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Pitesti, 12- 13 May 2017

THE ORDER OF THE INTEGRATING EUROPE IN THE UNITY OF UNION LAW AND MEMBER STATES' LAW

Herbert SCHAMBECK[1]

Abstract:

There is a hierarchical structure of the law of the Member States and the law of the European Union. But while Member State law is based on a constitution which is the result of democratic public decision-making processes by a constitutional parliament and, if necessary, a subsequent popular referendum, EU law is based on an international treaty worked out by government representatives. The EU's legitimacy is thus not an original one, but it is derived from its Member States. There are thus two basic systems or two levels of a system that is from a material, substantive-functional and institutional perspective consolidated into one single entity.

Key words: *European Union, Member States, hierarchy of norms, constitution, sources of EU law*

INTRODUCTION

The path which law took in the integrating Europe led from Bologna via Brussels to Lisbon[2]; this law was characterised by cultural elements which enabled unity to be experienced in Europe and whose development was based on Roman law and Canon law. This development originated in Bologna and emanated from European universities and their law schools; it was thus science-based[3]. Positive law thus evolved into a means of integration in Europe and after two world wars, this integration aimed to contribute towards securing peace.

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[2] See Herbert Schambeck, „Von Bologna über Brüssel nach Lissabon. Der Weg des Rechts in dem sich integrierenden Europa", in *Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschichte*, Volume 84, (2016).

[3] See Helmut Coing, „Von Bologna bis Brüssel, Europäische Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft", *Kölner Juristische Gesellschaft*,Volume 9, (1989)

1. Peace, as highlighted by AUGUSTINE (Aurelius Augustinus), is the tranquillity of order[1]. Under the Treaty of Lisbon[2], this order is characterised by a hierarchical structure of the normative law of the states and of the European Union[3].

This hierarchy of the state's positive law is based on the constitutional law of each individual state, which in line with the respective constitutional and legal awareness contains an identity of constitution in the formal and material sense, which is based on a constitutional law source as in the German Basic Law (Grundgesetz) of 1949, or – as in the case of Austria – is regulated in the Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG) of 1920 and in a large number of constitutional law provisions. In Austria, the paths of the law are defined by constitutional law[4], which is primarily directed at the formation, establishment, implementation and enforcement of laws governing both the public and private spheres[5].

Depending on whether a constitutional law system contains guiding value statements or not, the legislator will be obliged to execute them in the context of the concretisation of the constitution. All those matters, however, that are not provided for under constitutional law remain within the law-making power of the ordinary legislator.

The respective constitutional law system forms the basis for the EU Member States' ability to act.

A closer look at the individual constitutional law systems of the EU Member States,shows that they have a different constitutional tradition which legitimises them for membership of the EU.

The prerequisite for each individual state's participation in the European Union is its constitution, which is the result of democratic public decision-making processes by a constitutional parliament and, if necessary, a subsequent popular referendum. EU law, however, was

[1]Augustine (Aurelius Augustinus), *De Civitate Dei*, XIX, 11-13, 14.

[2] See *Der Vertrag von Lissabon*, 4th edition, edited by Rolf Schwartmann, (2011)

[3] See Herbert Schambeck, "The Hierarchy of Law at State Level and in the European Union" in *The International Conference - European Union's History, Culture and Citizenship, 9th edition*, (Bucharest: CH Beck, 2016), 5 et sequ., and Peter Fischer, Heribert Franz Köck, Margit Karollus, *Europarecht* 4th edition, (2002).

[4]For more information, please see: Herbert Schambeck, *Beiträge zum Verfassungs- und Europarecht*, (2014), 367 et sequ.

[5] See Constitutions of the EU Member States, 2005.

developed in a different manner; it was developed by government representatives and in the form of a contract or treaty.

2. The EU's legitimacy is thus not an original one, but it is derived from its Member States.

It is the law that established the EU and that continues to develop it further. In terms of law-making and regulation, the EU is bound by primary Community law, adopted by its Member States when they set up and further develop the Community. This law establishes the Community, authorises its bodies, determines their powers and responsibilities, and also defines the applicable procedure.

If one compares this primary Community law of the EU with the constitutional law of a state, one will realise that it differs mainly in two respects. The constitutional law of a state contains basic provisions with a claim to totality relating to the respective state as a whole – while primary Community law, in contrast, is based on the principle that the Community can only act within the powers conferred upon it – these limited conferred powers, can, however, be executed[1].

The EU's legitimacy is thus not original, but it is derived from its Member States. The EU is, as the Federal Constitutional Court of Germany puts it, a "union of states"[2] in which the states are "the Masters of the Treaties"[3], and thus the pre-requisite and at the same time the condition for the further development of the law of the EU.

While the individual constitutional state requires continuity and seeks to link the latter with stability, the EU combines continuity with dynamics. This dynamic requires of the individual EU Member States that they perform and execute their relevant tasks within the EU as well as exercise their national powers in a spirit of solidarity.

3.The constitutionality of the individual EU Member States is thus constitutive and provides guidance and prepares the path for the community of purpose of European integration in the context of the EU. There are thus two basic systems, which INGOLF PERNICE defines as two levels of a system that is from a material, substantive-functional and

[1] See Dieter Grimm, *Braucht Europa eine Verfassung?*, (1995), 28 et sequ.
[2] BVerfGE (Federal Constitutional Law) 89, 155.
[3]BVerfG2 BvR2134/92, 2 BvR2159/2 EuGRZ 1993, 585 et sequ.

institutional perspective consolidated into one single entity[1]. From this point of view, the EU is a community of law sui generis in which – on the one hand – each individual EU Member State has its own condition of origin and existence and its own structure of normative constitution. While on the other hand, they all have their individual, very special history and circumstances that led them towards forming a European union and/or accompanied them along this path. In the case of France and Germany, for instance, this involved putting an end to old differences and longstanding adversarial attitudes that have also resulted in two world wars. In the case of Greece, Spain and Portugal, this was the termination of an authoritarian period. These factors led them to join the European Union and participate, also politically and economically in what is now the democratic Europe. The same holds true for the post-Communist states of Central and Eastern Europe[2]. In this connection, mention must also be made of the fact that the re-unification of Germany took place within the context of an integrating Europe and thus contributed towards peace on this continent, in which the members of the EU contributed to the normative basis of this "union of states" by adopting a separate treaty. In terms of its general objective, this treaty is a reform treaty, referring to its character some have also called it the EU Basic Treaty – named after the place where it was concluded, it is, however, generally called the Treaty of Lisbon[3].

4. This Treaty of Lisbon establishes a new foundation for European primary law and draws on three legal sources, namely the Treaty on European Union[4], the Treaty on the Functioning of the

[1]Ingolf Pernice, „Europäisches und Nationales Verfassungsrecht", in: *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 60* (2001), 153.

[2] See Herbert Schambeck, „Politik und Verfassungsordnung postkommunistischer Staaten Mittel- und Osteuropas", in: Herbert Schambeck, *Zu Politik und Recht, Vorlesungen und Vorträge*, edited by the Presidents of the Austrian National Council and the Austrian Federal Council, (1999), 121 et sequ.

[3] See Rudolf Streinz, „Der europäische Verfassungsprozess, Grundlagen, Werte und Perspektiven nach dem Scheitern des Verfassungsvertrags und nach dem Vertrag von Lissabon", aktuelle Analysen 46, Hanns Seidel Stiftung 2008 and Klemens H. Fischer, „Der Vertrag von Lissabon", *Text und Kommentar zum europäischen Reformvertrag*, (2008).

[4]TEU, FLG No. C83/13 of 30 March 2010.

European Union[1] and the Charter of Fundamental Rights of the European Union[2], which all enjoy the same legal status.

Apart from having given the EU a uniform structure and legal personality, the Treaty of Lisbon also guarantees the freedoms and fundamental rights to be enjoyed by each individual person.

Under Article 2 of the Treaty on European Union, explicit mention is made of "the values on which the Union is founded", i.e.: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", without, however, describing this group of persons in more detail. The text then continues by pointing out that "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"[3].

Under Article 1, the Charter of Fundamental Rights of the European Union also recognises human dignity, under Article 2 the right to life, and in separate sections, freedom, equality, solidarity, citizens' rights, liberal, political and social fundamental rights as well as justice.

In its preamble, the Charter of Fundamental Rights of the European Union likewise reconfirms the principle of solidarity as well as the constitutional traditions and international obligations common to all Member States.

5. Updated by way of the Treaty of Lisbon, the EU once again proves to be a union in the service of peace-keeping. A goal towards which it is may also contribute in its capacity as an economic and monetary community as well as a community of laws and values. This requires of each individual in the EU that he/she contribute and take part in thinking, assessing, evaluating and decision-making as well as in fostering the connectivity between attachment to one's home country as well as national identity and European awareness.

[1] TFEU, FlG No C83/47 of 30 March 2010.
[2] TEU, Art. 2.
[3] Art.2 TEU.

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Legislation

1. Treaty on the European Union

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MODIFICATION OF THE PARLIAMENT'S FUNCTIONS RESULTING FROM THE INTEGRATION PROCESSES IN THE EUROPEAN UNION

Boguslaw BANASZAK [1]

Abstract:

Apart from the traditional functions: defining the basis of the political system, legislation, creation and review, the doctrine of constitutional law increasingly more frequently distinguishes a new function of parliaments of EU member states: participation in creating community (European) law. The reason for distinguishing this function is the fact that while the process of creating community law is based on the decisions made by executive bodes, national parliaments play an advisory role in the process (and in practice the role is played by their specialised bodies, which frequently become great European commissions)

Key words: *Parliament`s functions, European Union, modifications, processes*

1. LEGISLATIVE FUNCTION

It results from the principle of the division of powers. Generally, the parliament adopts the statutes, makes amendments to the Constitution and in some countries authorizes the head of the state - by meanings of an act - to ratify and terminate certain international agreements. Constitution making and amendment procedure are often classified as a separate system – forming function. As long as the making and amending of a constitution is equivalent with the adoption of a statute (even in a special procedure), such division is regarded as redundant.

It should be underlined that the EU law can not be discussed in isolation from the internal laws of its member states. It is created by the representatives of individual member states legitimised by the binding constitutions. EU does not replace the states but the states remain - as formulated by the German Federal Constitutional Tribunal - "the lords of

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the treaties". The Tribunal reserved the right to investigate "whether the legal acts of the European institutions and organisations remain within the limits of the ceded sovereign laws and do not exceed them"[1]. Similar attitude admitting supervision of constitutionality of the treaties constituting the EU primary law was adopted by constitutional tribunals in Italy[2] and Spain[3] and also Poland. Polish Constitutional Tribunal stated: "Establishment treaties are international agreements. The sovereign parties to these agreements are Member States. They independently and in accordance with their constitutions ratify the treaties and have at their disposal the right to terminate them"[4].

In this context the issue of resolving conflicts between the constitutions and legal acts and the Community primary and derivative law in the practice of member states' political systems is exceptionally interesting. The EU law does not include any provisions concerning the resolution of conflicts between it and the internal law of the member states. It should be added here that as early as in the 1960s the European Tribunal of Justice resolved that the superiority of the EU law is absolute and does not depend on the rank of the internal law norm or their temporal sequence. Besides, the uniformity of the EU law stipulates that it must be uniformly applied in all the member states and therefore its interpretation is reserved for the European Tribunal of Justice as it would be unacceptable that in individual member states their agencies, and especially courts, should interpret the law, which would cause chaos. Therefore, in the case when a member state's legal system retains the norms contradicting the Community law, the Tribunal may declare that it does not meet the requirements resulting from the treaties constituting the EU. Such ruling, however, does not entail direct legal consequences and the elimination of the legal norms conflicting with the Community law rests within the competence of a given state - a EU member.

In the case of conflict between the Community law and the constitution, courts and other legal institutions implementing the constitution attempt to use the interpretation favouring the EU law. But,

[1] *Entscheidungen des Bundesverfassungsgerichts. Amtliche Sammlung* vol. 89, 155.
[2] More about the subject cf. A. Oppenheimer (ed.) *The Relationship between Community Law and national Law: The Cases,* (Cambridge, 1994), 630.
[3] Cf. A. E. de Noriega, "A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration", *European Public Law* 5: 297.
[4] OTK ZU Nr 5/A/2005, pos .49.

as stated the Polish Constitutional Court "the interpretation favouring the EU law has its limits. In cannot after all lead to results not in accordance with the Constitution"[1].

If, however, the contradictions can not be removed, two solutions are available: either, due to the superiority of the constitution, the conflicting norms of the Community law are not enforced (which in the case of the primary law denotes the refusal to ratify the treaty which belongs to it or the denunciation of the ratified treaty) or - which is a much more frequent case - a constitution is modified before a EU regulation comes in force, which aims at ensuring the effectiveness of the Community law and the process of European integration. The above is exemplified by the modifications of several constitutions (French, German, Belgian and Spanish) performed to facilitate the ratification of the Maastricht Treaty. An interesting solution was adopted in Finland. International treaties discordant with the constitution may be incorporated into it by a majority of votes of the members of the parliament (two thirds), which practically denotes modifying the constitution. Constitutions are modified even when its provisions collide with the derivative law (e.g. in Germany).

In the practice of the political systems of the member states, the jurisdiction of constitutional courts, where they exist, or supreme courts attributes the EU law with superiority over internal regulations of a lower rank than the constitution, which has been based not so much on the EU law and the jurisdiction of the Tribunal but on the constitutional norms[2]. In Great Britain, where there is no constitution, in the early 1990s the House of Lords advocated the non-application of the internal law if it conflicted with the EU law. The superiority of the Community law over the constitution if both can not be reconciled denotes that "the restriction of the constitutional laws below the standards resulting from the international norms in relation to a ratified international agreement or a law resolved by an international organisation should not be admissible"[3].

The constitutions of the EU member states and the judicial decisions of courts do not decide about the results of the principle of the superiority of the Community law and it is not clear whether the

[1] OTK ZU Nr 5/A/2005, pos .49.
[2] As done by the Spanish Constitutional Tribunal, cf. W. Czapliński, „Członkostwo w Unii Europejskiej a suwerenność państwowa" in: E. Popławska (ed.) *Konstytucja...*:133.
[3] Policastro *Prawa podstawowe,* 346.

application of a regulation conflicting with the agreement of that category is only suspended or whether the regulation is invalid or ineffective. The analysis of judicial decisions prompts the conclusion that an internal law regulation which is not applied due to the superiority of the Community law still remains a part of the legal system and will be applied when the provisions of the Community law cease to be binding in the country.

In this context the following view expressed by the Polish Constitutional Tribunal should be quoted: "In the light of the constitutional principle of the priority of Community law over statutory norms (art. 92 par. 2 and 3 of the Constitution), if there are no doubts as to the content of the norms of Community law, the court should refuse to apply the provision of the statute not in conformity to this norm and apply directly the provision of Community law. The court does not adjudicate in this case on repealing the norm of national law but only refuses to apply it in the scope in which it is obliged to give priority to the norm of Community law. The legal act in question is not affected by invalidity, it is still binding and is applied in the scope not covered by the norms of Community law. If however, it is not possible to apply directly the norms of Community law, the court should seek the possibility of an interpretation of national law in accordance with the Community law. In the case of the appearance of interpretative doubts in relation to Community law, the court should turn to the European Court of justice with a prejudicial question"[1].

It follows from the discussion so far that the constitutions of the EU member states have retained their legal significance. Thus, the existing notional apparatus and research methods remain still valid, while the research of the constitutional law, including comparative research, makes sense. The member states, facing the same or similar external challenges and internal problems, solve them not only with the aid of the EU institutions but also adopting in their internal legal systems certain systemic measures verified in other member states. It would also be interesting to examine the reasons of rejecting the solutions present in the constitutions of other EU member states.

[1] OTK ZU Nr 11/A/2006, pos . 177.

2. CREATIVE FUNCTION

It is performed by the parliament through appointment and dismissal of various state bodies and their members, as well as holding them accountable for their activities. First of all, the parliament takes part in the process of establishing the government.

3. CONTROLLING FUNCTION

The performance of the controlling function by the parliament is – besides the legislative function – the essence of the parliament's activity in a democratic state ruled by law. The parliament exercises control over the activities of the executive within the scope specified by the constitution and statutes. The controlling function is performed not only by the said chamber *in pleno*, but also through the activities of committees and deputies themselves. The subject of the control is the activity of the government concerning internal affairs and foreign policy of the State in the field not reserved to other state organs and local government.

The parliament's supervision procedures consists of two forms of control – general and particular.

The general control contains demanding information on a given issue from a Government member (in written or in oral form) at the sitting of the parliament or a committee.

The particular forms of the parliament's supervisory function consist of a control performed by an investigative committee, an individual control exercised by the deputies and a control over budget performance(the parliament considers the report on the implementation of the budget together with the information on the condition of the State debt, presented by the government).

As result of control performed by the parliament , measures can be taken such as dismissal of the whole government in consequence of a vote of non-confidence or of an individual from a State post.

4. COOPERATION IN THE PROCESS OF MAKING OF THE EU LAW

The doctrine of the constitutional law very often distinguishes the cooperation in the process of making EU law as another function of the parliament. This function can be defined also as a legislative one, with some elements of the controlling function, and as a way to compensate national parliaments for the loss of some of their legislative competencies in favour of EU institutions. It is estimated that in the course of the European integration, the parliaments of the EU member states lost about 2/3 of their former legislative powers, which were moved to the European governing level. In conclusion, the traditional principle of the division of powers has been modified, since the executive power in the EU belongs to the Council of the EU, consisting of representatives of the national governments. This way a law made by the EU institution is in fact a law made by the executive authority and not by the parliament traditionally meant to perform a legislative function. In the beginning of the 90ties, the European Parliament adopted two resolutions providing institutional possibilities of influencing the legislative process at the EU level and therefore strengthening the position of national parliaments and preventing "the lack of democracy". The latest act providing some principles and requirements in the Treaty of Lisbon.

It should be emphasized that since the essence of the legislative function is the possibility of influencing the shape of the law-binding in the country, so the powers of the parliament relating to influencing the content of the position adopted by the given state in the forum of the Council of the UE should be included within this function.

5. THE ROLE OF NATIONAL PARLIAMENTS IN EU

Articles 5.3, 10.2 and 12 TEU, as well as Protocol No 1 and Protocol No 2 strengthened the powers of national parliaments and give them some new and rights. The most important Treaty of Lisbon provision on the role of national parliaments within the EU is Article 12 TEU which states that national Parliaments contribute actively to the good functioning of the Union.

The new provisions give national parliaments an opportunity to play a more active role within the EU, but they have not caused national

parliaments as key actors within the European polity. The Treaty established no institutional status to national parliaments. In fact the new rules has only fostered the dialogue between national legislators and institutions of the Union,

1/ National parliaments should be informed by the EU organs by having submitted all legislative drafts. They can still be adopted regardless of opposition from national parliaments.

2/ The early warning mechanism

Although in 2011 there have been given 64 reasoned opinions by national parliaments to 28 different legislative proposals on the Union level, neither a"yellow" or an "orange" card procedure had to be initiated. These are following reasons responsible for this:

(1) Coordination between national parliaments is insufficient. Each parliament uses its own internal procedure for applying the mechanism.

(2) The foreseen time periods are prohibitively short in order to achieve parliamentary consensus on an international level.

(3)The early warning mechanism cannot be perceived as the fulfilment of a procedural function as it can only be used by national parliaments at the tail end of the decisionmaking process.

3/ The extension of the information mechanism concerning decisions of European Council.

In comparison to the Amsterdam Treaty Protocol on the Role of National Parliaments in the European Union, Protocol No 1 contains two elements, which have been considerably improved.

(1)First of all, the catalogue of documents with which national parliaments are to be provided has been substantially extended. Currently, Protocol No 1 requires the provision of: Commission consultation documents, the annual legislative programme; draft legislative acts (regardless of whether they are provided by the Commission, initiated by a group of Member States or the European Parliament or requested by the CJEU, the European Central Bank or the European Investment Bank; Council agendas; minutes and the annual report of the Court of Auditors.

(2)The second and most significant improvement is the commitment to transfer adequate documents in all official languages directly to national parliaments.

6. NATIONAL PARLIAMENTS AND EU FOREIGN POLICY

National parliaments have a crucial position, when an international agreement has to be concluded as "mixed agreement". This is usually necessary when an international treaty requires that Member States and the Union sign and ratify it because the allocation of competences between them is shared or unclear. In summary, this seems to remain the only situation where one can clearly argue that a unified policy of the Union in a binding form exists and national parliaments, by blocking the required national ratification, do have direct influence on whether the relevant text will come into force or not.

Polish example:

From the point of view of the principle of sovereignty a very significant regulation is contained in Article 90 of the Constitution. The art. 90 states:

"1. The Republic of Poland, by virtue of international agreements, delegates to an international organization or international institution the competence of organs of State authority in relation to certain matters".

2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

This regulation allows only to delegate the competences but not to limit the sovereignty. The Constitutional Tribunal have stated: "The Constitution remains 'the supreme law of the Republic of Poland' in relation to all international agreements, including agreements delegating competence. In particular […] there could not come about a delegating of competence to the extend that would cause Poland not to be able to function as a sovereign and democratic state. Furthermore, the limiting of the scope of delegating to 'certain matters' means a prohibition on

delegating: firstly, the entirely of the competence of a given organ; secondly, competence in the entirely of matters in a given field; and thirdly, competence as to the essence of matters defining the management of a given organ of state authority"[1].

7. THE FUTURE OF NATIONAL PARLIAMENTS WITHIN EU

The development of European integration also stimulates the questions concerning the future of national parliaments and the future of the classically understood internal law created by them. The future is not very promising if it were assumed that "the notion of the constitution, at least in its wide meaning, may be transformed onto the supranational level, onto the legal order of the European Community, which emerged from the transfer of the national sovereign laws as the Community increasingly takes over the functions of the states and thus increasingly more intensively substitutes a functional state"[2]. This proposal corresponds with the idea of emergence of a new decision-making subject in the EU, i.e. the citizens of the Union[3]. But are these premises still relevant?

The answer requires defining the character of the EU and the role of the EU law in the member states' legal systems. As to the former issue, the EU is not a state nor is it an entity resembling a state. It is composed of member states, which transfer their competence in the matters defined by treaties. The constitutional regulations in many member states allow only to delegate the competences but not to limit the sovereignty.

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

[1]OTK ZU Nr 5/A/2005, poz .49.
[2] R. Arnold, "Perspektywy prawne powstania konstytucji europejskiej", *Państwo i Prawo* (2000): 36.
[3] Cf. Pernice, *Europäisches und nationales Verfassungsrecht* VVdStRL z. 60 (2001), 171.

a *modus operandi* represents a serious challenge to the sovereignty of the Member States"[1].

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

In this context another opinion occurring in legal literature could be quoted here "It appears that the future of national parliaments within the European Union entirely depends upon the future of the European Union itself. More Europeanization heading towards a federal European state […] will mean less power for national parliaments. And vice versa: the emergence of stronger interests of Member States within European integration will increase the importance of national parliaments as European actors"[3].

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[2] OTK ZU Nr 5/A/2005, poz .49.

[3] M. Zalewska and O. J. Gstrein, „National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity", *Bruges Political Research Papers / Cahiers de recherche politique de Bruges* 28 (2013): 19.

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THE PRESENT CRISIS OF THE EUROPEAN UNION AND ITS CAUSES

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Abstract:

The crisis of the European Union stems from the dissatisfaction of many people with the Union's performance. People think that the European Union does not live up to their expectations. However, these expectations are not reasonable, because they are either unrealistic or objectionable. Yet, some politicians pretend that the unrealistic can be done and appeal to the mean instincts that are at the basis of people's objectionable expectations, namely greed, fear and hatred. If they should succeed to destroy the European Union, the next step would be the destruction of the liberal, democratic state under the rule of law grounded in the pluralism of society.

Key words: *European Union, crisis, unreasonable and objectionable expectations, populist politicians, liberal and democratic state,rule of law, pluralism of society*

The European Union is in a state of crisis. Any form of comprehensive political organisation of society, be it the state,[2] be it a community of states,[3] is in a crisis if it appearsto not be able to produce the expected results. The results expected from these political forms of organisation can be summed up in one notion, namely the common good.[4] The common good consists of peace, freedom and welfare. In this regard, here is no essential difference between traditional schools of legal philosophy which are all a kind of natural law thinking – although their notion of "nature", which refers to the essence of man and society, has

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[2] Cf. Erika Cudworth and Timothy Hall and John McGovern,, *The Modern State. Theories and Ideologies*, (Edinburgh: Edinburgh University Press).

[3] I.e., international and supranational organisations, whatever their particular designation (e.g. 'Staatenverbund`).

[4] See Jacques Maritain, *The Person and the Common Good*, (Notre Dame/Indiana, 1965).

greatly varied[1]and the pluralistic approach to state and lawwhich corresponds to the pluralistic society. The only difference between traditional approaches and the pluralistic one is that the former are based theoretical considerations about man and society while the latter on has an empirical basis derived from experience which permits to formulate the expectations people hold with regard to state and law.[2] But both approaches convergein the demand for the common good, because it is a fact that by and large people want to live in peace and lead a life according to their own ideas and concepts by means of a fair access to the goods of this world in the broad meaning of physical and mental welfare.

I have said that the European Union is in a crisis if it appears to not be able to realise the common good. This is not necessary the same as not being able to do so. The latter is an objective fact. The former is just a subjective impression which can be justified or not. But it would be wrong to assume that the subjective impression does not matter, even if it is not justified. People cannot but decide on the basis of their impressions; and in fact none of us can do otherwise. If the impression is wrong, the decision will be wrong. It is therefore important that our impressions coincide with reality. This can only be reached through a serious process of information.

Yet, the impression – whether right or wrong – that the European Union is not able to produce the expected results is just one aspect of the problem. Another aspect is the expectations themselves. Expectations can also be justified or unjustified. But people normally do not question their own expectations. In order to make them do so they have to be taught that not all expectations are justified *a priori*. Here again, it needs a process of serious information in order to find out which expectations may be considered justified and which not. In the case of expectations, however, information about what may considered justified and what not, may not be readily received, if the expectations are informed by our

[1]In particular if we include not only idealistic but also materialistic theories where freedom is not so much regarded as a "freedom to" but a "freedom from", namely from self-alienation. Cf. George Novacek/Ernest Mandel, *The Marxist theory of alienation*, 2nded, 11th printing, (Atlanta. GA: Pathfinder Press, 2010).
[2] See Heribert Franz Koeck, *Recht in der pluralistischenGesellschaft*, (Vienna, 1998).

wishes and desires rather than by objective reasons and if, consequently, we have to be told that our expectations are not well-founded, no "reasonable expectations". Unless I reduce my expectations to what is reasonable, I will be disappointed with the performance of the European Union even if it this performance corresponds to what is reasonably to be expected.

Is the wrong impression about the ability of the European Union to fulfil its tasks properly and the wrong expectation about what constitutes proper fulfilment of these tasks the only reason why the EU is in a crisis? Unfortunately, this is not the case. In a democratic system – and the system of the European Union is a democratic one –, the performance of the body politic depends on the support it receives by the people, and people who are not satisfied with this performance will not be ready to support it.

Under these circumstances, the causes for the present crisis of the European Union are manifold.

First, there is the gap between the reality of the European Union and its work, on the one hand, and the impression that is conveyed, on the other. The European Union and its work are better than its reputation. What is needed, therefore, is better information. Here, we are already confronted with the first serious problem.

Although information in the objective sense, i.e. the relevant data, does exist, it mainly remains with the European Institutions and rarely arrives at the individual citizen.[1]In this connection the question is discussed whether there is a duty to provide or a duty to obtain information. Has the European Union, have the Member States, have the individual politicians who are involved in matters of European integration, a duty to provide the individual citizen with the relevant

[1] Although the European Commission, in conformity with the principle of transparency, publishes 'Information on where to find documents held by the European Commission and other institutions, including legislative information, official documents, and meeting minutes and agendas'. See https://ec.europa.eu/info/about-european-union/principles-and-values/transparency/access-documents/how-access-commission-documents_en.

information? Or has the individual citizen the duty to obtain, i.e. procure, the information? Often both duties are affirmed, that to provide and that to obtain.

But fulfilling these duties is not that easy. As regards the citizen, searching the internet in order to find the data which have been put online, would be the most simple and speedy way, given the fact that all important information about the European Union have been published there. However, a considerable number of citizens have still no access to the internet or are not so well acquainted with either using the computer or finding their way around in the internet that this way of obtaining information could be regarded effective; not to speak of the lack of interest that will prevent many people from even trying to inform themselves.

As regards the European Institutions, the Member States and the competent politicians, they also primarily use the internet for disseminating information. A second way is information in printed form that is either made available through information centres or sent to the citizens by traditional (so-called snail) mail. A third way is information events. The politician may even use a fourth way, namely paying visits to the citizens in their homes. However, none of these manners of information distribution will reach more than a small percentage of citizens, partly because of their lack of interest to make use of these offers, partly because people's living habits have changed to such an extent that it is very difficult for any politician to get into personal contact with the majority of citizens. It is possible that social networking services like Facebook and Twitter will partly make up for this information gap; but experience shows that they are hardly suited to disseminate comprehensive information and that they are often used for running campaigns rather than for impartial information.

The only workable means of transmission between political institutions and the citizen are the media. Television, radio and the print media are the only ones who are able to contact the individual every day and everywhere, and for the great majority of citizens they are the only ones which are used for information.

A functioning democracy needs the well-informed citizen, be it at the level of the state, be it at the supranational or international level. Well-informed means being comprehensively and objectively informed. But the coverage of most of the media is neither comprehensive nor objective. For a democratic society, this is disastrous, because it needs the well-informed citizen.

Of course, the freedom of the media is a fundamental right,[1] and the plurality of opinions that that can be found in the media reflects the pluralism of society. But even fundamental freedoms carry their responsibility. Another fundamental right, namely the right to property,[2] can serve as a model. In the first heydays of individualism and liberalism – both results of enlightenment –, towards the end of the eighteens and in the early nineteenth century the right to property was considered an absolute one, giving the owner the power not only to use it but also to destroy it. This is reflected in the civil codes promulgated at that time, as, e.g., in the Austrian General Civil Code of 1811. In the meantime, we have grasped that property also has a social aspect and has tobe used, not to the detriment but rather, to the advantage of society. We speak of the social obligation incumbent on the owner.[3] In the very same way, liberty of the media is not only a right of those who own or make them but also carries an obligation towards society, namely the obligation to inform objectively and comprehensively.

Unfortunately, media have proven resistant to self-control or control by a body composed by representatives of their own profession. Frequently, just those whose manner of reporting has most often come under criticism have rejected to cooperate with any such body at all.

[1] It is comprised by the freedom of opinion and expression that includes the right to impart information and ideas through any media regardless of frontiers, as recognised by the Universal Declaration of Human Rights of 1948, the European Convention on Human Rights of 1950 and the International Covenant on Civil and Political Rights of 1965.

[2]Enshrined in the Universal Declaration of Human Rights of 1948 and Protocol I to the European Convention on Human Rights of 1952.

[3]Hanoch Dagan,"The Social Responsibility of Ownership", *Cornell Law Review*, (1992, 2007), 1255-1273.

Thus, peer supervision has failed to guarantee serious and comprehensive information. This is not tolerable. To enforce fulfilment of this obligation, sanctions for breaching it are necessary. Since political and administrative measures are regarded incompatible with the freedom of the media, they only way to subject them to control is to apply to them those sanctions which apply *mutatis mutandis* also to individuals, even in the context of human rights. If the state is entitled, according even to the European Convention on Human Rights and other international human rights instruments, to subject the freedom of expression which includes the freedom 'to receive and impart information and ideas without interference by public authority' – 'since it carries with it duties and responsibilities' – 'to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others', why should it be a violation of the freedom of the media to subject them to, e.g., the laws on libel and on liability for damages? Why should the media be free from judicial review of their conduct?

According to the much quoted dictum of Wolfgang Boeckenfoerde, '[t]he liberal, secularized state lives by prerequisites which it cannot guarantee itself'.[1] Applied to the freedom of the media, the dictum would run: 'Objective and comprehensive information by the media cannot be guaranteed by the liberal state.' However, this is as wrong as the original dictum. From the point of view of the pluralistic society, the state is not obliged to toleratebehaviour that violates the fundamental consensus on which it is based itself and which to protect is part of its *raison d'être*. And since this common consensus is the only fundament for state and law in the pluralistic society as well as for the claim of the individual to their protection, anyone who places himself outside this common consensusloses this protection and must suffer the repressions taken against him to preserve the common good.[2] (This

[1]*Ernst-Wolfgang Böckenförde,* Staat, Gesellschaft, Freiheit, *(Francfort/Main, 1976), 60.*

[2] According to the picture used by Thomas Hobbes for people in the 'stateless sate of nature', such a person must be regarded a *homo homini lupus* and cannot complain if society, through state and law, exercise against him the right of self-defence.

insight justifies the measures that had and have to be taken against individuals or groups who refuse to recognise the state and to conform to its law, as they have appeared in various Member States of the European Union, e.g., in Germany and Austria.)

The pluralistic society has therefore every right to sanction the abuse of the freedom of the media. Unfortunately, most politicians do not have the moral courage to even discuss this issue in public for fear that the very media concerned would fall upon them and that there was little chance for the necessary political closing of ranks.

What is worse, there are politicians who thrive on the failure of many media to provide objective and comprehensive information. These politicians have not been able to succeed under normal circumstances, at a time when media had not yet generally denounced politicians as greedy scoundrels whose only objective was to enrich themselves and political institutions as superfluous entities which only or predominantly serve the dark purposes of politicians. In the meantime, media have succeeded to undermine the confidence of the citizens in their political institutions and their political representatives, and politicians have landed at the bottom of the scale of social esteem. This is the breeding ground for political movements which appeal to the lowest instincts of man – greed, fear and hatred–and which in the meantime have found followers in a number that would have been unimaginable one or two decades ago.

It is a sad fact that this development has started with the political turn in Europe 1989/1991 and that it has started in those countries of Europe that had not been under communist rule. As soon as the external enemy had disappeared, social consensus began to crumble and political processeslike that of European integration were put in question. The rejection of the Constitution for Europe, adopted by the European Constitutional Convention,[1] in referenda held in France and in the Netherlands against the recommendation of the broad spectrum of

[1] The Treaty establishing a Constitution for Europe was signed in 2004 by all the then 25 Member States of the European Union and had already been ratified by 18 of them, in Spain and Luxembourg after endorsing referenda, when the negative outcome of the referenda held in France in May 2005 and in the Netherlands in June 2005 put an end to the project.

national politicians was a premonition and signalled future calamities which so far have reached their apex in the BREXIT. There is little consolation in the fact that – what has been called – collective insanity has already spilled over to other continents and has infected even the United States.

I now turn to the second aspect of the problem, namely the expectations of the people. As stated above, expectations can also be justified or unjustified. Expectations are justified, if they are supported by ideas of the common goodand directed to its implementation. Expectations that are not covered by what is required for the implementation of the common goodare not justified.

In order not to remain in the abstract but to be more concrete, I refer to the aims and values of the European Union which can be regarded a useful summing-up of these requirements. According to the Preamble of the Treaty on European Union, these are in particular 'the ending of the division of the European continent', the 'principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law``, 'fundamental social rights' and 'economic and social progress'. According to Article 2 TEU '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' And according to Article 3 TEU, '[t]he Union's aim is to promote peace, its values and the well-being of its peoples'[1] and to set up 'an area of freedom, security and justice'.[2]

Of all these principles, values and aims which are part of the common good and its implementation, most people have always been interested only in economic and social progress. They want that life becomes better and better; and by better and better they understand that they can spend more and more money. After World War II, economic reconstruction and (in Western Europe) the so-called economic miracle

[1]Paragraph 1.
[2]Paragraph 2.

(*Wirtschaftswunder*) has made this possible for almost 25 years; and continuing, though more moderate, economic growth and the cornucopia of the welfare state permitted people to believe that the trend to an ever better life was irreversible. As a consequence, the political parties and their leaders that were connected with incessant economic progress were considered reliable and were trusted, together with the political and economic institutions which to create they had though necessary or useful.

However, the last two decades have proven that everlasting economic growth is an illusion and that mankind, in order to survive, has to turn from economic growth to economic sustainability. Moreover, globalisation had not only permitted companies to close down their manufacturing plants in the countries of the North with their high wages and social standard and to open up factories in the South with its low wages and social standards and thereby to make high profits; globalisation had inevitably directed the focus to the poor nations in the South and has raised the question whether solidarity would not oblige the rich nations to share part of their wealth with the poor ones.

This development has met with little understanding on the part of the people in the North. Of course, many of them are generous if some donation campaign is started in favour of people in need, whether on their doorstep or in some remote region, but they are used to do so out of their abundance. In fact, people regard this as a matter of charity, not a matter of justice. They are ready to give alms, but they oppose redistribution of the global wealth, even ifthis would apply only in the future. Even freezing their standard of living at the present level would they regard an unreasonable demand, practically a first step towards poverty,according to the slogan that he who does not advance falls behind.

Had this problem remained one of development aid in the traditional form[1] where states have been called upon to spend a

[1]See Gilbert Rist, *The History of Development: From Western Origins to Global Faith*, 4th ed., (London-New York: Zed Books, 2002); and Nichole Georgeou, *Neoliberalism, Development, and Aid Volunteering*, (New York: Routledge, 2012). But see also Paul

comparatively small percentage of their gross national product for this purpose and where it has been easy to pay only part of the amount due, people probably would have ignored it. But in recent years, the situation has changed perceptibly. The rapid growth of that part of the population that had originally come from (especially) Turkey as foreign workers ("guest workers") but instead of returning home had brought their entire family to join them[1] and who were given the citizenship of their host country without serious examination whether they either knew or were ready to accept European values and to fit into the existing ("native") society had made the problem visible and tangible to the ordinary people at home. In recent years, awareness of the need to share has been strengthened by the continuous and increasing influx of migrants, whether true refugees fleeing from persecution or those who, under the pretext of being a refugee, were economic migrants[2] in search of a better life.

People thus became susceptible to slogans like 'our money for our people' and were increasingly ready to support politicians who were using these slogans in their campaigns. Part of the fault also lies with those politicians who, while seeing the problem constituted by refugees and other migrants, do not want to face it. Even if there is a general consensus among political leaders at the EU and the Member State level that solidarity would require to solve the problem at its roots and to enable refugees and migrants to stay in their home country, politicians hesitate to draw the necessary concrete conclusions. Past experience tells us that an increase in development aid alone would not suffice. It would have to go hand in hand with fundamental political and economic reforms in the countries concerned.

Collier, *The Bottom Billion*: *Why thePoorest CountriesAreFailing* and*WhatCanBeDoneAbout It*, (Oxford: Oxford University Press, 2007).

[1]In Germany, e.g., citizens with immigrant background amount to around 10 million or 12,3 per cent. Of these, 5 to 7 percent are of Turkish origin or descent.

[2]An economic migrant is a person who 'goes to a newcountry because livingconditions or opportunities for jobs are not good in their own country. This word is used by governments to show that a person is not considered a refugee(i.e., someone who has been forced to leave their country for politicalreasons)' under the Convention on Refugees of 1951.http://www.macmillandictionary.com/dictionary/british/economic-migrant

However, national elites have proven to be neither capable nor willing to adopt these reforms, because this would mean to share their power and wealth with their people; and *grossomodo* they are not ready to do so. What would therefore be necessary would be the installation of an international regime under the supervision of the international community as a whole, under the overall management of the United Nations and with the necessary means to enforce reforms even against the resistance of national elites. This regime would have to remain in full effect until these countries have been transformed into pluralistic democracies with the respect for, and the protection of, human rights, together with economic structures that are able to guarantee general welfare through a sustainable development. Most of developing countries have become independent in the nineteen sixties and seventies. Comparing the situation immediately after emancipation from colonial rule with the situation today shows that fifty years have not sufficed to get most of these countries on their feet and to reduce poverty there.

When the League of Nations Covenant set up, in article 22, the mandate regime, responsible statesmen had still the courage to speak out about peoples that were not 'able to stand by themselves under the strenuous conditions of the modern world'. Consequently, they were 'entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility'.[1]In two years from now, in 2019, it will be a century that the League of Nations was founded. In hundred years, the situation has not changed essentially. There are still peoples who are unable to stand by themselves under the strenuous conditions of the modern world. The only change that has taken place was (or is) the oss of courage to call a spade a spade. These peoples need no less to be entrusted to nations that are able bring about the reforms necessary, although this should not be individual nations but the United Nations as a whole.

Of course, setting up such a regime would require, first, a consensus among the most powerful states that would have to be reflected by a common commitment of the permanent members of the Security Council, and second, the readiness of the industrialised countries

[1]Quincy Wright, *Mandates under the League of nations,* (Chicago, Ill.: The University of Chicago press, 1930; reprint 1968), (New York: Greenwood Press).

of the North to contribute the financial means necessary for the setting up and successfully running this regime. It would not be that difficult to raise this money, if the big powers and other countries would implement their standing obligation to general disarmament.[1] Otherwise, it would be much more difficult; and all countries of the North would have to dig deep into their pockets to make the regime in question a going concern.

This planshows the only humanitarian way to an international society where the *bonum commune*, the common good, originally developed with regard to the state and its nationals has been developed into the *bonum commune humanitatis*, the common good of mankind.[2] However, its realisation is likely to curb people's expectations, in the North, that their standard of life would increase as it did in the past; indeed they would be confronted with the fact that they and their economy have to adjust to a world economy with (only) sustainable development.

Most of the people in the North will not like this; rather, they will listen to politicians who lead them to believe that no sacrifices are necessary. This means no international regime for developing countries that have shown themselves incapable of the necessary reforms – slogan: 'What business do Europeans have in Africa?' –,no additional money for development aid – slogan: 'We have enough poverty at home!' –, and no admission of additional refugees and migrants – slogan: 'The boat is full!' The only money most people are willing to spend is money for measures of sealing off, be it for a sufficient defence of the 'fortress Europe' against those who still want to 'invade' it, be it for building a wall against illegal migrants from the South.

Of course, responsible politicians both at the EU and the Member State level agree that protection of the Union's external borders by police, army and navy is only an emergency measure and does not free countries in the North from their obligation, under the principle of

[1]World-wide, countries spend more than three thousand billion dollars for armament each year.

[2]See Alfred Verdross, „Der klassische Begriff des *bonumcommune* und seine Entfaltung zum *bonumcommunehumanitatis", ÖsterreichischeZeitschrift für öffentliches Recht*.28 (1977): 143 *et seqs.*

solidarity, to help countries in the South on their path to development. The same applies to measures that could prevent countries neighbouring the EU from having refugees and migrants pass through on their way to Europe. To set up and/or finance camps for political and economic refugees in the countries around the Mediterranean Sea, from Turkey through Lebanon to Egypt, Libya, Tunisia, Algeria and Morocco can also be no more than a transitory measure; quite apart from the fact that it has a cynical connotation if Europe uses money to induce the just-mentioned states to offer that shelter to refugees which European countries themselves are not ready to grant.

Moreover, any such policy as advocated by populist or short-sighted politicians will not be able to solve the problem more than temporarily. Given the fact that from 2000 to 2100, Europe's share of world population will be cut in half, from 12.0 to 5.9 per cent, while Africa's will almost double, from 13.1 to 24.9 per cent, the migration pressure will thus quadruple itself.[1] If Europe does not want the dikes against uncontrolled migration movements to break in the foreseeable future, the causes for such migration movements must be removed. And this will be possible only in the migrants' countries of origin.

Unfortunately, people have no insight into this scenario and therefore expect the European Union to do nothing more than to just keep refugees and migrants out of Europe – with the exception, of course, of those who are needed here for keeping the economy going. Most people are not interested in whether the measures for keeping refugees and migrants out are humane and do not violate human rights. And some would not care even if they did so and if some of these refugees and migrants should parish in their attempt to get to Europe by illegal means. They would think that to drown, being shot or ending up in an electric fence serves them right and will have a deterrent effect on others. Only recently, I heard the argument that the sea route from Libya to Italy would lose its attraction if the Italian coast guard would pick up boat people only in Italian territorial waters instead of doing so already on the high sea close to the African coast. This mentality has found expression

[1]See United Nations Department of Economic and Social Affairs/Population Division, *World Population Prospects: The 2015 Revision, Key Findings and Advance Tables*, New York:UN, 2015.

during the war in former Yugoslavia, when relief organisations in Austria were trying to help war victims through a fundraising campaign under the motto "Neighbour in need". Those who opposed this humanitarian action produced by a two-line rhyme which, when translated from German into English, runs as follows: 'Noneighbourwill be left in need / once all of them are dead, indeed.'

It is a philosophical question why many people do have this mentality. Thomas Hobbes (1588-1679) assumed that in a state of nature human beings are no better than wild beasts (*homo homini lupus*).[1]This is in strong contrast with the idea, more extensively expounded by Jean Jacques Rousseau (1712-1778), of the "noble savage" who symbolises humanity's innate goodness[2]while man's vices are ascribed to corruption through civilisation.[3]Immanuel Kant (1724–1804) took a middle course by stating that man was characterised by unsociable sociability.[4] The Austrian popular poet Johann Nestroy (1801-1852)tried to resolve this contradiction in a tragicomical aphorism, stating that 'man is good, but people are bad.'[5] Christian theology would explain this mentality by the imperfect state of society characterised by personal and structural evil, a fact that has already found expressionin St. Paul's view that 'the whole creation groans and suffers the pains of childbirth together until now. And not only this, but also we ourselves, having the first fruits of the Spirit, even we ourselves groan within ourselves, waiting eagerly for our adoption as sons, the redemption of our body.'[6]

People's mentality is at cross with all values on which the European Unions is built and which are – according to article 2 TEU – common to all Member States. There are no such easy solutions for the problems facing Europe and her citizens as many people would like and

[1]Thomas Hobbes, *Leviathan, or the Matter, Forme, and Power of a Commonwealth, Ecclesiasticall and Civil,* 1651.
[2]*Discours sur l'origine et les fondements de l'inégalité parmi les hommes,*(Amsterdam,1755).
[3] The term 'noble savage' was first used by John Dryden (1631-1700).
[4]*Ideezueinerallgemeinen Geschichte in weltbürgerlicherAbsicht (Idea for a Universal History with a Cosmopolitan Purpose* or *The Idea of a Universal History on a Cosmopolitical Plan*), 1784.
[5] *Der Mensch ist gut, aber die Leut' sindschlecht*.
[6] Epistle to the Romans, 8, 22-23.

as irresponsible politicians try to make them believe. The European Union will therefore not be able to deliver such solutions and thus live up to these people's expectations. This is the only reason why the European Union is in a crisis.

One of the slogans of these politicians is that the European Union is too remote from ordinary citizens. The truth is that the ordinary citizen is too remote from the European Union. And those politicians who try to alienate European citizens even further from the European Union are contributing to the latter's crisis.

Of course, to say that the ordinary citizen is too remote from the European Union sounds like a bad political joke copied from communist times where the formula 'the people have lost the confidence of the government, the people have to work twice as hard to win back this confidence' was created.[1] What is really meant is that many citizens of the Europe Union are too remote from the Union's values. This applies in particular to the values of respect for human dignity, the rule of law and respect for human rights, including the rights of persons belonging to minorities, non-discrimination, tolerance, justice and solidarity.

But even in a democracy these values must not be ignored, and be it by the majority. The possibility that democracy may degenerate is always there. Legally, recourse can always be had to judicial review. But if the European Court of Justice should be powerless to redress these grievances, all people of good will in the European Union are called upon to stand up and offer resistance. We must not shrink from the crisis; we have to do everything possible to overcome it. And we must not permit anyone to destroy our European Union!

By the way: Should we permit these people to destroy the European Union, this would not be the end but only the beginning. People who do not recognize the values of the European Union will also not respect the values of the Member States, for the values of the Union are values the Member States have in common. The logical consequence would be – after an exit from the EU – an exit from the state. Probably,

[1] See Berthold Brecht, Die Lösung (The solution), *Ausgewählte Werke* (Selected opera), Vol. III (Poems), (Francfort/Main: Suhrkamp, 1997), 404.

many people would like to do so. Prof. Herbert Schambeck, confronted with the high number of people who leave the church every year, once stated that we would be surprised about the number of people who would leave the state, if only they could do so. But since this is not a realistic option – states will not tolerate such a dissociation of their citizens[1] –, these people will ignore the pluralism of society and will try to shape the state according to their ideas. The end of the European Union would thus be the beginning of the end of the liberal, democratic state under the rule of law. Therefore, we need to nip things in the bud.

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[1]See *supra*, at fn. 11. The only admissible way to exit from the state is by emigration. But since there are no *terrae nullius* nowadays, emigrants just change one state for another.

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THE FINALITIES OF CONSTITUTIONAL INTERPRETATION: SOME REFLECTIONS

Rainer ARNOLD [1]

Abstract:

The Constitution is a living instrument. Its interpretation has on the one hand to consider the major changes in the perspectives of the society but on the other hand to be aware that its normative character will not be given up. In particular in the field of values important tendencies have emerged. Interpretation in favour of a comprehensive protection of the individual, internationalization of constitutional concepts and its limits such as constitutional identity as well as the understanding of the Constitution as a functional unit are some of the tendencies which will be considered in the presentation

Key words: *constitutional, interpretation, instrument, changes, functional unit*

1. THE FUNCTION OF THE CONSTITUTION

The Constitution is the basic legal order of the State.

The attribute "basic" means that it establishes the fundamental structures and determines the central values for the State authorities as well as for the society. The fundamental structures of the State are the form of government, the territorial organization and the institutional system.

Values are the fundamental rights and the form of government insofar as they have value character, thatis in particular democracy, rule of law, and the "open" State. Democracy means political self-determination of the individuals united in a State's society, a basic political concept with a strong individual-related dimension which finds its nucleus in human dignity, as is the German Federal Constitutional Court has rightly pointed out in its Lisbon Treaty decision.[2]Parliament as

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[2]Judgment of June 30,2009 (English version)
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html, para 211.

an institution which realizes political self-determination is an institutional value as well as Rule of Law which requires the existence of an independent judiciary and imposes the respect of law to all public institutions. Open statehood, a concept detailed for Germany by the Constitutional Court[1] but existing also in the other countries of the globalized world, is also at the same time institution- and value-oriented. The national institutions have to implement the external dimension of the nation-State.

Traditionally the Constitution is the basis of the State. With the shift of public power from the State to the multinational level and with the growing interference of international value declarations with the national constitution-fixed values the idea of a functional Constitution has emerged at the multinational level. This is also important for interpretation: have the European Convention of human rights and the European Union fundamental rights charter to be interpreted in suchtaditionally international, sovereignty respecting way or in a new state-like manner with an individual-related finality?

What we can state is that paradigms from the international level are immerging into the national interpretation methodology. Effet utile–oriented, evolutionary interpretation as it is now recognized in national constitutional law seems to have its origins in the jurisprudence of multinational courts.[2]

A Constitution, either a formal or a functional Constitution[3] (the latter being the basic order of a supranational organization, such as the European Union, or an internationaltreaty which is functionally integrated into the national constitutional order, such as the European Convention of human rights), is basic in the subjects of its regulation and also basic in its function: it is superior to specific legislation and it is not changeable with ordinary means. The supreme place within the normative hierarchy results from the basic character of the Constitution as well as the necessity to fulfill qualified requirements for its reform.

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[1] See Karl-Peter Sommermann, *Handbuch der Grundrechte (Hrsg. D. Merten / H.-J.Papier)*, 14.

[2]Michael Potacs, *Effetutile als Auslegungsgrundsatz*, (EuR 2009), 465

[3] See R.Arnold, *Begriff und Entwicklung des Europäischen Verfassungsrechtes, in: Staat – Kirche – Verwaltung, Festschrift für Hartmut Maurer, M.-E. Geis/D. Lorenz (Hrsg.)*, (München 2001), 855 - 868

2. THE CONSEQUENCES FOR THE INTERPRETATION OF THE CONSTITUTION IN GENERAL

a) The moderate adaptation

The Constitution is destined to regulate the basics of legal order for an unlimited time. It shall give stability to a political entity. It is therefore a long-time instrument which can fulfill its function during the period of its existence only if it adapts to the major social changes. The regulation which results from a law is expressed in the spirit of a certain time; the normative expression can change if time goes on. Regulations are therefore to a certain extent time-related. If constitutional law is formulated in a broad, open sense they can easily be adapted to changes by the interpreter whereas norms with a clear, determined content are much less flexible in their understanding. It is therefore difficult to adapt them by a mere interpretation.

Adaptations of the constitutional order take place by constitutional reform or, if this is possible, by interpretation. In any case, interpretation never can assume the power of constitutional reform or even constituent power. With regard to undetermined constitutional concepts the power of interpretation is however far reaching.

b)The guarantee of efficiency in general

It results from the character of the Constitution as the basic legal order of a State that it fulfills its finality with efficiency. The principle of efficiency is crucial for a Constitution. It is inherent in law that its normative efficiency is ensured. This is particularly important for a Constitution as it is the basic instrument for the whole legal order, the normative framework as the fundament of the State. Being the pillar of the State construction means to be necessarily efficient for guaranteeing the fundament.

c) Interpretation in accordance to democratic constitutionalism: the anthropocentricas the fundamental Constitution pattern

A further element of the Constitution is that it follows a fundamental pattern with a determined finality: the modern democratic Constitution is liberal in the sense that its supreme value is human dignity which is necessarily connected with the autonomy and freedom of the individual. Constitutional interpretation has to fill up the gaps or to specify undetermined and uncompleted concepts in conformity with this

basic pattern. However, it must be respected that the field of interpretation is necessarily limited.

A Constitution consists of written and unwritten norms, principles and rules. The intended efficiency of the basic legal order requires the interpreter to express the unwritten parts of the Constitution.

In particular: Substantive and functional efficiency as an interpretation finality

Constitutional interpretation has to realize the efficient functioning of the Constitution in the sense of the fundamentals of a liberal rule of law based democracy. Modern constitutionalism is necessarily democratic and liberal. Other forms of government are nondemocratic or democracies in letter but not in practice.

Democracies can only be based on the Rule of law[1]. Rule of law does not mean pure legality but constitutionality. Rule of law is value oriented and comprises the protection of the individual. The value fundament culminates in human dignity the protection of which is either explicitly expressed in the constitutional text or implicitly comprised. Dignity includes the principle of freedom which is a main element of human dignity. Man is born free and shares his/her freedom with the other individuals. Dignity which is absolute implies shared freedom. Equality is the relevant criterion for shared freedom. This anthropocentric view of constitutionalism understands freedom as the principle and restriction of freedom as exception which must be legitimized.

Restriction of freedom is legitimized if it takes place for a legitimate aim of common good. This aim always has to serve, directly or indirectly, the benefit of the individual. The ultimate finality of law and in particular of constitutional law is the protection and promotion of Man.[2] The relation between freedom and restriction of freedom is in balance if this ultimate finality is observed.

The principle of freedom is specified by fundamental rights, regularly written down in the text of the Constitution. However, the principle of freedom as such is not limited, it comprises all needs for

[1]Stephan Kirste, *Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and the Rule of Law.The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat).* James R. Silkenat and James E., Hickey Jr. and Peter D. Barenboim, (Eds.), 29-43.

[2]Omneiushominum causa D.1,5,2 HermogenianuslibroprimoEpito.marum

protection against dangers for the individual, existing or emerging in the future. Constitutional practice is quite clear in this point: the interpreters of the Constitution will not accept gaps in the fundamental rights protection but formulate rights which are not written but do exist as specifications of the principle of freedom.

Freedom would not be efficiently guaranteed if only the written specifications of the freedom principle would be applied. The Constitution is necessarily based on freedom as an indispensable element of human dignity. In some constitutions, such as the German Constitution, this principle is clearly written (see article 2.1 Basic Law) and therefore the basis for fundamental rights which are not formulated by the Constitution text. However, even if article 2.1 BL would not exist in the written form, it would have to be recognized as a constitutional principle. The judges, in particular the constitutional judges have the competence and even are obliged to complete the protection by formulating new aspects of a written fundamental right or even by naming a new right, all of them derived from the freedom principle.[1]

It is evident that this competence and obligation to complete the constitutional text by interpretation is not valid for social rights. These rights areconnected with the social finality of the State, an important element which regularly has to be realized by the legislator.

Besides the substantive efficiency interpretation has to take into consideration also functional efficiency of their freedom guaranteed.

This aspect implies essentially the following four issues: (a)freedom, that is fundamental rights have to be interpreted in a way that they offer an *optimum* protection, (b) restrictions of freedom can only be established by law, (c) restrictions have to comply with the criteria of the principle of proportionality, and (d) restrictions never can affect the very essence of a fundamental right, its nature. If these requirements are not written in the text of the Constitution, interpretation has to develop them.

a) For realizing the *optimum* of protection, freedom and restriction must be brought into an adequate balance. This presupposes that the fundamental rights which are in question can deploy their full function. This means that they have to be interpreted according to the

[1]R. Arnold, *Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, in: Max-Emanuel gesi, Markus Winkler, Christian Bickenbach, Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag,* (C.H. Beck, 2015), 3 – 10

principle of *effet utile*, an interpretation modality which corresponds to the anthropocentric approach of freedom guarantees. The rights shall serve the individual to a high degree. This can be reached by an interpretation which is not static but dynamic and evolutionary. It results from the fact that interpretation intends to research the objective will of the Constitution in the moment of the interpretation that evolutions of legal thinking which influence on the meaning of a constitutional concept have to be duly respected. Furthermore, the *effetutile* oriented interpretation intends to protect as far as possible the individual, the requirement also resulting from the anthropocentric perspective which is basic for contemporary constitutionalism. It shall be added that fundamental rights are principles, specifications of the comprehensive principle of freedom, guarantees for all the members of society. They must therefore be brought into the right relation, under observance of the principle of equality. This excludes that the *maximum* of protection can be reached; by weighing out diverging principles it is only possible to end up with the *optimum* of protection. Sharing freedom with the other is not the restriction of freedom but the necessary distribution of freedom.
In conclusion it can be said that interpretation must conceive freedom in its general and its specific expressions to a full extent, guided by the anthropocentric approach of modern constitutionalism. Furthermore, interpretation must reconcile in a specific case the freedoms of all who are involved. This process of sharing freedom must result in the realizing the optimum of protection, reaching the "practical concordance" , as KonradHesse has formulated[1].

Bringing the freedoms of several persons into an optimum relation is a difficult task of interpretation. Such process takes also place if freedom and other constitutional values must be brought into compatibility. This process is not a process of restricting freedom but of realizing freedom in a way which has been determined by the Constitution. Also with regard to this second type of reconciling different constitutional concepts only an optimum can be reached, not a maximum.

However, the supreme value of the constitutional order, human dignity, is untouchable, neither exposed to restrictions nor able to be weighed out against other constitutional values. The realization of human dignity has always to lead to a maximum solution.

[1]*Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 18th ed., (1991), marg. notes 317, 318, 133-134

(b) Functional efficiency of the freedom protection requires that the restrictions are made only by law. If this is not written in the text of the Constitution it must be confirmed by interpretation. The basic idea is that freedom is the principle and restrictions are the exceptions which must be legitimized. The fact that the representatives of the people in Parliament adopted a law authorizing restrictions of freedom expresses the consent of the individual to restrict his/her freedom. The involvement of Parliament is therefore a legitimizing element because the individuals authorize, indirectly through their representatives in Parliament, the restriction.

c) Functional efficiency of the freedom protection largely depends from the right use of proportionality by the interpreter. This principle which has got a worldwide importance is expressly written in some of the new Constitutions but has been regularly developed by constitutional jurisprudence. The constitutional interpreter cannot avoid to use this principle which indicates whether freedom and restriction of freedom are in an adequate relation.

d) A part of the Constitutions expressly protects the freedom from excessive intervention of the legislator. As the German Constitution does in its article 19.2 the very essence of the fundamental right must not be affected by the restriction. If this is not foreseen in the text of the Constitution, the interpreter has to develop this. An example is the jurisprudence of the French Conseil constitutionnel establishing the prohibition of the legislator to destroy the nature of fundamental rights (" dénaturer")[1].

3. THE INTERNATIONALIZATION OF INDIVIDUAL FREEDOM

Constitutionalism of today does not accept the "closed State". "Open statehood" is a characteristic of the State in the midst of globalization and regional integration. This has been confirmed by the continuous jurisprudence of the German Federal Constitutional Court[2]. The State no longer decides exclusively on its values. The fundamental rights have developed in the various constitutional orders autonomously

[1] R. Arnold, „Ausgestaltung und Begrenzung von Grundrechten im französischen Verfassungsrecht" *Jahrbuch des öffentlichen Rechts* 38 (1989): 197 - 216

[2] See note 2.

but are in an open process of dialogue with other countries and with the international level. Through the dialogue of judges and the existence of multiple forms of fundamental and human rights protection the internationalizing process in the field of fundamental rights has considerably increased.

The German Federal Constitutional Court has joined this position and clearly expressed in its important decision in Görgülü case (2004)[1]. According to this judgement, the fundamental rights listed up in the German constitution have to be interpreted in the light of the European Convention of human rights and in particular of the jurisprudence of the Strasbourg court. For legitimizing this view reference was made to article 1.2 Basic Law (BL) where the acceptance of human rights by the German people which are the basis for peace and justice in the world is stated. This statement is seen as a consequence of the obligation of the State to protect human dignity as required by the first paragraph of this article. Furthermore, this statement is a general one referring to human rights as such, not only to those which are named in the constitutional text but also of those embodied in international treaties. This results from the wording of paragraph 2 of article 1 and from the reference made to the importance of human rights for peace and Justice at international level. The respect of human rights is not only a matter of the Constitution and not limited to the own territory but the requirement which is relevant and important all over the world. This argumentation enables the Constitutional Court to internationalize the national fundamental rights and to incorporate functionally the European Convention of human rights into the German constitutional order.

This standpoint also enlarges the rule of law concept. It is no longer seen as purely national but includes also the respect towards international law.

The judgement also confirms that the application of national fundamental rights which have been interpreted only from a national perspective and have not adapted the protection to the level of the Convention as indicated by the jurisprudence of the Strasbourg Court would violate even the national Constitution and not only the Convention. An individual constitutional complaint would be possible with reference to the interpretation of the national fundamental right only

[1] http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html

in a national perspective which gives less than the required interpretation in conformity with the Convention.

Constitutional interpretation has also to reconcile supranational law with the internal legal order. In order to avoid conflicts between the two orders interpretation has to try as far as possible to interpret the national Constitution in favor of the supranational order which enjoys primacy over national law. If such interpretation is not possible or has no success, interpretation must guarantee that primacy of supranational law can have effect. However, it is also the task of interpretation to maintain the core elements of the Constitution. Interpretation cannot abolish its own object. Constitutional identity as a limit of integration has been elaborated and legitimized by jurisprudence.[1]

The finality of constitutional interpretation to internationalize fundamental rights is an element of the international function of constitutional judges which have obtained an increasingly important role for safeguarding and also reconciling the Constitution with the challenges of the globalization process.

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[1] See the Lisbon decision of the Federal Constitutional Court, BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), version

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LETTERS OF CREDIT AS PROVIDED BY UCP 600 OF 2007

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Abstract:

One of the most frequently used payment methods in international trade is the letter of credit. At present, there is no international convention governing this method of payment, but using the international practice in the matter as a landmark, the International Chamber of Commerce in Paris has developed the so-called "Uniform Customs and Practice for Documentary Credits", also known as UCP 600 of 2007, which constitutes a uniform set of rules applicable when participants in international trade refer to it in the contract they conclude. The remarkable advantage that documentary letters of credit provide to the parties to an international trade contract concerns the guarantees that each party has, i.e. that the performance of one party's obligation will be followed by the performance of the other party's obligation.

Key words: *method of payment, international trade contract, letter of credit, uniform set of rules, performance of the obligation, UCP 600 of 2007.*

INTRODUCTION

As a rule, international trade contracts provide the method for paying the price of goods supplied, works performed or services rendered. This method is established by business partners based on the relevant provisions of the applicable law, interstate agreements on trade and payments, and international practice.

One of the most frequently used payment methods in international trade is the documentary letter of credit. The first uniform rules on letters of credit, called "Uniform Customs and Practice for Documentary Credits" were developed by the International Chamber of Commerce in Paris

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(ICC-Paris)[1] and adopted at the Conference in Vienna in 1933; a revision of these rules was adopted at the conference in Lisbon in 1951, and in 1962 and 1974 ICC-Paris developed new versions of the uniform rules in matters of documentary credits. The ICC Commission on Banking Technique and Practice adapted these rules to the new requirements in banking, transport and insurance in 1984 (known as Publication 400), then in 1993 (Publication 500) and in 2007 (Publication 600 or UCP-600)[2]. The uniform rules in matters of documentary credits were embraced by banks in over 170 countries, including Romania. As a result of the existence of these uniform regulations, about 70% of international trade transactions are based on letters of credit.

Currently, payment by letters of credit is made in compliance with the ICC-Paris document called "Uniform Customs and Practice for Documentary Credits" (Publication 600). The English version of ICC Publication 600 is the official text.

The uniform rules for documentary credits drawn up by the International Chamber of Commerce in Paris are not binding on participants in international trade; under the principle of the free will of the contracting parties, they can choose to pay the price under the terms of one version of the uniform customs and practice for documentary credits (for example, Publication 500 or Publication 600); likewise, the parties may agree that the documentary credit contains exceptions to the rules laid down by the uniform customs and practice for documentary credits that the parties chose as a matter of principle.

[1] The International Chamber of Commerce based in Paris (ICC-Paris) is a professional organization of traders around the world, created in 1920, following the decision of the International Trade Conference in 1919; it aims to promote international trade and the market economy; to achieve this, ICC-Paris developed many uniform rules applicable to international trade legal relations; for this activity, ICC-Paris established several committees consisting of experts in various fields of interest in international trade (competition law, intellectual property law, international transport, banking techniques, telecommunications, information technology, environmental protection, energy, investment, taxes , trade policy, etc.). Thanks to the competence of these experts, ICC-Paris acquired, in 1946, a consultative status within the United Nations and its specialized Agencies. ICC-Paris members represent organizations of businessmen and companies in most countries. The Chamber of Commerce and Industry of Romania became a member of ICC-Paris in 1990.

[2] M. Negruș, *Plăți și garanții internaționale* (Bucharest: C.H. Beck, 2006), 43-46.

1. NOTION. LEGAL NATURE

A documentary letter of credit can be defined as a commitment whereby a bank undertakes, at the request of a client (importer), to make a payment to a beneficiary third party (exporter), to which it gives a letter to this effect (called letter of credit), the payment being subject to delivery by the beneficiary third party of documents mentioned in the agreement between the bank and its client (for instance, commercial invoice, insurance policy, transport documents, customs documents, etc.); for this reason it is called a documentary letter of credit[1].

The bank has the obligation to honour the documentary letter of credit only if the presentation of documents by the beneficiary of the documentary credit, complies with the terms and conditions of the credit; a bank's honouring of a documentary credit means (art. 2, UCP 600): a) to pay at sight if the credit is available by sight payment; b) to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment; c) to accept a bill of exchange drawn by the beneficiary and pay at maturity if the credit is available by acceptance

The payment undertaking of the bank issuing the documentary credit can take place directly, when the issuing bank makes the payment, or indirectly, when the issuing bank entrusts the payment to a correspondent bank which is usually located in the exporter's country.

In terms of legal nature, a documentary letter of credit is a promise to pay. The fact that it is a legal act independent of the international trade contract that determined it, produces significant legal consequences, such as the following:

a) the rights of the beneficiary of the letter of credit towards the bank issuing the letter of credit are independent of the contractual relations between him and the applicant; if the bank has received all the documents mentioned in the letter of credit, it cannot refuse to pay the amount of money provided in the credit, raising exceptions from the sales contract, because such exceptions are inapplicable, except in case of fraud committed by the beneficiary; banks verify only the documents, not

[1] Șt. Scurtu, *Dreptul comerțului internațional. Partea generală* (Bucharest: Didactică și pedagogică, 2010), 182; I. Macovei, *Tratat de drept al comerțului internațional* (Bucharest: Universul Juridic, 2014), 589.

how the contractual obligations have been performed in relation to the quality or condition of the goods[1];
b) if the letter of credit and the international trade contract underlying it have contrary provisions, the provisions of the letter of credit prevail; because the text of the letter of credit is consistent with the instructions of the applicant, the bank bears no liability for any discrepancies between the letter of credit and the international trade contract, the dispute being settled between exporter and importer;
c) inclusion in the letter of credit of references to the main contract, has no effects, so is not binding on banks;
d) because the rights of the beneficiary exporter arise directly from the letter of credit, they are independent of the relations between the bank and the applicant importer, and the interruption of these relations (upon death, bankruptcy, etc.) does not allow the bank to refuse to perform the obligations arising from the documentary credit[2].

Parties involved in payment by a documentary letter of credit

In carrying out the operation called documentary letter of credit, there are three, possibly four persons, who have names established in banking practice, namely: applicant, beneficiary, issuing bank, correspondent/advising bank of the issuing bank[3].

The applicant (issuing the documentary credit order) is the importer who bought the goods, benefited from the performance of works or services and, as a result, has become a debtor of the exporter. The applicant initiates payment by a documentary letter of credit, by an order that he gives his bank. In the application for the letter of credit, he states all the conditions (terms, documents) that the bank must consider in respect of payment.

The beneficiary (third party for the benefit of which the letter of credit is issued) is the exporter - seller of goods, contractor or service provider, having the quality of creditor of the importer-applicant. The beneficiary is the person for the benefit of which the letter of credit is opened and who submits the documents mentioned in the letter of credit to the bank and gets money for handing over the documents.

[1] T. R. Popescu, *Dreptul comerţului internaţional* (Bucharest: Didactică şi Pedagogică, Bucureşti, 1983) 287.
[2] Popescu, *Dreptul comerţului internaţional,* 287.
[3] Scurtu, *Dreptul comerţului internaţional. Partea generală*, 183.

The issuing bank (ordering bank) is the importer's bank, which, at the request of the client (applicant) undertakes, in writing, the payment to the exporter - beneficiary of the letter of credit.

The correspondent bank of the issuing bank (also called intermediary bank) is the banking company whose services the issuing bank uses; for example: it transmits the text to the beneficiary, possibly pays the amount of money provided in the letter of credit or accepts the bills of exchange of the beneficiary; for services provided at the request of the issuing bank, it will receive a commission.

The name of the intermediary bank differs depending on the tasks it has[1]: notifying (advising) bank, paying bank, accepting bank, negotiating bank, confirming bank.

The notifying or advising bank acts as an intermediary which handles documents for a fee: it informs the exporter of the letter of credit, then it receives from the latter the documents mentioned in the letter of credit and sends them to the paying bank. The payment of the amount of money mentioned in the letter of credit is made by the issuing bank or a third bank.

The paying bank is empowered by the issuing bank to pay the amount of money to the exporter for handing over the documents mentioned in the letter of credit, then to send the documents to the issuing bank so that the latter will reimburse the amount paid. The paying bank may be in the exporter's country or in a third country.

The accepting bank has the role to receive from the exporter the documents certifying the delivery of goods, accompanied by bills of exchange; the accepting bank accepts the bills of exchange and returns them to the exporter, whereas the documents are sent to the issuing bank or the importer. At maturity, the accepting bank has the obligation to pay the bills of exchange to the beneficiary.

The confirming bank is the bank that adds its undertaking to the payment undertaking of the issuing bank. If the issuing bank fails to honour its undertaking, the payment will be made by the confirming bank.

The negotiating bank is common in the Anglo-Saxon banking practice, where the letter of credit requires the presentation of documents by the beneficiary, accompanied by one or more bills of exchange drawn on the issuing bank, the place of payment being the headquarters of the

[1] Negruș, *Plăți și garanții internaționale*, 49.

issuing bank. This drawback can be eliminated by the issuing bank, which, if instructed by the applicant, may authorize another bank to negotiate the documents. The applicant pays the bill of exchange to the beneficiary for the documents, and then sends them to the issuing bank, receiving from the beneficiary a negotiation fee[1].

2. OPERATIONS NECESSARY FOR PAYMENT BY A DOCUMENTARY LETTER OF CREDIT

If payment by a documentary credit is made by the exporter's bank, the payment includes the following (legal or bank) operations[2]:
1. Conclusion of an international trade contract on the delivery of goods, in which parties agree to pay the goods by a documentary credit. As a result of the clause provided in the contract, the importer has the obligation to ask his bank to open a letter of credit for the benefit of the exporter and the exporter has the obligation to deliver the goods as provided in the letter of credit. The buyer's obligation to order his bank to open the letter of credit is essential for the conclusion of the contract; as a rule, the parties stipulate in the contract they conclude the consequences of the failure to open the letter of credit; without an option of the parties, in the general regulatory framework, if the letter of credit is not opened, the seller may refuse the delivery of the goods, and may request the termination of the contract and payment of damages.

2. The request made by the importer to the bank to open a letter of credit. Acceptance of such a request involves the conclusion of an agreement between the importer and the bank regarding the opening of the letter of credit; this agreement establishes the obligations of the parties, the content of the letter of credit (terms that the exporter must comply with and the documents that he must submit to the bank for the payment) etc.

The instructions of the importer to issue a letter of credit must be complete and accurate. To avoid confusion and misunderstanding, banks

[1] A negotiation fee represents the interest on the amount paid to the exporter, calculated for the time between payment and repayment of money by the issuing bank (M. Negruş, *Plăţi şi garanţii internaţionale*, (Editura All, Bucureşti, 1998), 19).
[2] For details, see Macovei, *Tratat de drept al comerţului internaţional*, 591-592; Popescu, *Dreptul comerţului internaţional*, 286 sqq.; Negruş, *Plăți și garanții internaționale*, 19 sqq.

do not accept the inclusion of excessive details in the letter of credit or any amendment thereof; banks do not accept instructions for the issuing, endorsement or confirmation of a letter of credit by reference to a previously issued letter of credit; instructions to issue or amend a letter of credit must clearly indicate the documents for payment, acceptance or negotiation.

A requirement for the importer's bank to undertake payment to the exporter by a documentary credit is the existence of available cash in the account of the importer, for which purpose the bank is able to grant him a credit.

3. Issuing of the letter of credit by the importer's bank. By this bank document, the issuing bank undertakes to pay a certain amount to the exporter, as mentioned in the documentary letter of credit; the document is sent to the exporter's bank.

4. Notification of the exporter, beneficiary of the letter of credit, by the correspondent bank of the issuing bank regarding the opening of the letter of credit and transmission of the bank document to the exporter. The mere receipt of a letter of credit by the exporter is equal to the exporter's implied acceptance. If he identifies inconsistencies between the clauses of the international trade contract concluded with the importer and the letter of credit issued for his benefit, he requires the importer to take necessary steps for the amendment of the letter of credit by the issuing bank.

5. Delivery of goods by the exporter, in compliance with all the terms of the documentary letter of credit and the drafting of all documents mentioned in the documentary letter of credit.

If he cannot meet all the conditions of the documentary credit, the exporter asks the ordering bank to modify it (for instance, to change the dates of shipping the goods, to extend the time limit for presenting the documents or to waive certain documents which he cannot obtain); the goods are shipped by the exporter only when all the requirements of the letter of credit are met.

6. Use of the documentary letter of credit, namely the delivery of the letter of credit and the documents certifying the delivery of goods by the exporter to the paying bank and the receipt of the money owed. Before making the payment, the bank verifies whether the documents comply with the terms and conditions of the letter of credit. For example, when the commercial invoice is presented, the bank must control the

following: a) if the exporter and the importer in the invoice correspond to those in the letter of credit; b) if the description of the goods, value and unit price coincides with that in the letter of credit; c) if the invoice meets the requirements of the letter of credit, in the sense of being signed, notarized or certified by a chamber of commerce or a consulate; d) if the value of the invoice does not exceed the value of the letter of credit; e) if the indication of the delivery condition coincides with the indication of the letter of credit; f) if the name of the vessel is the same as the name of the bill of lading; g) if the invoice indications coincide with those in the shipping documents and other documents regarding the number of packages, quantity and weight of the goods, packaging marks, etc[1].

The payment of the amount of money provided in the documentary letter of credit may be made by the paying bank by crediting the account of the beneficiary, by granting a loan with deferred payment or by accepting the bill of exchange, which is to be received at maturity or expected from a bank.

7. Handing over the documents by the paying bank to the issuing bank; after verification of document compliance with the conditions of the letter of credit, the latter reimburses the paying bank or, if the documents do not comply with the letter of credit, it refuses to pay.

8. Notification of the importer by the issuing bank for submitting documents for payment. The importer's bank submits the documents and receives the amount paid if the importer, while checking the documents, notices that they comply with the instructions given by him by the request to open the documentary letter of credit.

9. Delivery of transport documents by the importer to the carrier. The importer delivers the transport documents to the carrier so that the latter releases the goods delivered by the exporter.

3. CONTENT OF THE APPLICATION FOR OPENING A DOCUMENTARY LETTER OF CREDIT

The application for opening a documentary letter of credit should contain the following elements[2]:

[1] I. Turcu, *Operaţiuni şi contracte bancare,* (Bucharest: Lumina Lex, 1994), 319 sqq.
[2] Negruș, *Plăți și garanții internaționale*, 59 sqq.;. Scurtu, *Dreptul comerțului internațional. Partea generală*, 185 sqq.

a) the identification data of the person requesting the opening of the letter of credit (name and address of the importer-ordering the letter of credit), and necessary data for the bank to communicate faster with the applicant (telephone number, fax, e-mail, etc.) ;
b) the name and address of the bank where the request for issuing a letter of credit is submitted;
c) the date of the order to open the letter of credit; the importer will request the opening of the letter of credit with a certain number of days before the date of dispatch of the goods by the exporter; this term is agreed to by the contracting parties or left to the discretion of the importer;
d) the term of validity of the letter of credit; the undertaking of the issuing bank is valid from the time of issuing the letter of credit until its expiry; within this term the necessary documents for payment, acceptance or negotiation of the letter of credit must be sent to the correspondent bank of the issuing bank; the validity period of the letter of credit may be expressed by reference to a certain date or by giving the number of time units (days, weeks, months, etc.); the validity period is one of the elements considered by the issuing bank for setting charges and bank fees; the letter of credit must specify unequivocally the last day when the beneficiary can use it;
e) the place of presentation of documents by the beneficiary of the letter of credit (country, city and bank); for documents presented on paper, the applicant must indicate the physical address of the bank where documents will be presented; for documents presented electronically, one must mention the e-mail of the bank; the place of presenting the documents may be in the exporter's country, in the importer's country or in a third country; the exporter's interest is that the letter of credit is domiciled in his country because there are no risks involved in sending documents by courier to the bank where they must be submitted, and the period of collecting the equivalent value of the goods is shorter;
f) the name and address of the exporter-beneficiary of the letter of credit and the necessary information for the bank to be able to communicate quickly with him (telephone number, fax, e-mail, etc.); as a rule, a letter of credit is opened for the benefit of the exporter, but there are situations when it is opened for the benefit of a third party (supplier of parts of the goods to be delivered, a subsidiary of the exporter, etc.);

g) form of the letter of credit (revocable or irrevocable); in the absence of such a specification, the letter of credit will be considered irrevocable; the specification must also refer to the fact that the letter of credit is transferable or non-transferable; in the absence of such a specification, the letter of credit is not transferable;
h) the method of notifying the opening of the letter of credit. Transmission of letters of credit and any messages relating to the letter of credit is done by banks by mail (letter or telegram), by telex, by fax or other means of communication, according to the urgency of the banking operation. But because banks do not take responsibility regarding the consequences of delay or error occurred in sending messages, the forms of letters of credit include mentions of how to communicate these documents;
i) the value of the letter of credit. This may be indicated by a fixed amount, by an approximate amount or by a maximum limit; the value of the documentary credit is determined by the value of the goods to be shipped by the exporter;
j) the method of payment (at sight, at maturity or otherwise), currency (it may be the currency specified in the contract between the exporter and the importer or another currency; in case of discrepancies between the international trade contract and the documentary letter of credit, the mentions in the letter of credit will prevail) and place of payment of the documentary credit;
k) the goods to be delivered by the exporter. Description of the goods must be complete and accurate, without excessive detail (to avoid confusion and misunderstanding);
l) terms of delivery of the goods which make the object of the letter of credit (deadline for delivery) and delivery conditions. The deadline for shipping the goods must be related to the expiry of the letter of credit because the shipping documents presented after the expiry of the validity of the letter of credit will not be considered by the bank.

The delivery conditions must be specified in the letter of credit, as was stipulated in the basic contract; they may be indicated with reference to INCOTERMS or RAFTD. It should also be made clear if partial shipments and transhipments are permitted;
m) the minimum insurance value of the goods;
n) freight documents (bills of lading, shipping documents issued by forwarding agents, shipping documents by air, road, rail, water);

o) documents that the beneficiary must present for payment, acceptance or negotiation of documents.

The issuing bank must mention in the letter of credit the documents that must be presented by the beneficiary, showing for each document its name; for example, commercial invoice, transport document, insurance policy, certificate of origin, certificate of quality, weight certificate, list of packages, etc.

The letter of credit must make it clear who must issue these documents to be considered by the bank and the way of drafting them, or what information they should contain.

The documents must be submitted to the bank in the original form, but (unless otherwise provided by the letter of credit) banks will accept as original documents, the documents produced by systems of graphic reproduction, either automatic or computer reproduction, through carbon copies, provided that they are marked as original and, wherever necessary, signed.

The banks will accept a document whose issue date is a date prior to the date of opening the documentary credit, if this document is presented to the bank within the time limits set out in the documentary credit.

The banks assume no liability for the authenticity of the documents; they are not liable if a document is false, if the value, quantity, quality, packaging of the goods do not conform with the documents, if the sender, carrier, recipient, insurer of the goods do not act in good faith.

According to the legal nature, documents are classified into trade bills (debt securities or representative securities – bill of exchange, bill of lading, warrant-receipt) and documentary evidence and accompanying documents (commercial invoice, way bill, insurance policy, certificate of origin, etc.). Trade bills can be nominal, by order or payable to the bearer[1].

Incidents concerning irregularities of documents (flaws regarding the completeness, accuracy and compliance of documents) can lead to the blocking of the use of documentary letters of credit, which may be avoided by presenting the documents to the bank before the expiry of the

[1] Turcu, *Operaţiuni şi contracte bancare*, 320; M. Mazilu, *Dreptul comerţului internaţional. Partea specială,* (Bucharest: Lumina Lex, 2000), 387.

letter of credit, so that there is enough time to restore documents and submit them to the bank within the time limit[1];
p) the specification of the applicant's account number, because he is to be debited with the amount representing the value of the documentary credit, bank fees and other related expenses;
q) the applicant's signature.

4. CLASSIFICATION OF DOCUMENTARY LETTERS OF CREDIT

The doctrine has identified several criteria for the classification of documentary letters of credit, such as: firmness, place of residence, payment method, terms contained therein[2].
1. Depending on their firmness, documentary letters of credit are revocable and irrevocable. Letters of credit must clearly indicate whether they are revocable or irrevocable. In the absence of such a specification, the letter of credit will be irrevocable.
a) A revocable letter of credit may be amended or cancelled by the issuing bank at any time, without notice to the beneficiary; so the only obligation of the bank towards the third party beneficiary of the letter of credit, is to inform that the letter of credit was opened. In all other respects, the bank has an obligation only towards the applicant on the basis of the agreement between them.

The right to revoke of the issuing bank is extinguished when the payment is made by the paying bank. Therefore, if the correspondent bank paid the letter of credit or accepted or negotiated payment of the letter of credit, prior to the receipt of its modification or cancellation, the issuing bank must reimburse that amount to the paying bank. The revocable letter of credit is seldom used in practice due to the risks it has.
b) An irrevocable letter of credit involves the firm undertaking of the issuing bank to pay the amount stipulated in the documentary credit to the beneficiary, if the stipulated documents presented to the designated bank or issuing bank, are compliant with the terms and conditions of the

[1] Mazilu, *Dreptul comerţului internaţional. Partea specială,*, 387.
[2] Negruș, *Plăți și garanții internaționale*, 103 sqq.; Scurtu, *Dreptul comerțului internațional. Partea generală*, 191 sqq.; Macovei, *Tratat de drept al comerțului internațional*, 593 sqq.

letter of credit. If the documentary credit mentions some conditions without showing the documents that must be presented for certifying the fulfilment of the conditions, the banks will deem such conditions as not written and will ignore them. In accordance with art. 10 of UCP 600 an irrevocable letter of credit cannot be modified or cancelled without the consent of all concerned: issuing bank, confirming bank (if any) and beneficiary.

Irrevocable letters of credit can be confirmed or unconfirmed.

In the case of unconfirmed irrevocable letters of credit, the issuing bank is the only one undertaking to pay, and the correspondent bank does not assume, towards third party beneficiaries, such an undertaking, acting only as an agent of the issuing bank, under its instructions. Based on these instructions, the correspondent bank can only act as the advising bank or/ and paying bank, even if it has not assumed this role towards the exporter. If the correspondent bank of the issuing bank fails to honour the obligation to pay or does not accept the bill of exchange drawn on it, or it does not pay at maturity the bills of exchange accepted by it, the issuing bank is required to perform these obligations.

In the case of confirmed letters of credit, the issuing bank's undertaking is supplemented by an independent undertaking of the confirming bank that can be the exporter's bank or a bank located in another country. If the issuing bank fails to pay the letter of credit according to the undertaking, the confirming bank has the obligation to pay based on its own undertaking. Most often, the confirming bank accepts such a request from the issuing bank, provided that, prior to it, it may dispose of the amount corresponding to the value of the letter of credit which is to be confirmed, in which case we are in the presence of the so-called letter of credit with anticipated coverage.

The confirmation of the documentary letter of credit by another bank is made as a result of the empowerment given by the issuing bank, contained in the text of the documentary credit.

The advantage of confirmed letters of credit is that they provide an additional guarantee to the exporter for the payment of the goods supplied; the disadvantage is related to the increased bank fees, the confirmation fee being covered by the beneficiary of the letter of credit.

Confirmed letters of credit are used when the issuing bank has its headquarters in a country with a difficult financial situation or the issuing bank's creditworthiness is questionable.

2. Depending on the place of presenting the documents or the place of residence of the documentary credit, there are: documentary letters of credit in the importer's country, documentary letters of credit in the exporter's country, and documentary letters of credit in a third country.

The letter of credit in the importer's country has the disadvantage for the exporter that he will get the equivalent value of the goods only after the documents, submitted to the notifying bank, are in the possession of the issuing bank; to avoid this inconvenience, the beneficiary of the letter of credit may negotiate the bill of exchange drawn on the importer, by paying a negotiation fee.

The letter of credit in the exporter's country requires the payment of the amount specified in the letter of credit as soon as the correspondent bank of the issuing bank receives, verifies and accepts the letter of credit.

The letter of credit is in a third country when the issuing bank is located in a country other than the country of the importer or exporter; such solutions are preferred to avoid economic, political risks, etc.

3. Depending on the method of payment, letters of credit are available by: sight payment, payment at maturity, acceptance and negotiation.

a) letters of credit with payment at sight, letters of credit are paid immediately after the exporter's presentation of documents to the paying bank. The letter of credit contains the mention "sight payment". Immediate payment means that it is made immediately after the paying bank has verified the compliance of the documents with the terms and conditions of the letter of credit, verification that must be performed within a certain period.

b) letters of credit with payment at maturity, also called letters of credit with deferred payment, are paid at a later date of their presentation to the bank (usually after 30-60 days), date expressly specified in the text of the letter of credit ("X-day deferred payment").

The advantage of the importer resides in the fact that, having possession of the documents, he can take the goods before paying for them. In these letters of credit, the exporter is performing in fact a credit sale. The inconvenience for the exporter is that he cannot raise his claim

by discount, as happens with the letter of credit with payment by acceptance. However, sometimes banks grant loans to exporters, accepting letters of credit with deferred payment as a guarantee.

c) letters of credit with payment by acceptance are used for short-term and extremely short-term sales on credit (between two months and one year). In the letter of credit opened by order of the importer, the mention "x-day acceptance payment" is inserted.

This letter of credit is characterized by the fact that after the delivery of the goods, the exporter also submits to the bank, with the documents mentioned in letter of credit, a bill of exchange or a set of bills of exchange, drawn on the bank indicated in the text of the letter of credit (which may be the issuing bank, the accepting bank, the expressly designated bank), maturity corresponding to the number of days specified in the documentary credit.

If the documents are in accordance with the letter of credit, the paying bank accepts the bill of exchange and returns it to the exporter, and the other documents are sent to the issuing bank which sends them to the importer. The exporter may wait until the due date for payment to obtain the amount provided in the bill of exchange or may sell the bill of exchange to a commercial bank (operation called discounting of a bill of exchange), while paying a discount fee; through the discounting of the bill of exchange by the exporter, a credit sale turns into a sale at sight[1].

d) The letter of credit with negotiation payment is used especially in Anglo-Saxon countries.

The issuing bank drafts the letter of credit for an amount expressed, as a rule, in the national currency and authorizes the exporter to draw a bill of exchange on the issuing bank, the importer or on another bank specifically mentioned in the letter of credit. The issuing bank guarantees the payment of the bill of exchange.

Since under the law of bills, the place of payment is the domicile of the drawee, the exporter may present a bill of exchange with the original letter of credit and the documents mentioned in the letter of credit, at the domicile of the drawee (usually the issuing bank).

[1] M. Isărescu, „Letter of credit", in *Dicţionar juridic de comerţ exterior*, colective work, coordinators O. Căpăţână and Br. Ştefănescu, (Bucharest: Ştiinţifică şi Enciclopedică, 1986), 323; Costin M. N., *Dicţionar de drept internaţional al afacerilor, vol. 3*, (Bucharest: Lumina Lex, 1996),. 166 sqq.; Negruș, *Plăți și garanții internaționale*, 27.

To avoid this inconvenience, the issuing bank may authorize other banks to "negotiate" documents, which means that the exporter can present the bill of exchange, accompanied by documents, to the negotiating bank, which buys them from the exporter for a negotiation fee (it is the interest on the amount paid on the documents for the period of time starting from the moment of paying the documents until the reimbursement of the amount by the issuing bank)[1].

4. Depending on the terms they contain, letters of credits are classified as: revolving letters of credit, red clause letters of credit, transferable letters of credit, compensation letters of credit[2].

a) The revolving letter of credit is used in contracts with successive performance and is characterized by the fact that the value of the letter of credit is automatically increased, as payments are made to a certain level after each delivery of goods; when it is opened, the letter of credit has the value of a single delivery, and after payment of the first delivery, it shall be automatically extended, under the contract, to the full performance of the contract (hence, the value of the letter of credit is given by the value of a single delivery and not the sum of all deliveries; as a result, bank fees are lower).

All deliveries are covered by a single letter of credit that allows partial deliveries and payments. The exporter delivers the goods under the terms of the letter of credit, then for each delivery, he presents the documents required by the letter of credit to the paying bank, then collects the equivalent value of the goods. If in a single delivery the exporter does not meet the requirements in the revolving letter of credit, the credit can no longer be used for any of the delivery that should have followed.

b) The red clause letter of credit. The characteristic of this type of letter of credit is given by the fact that it allows payment to be made before the submission of documents confirming the shipment of goods; moreover, the text of the letter of credit contains the words "red clause" or "prepayment". Payment made before the delivery of the goods can be equal to the value of the letter of credit or can be an advance payment, a

[1] Negruș, *Plăți și garanții internaționale*, 115; Turcu, *Operaţiuni şi contracte bancare*, 309.

[2] For details, see Macovei, *Tratat de drept al comerțului internațional*, 595-597; Popescu, *Dreptul comerţului internaţional*, 287; Turcu, *Operaţiuni şi contracte bancare*, 309 sqq.; Negruș, *Plăți și garanții internaționale (2006)*, 118 sqq.

percentage of the amount expressed in the letter of credit or a fixed amount.

The purpose of the advance payment is to allow the exporter to obtain the financial means he needs to finance production or to buy, either entirely or partially, the goods that he undertook to deliver to the importer. After shipping the goods, the beneficiary of the letter of credit presents the shipping documents to the bank and collects the rest of the amount.

When the money is granted in advance, the exporter submits a letter of undertaking to the bank, assuming the obligation to use the money only for the purpose for which it was granted, and to present the shipping documents and compliance with the letter of credit of the goods by the due date expressly specified in the letter of credit, and in case of failure to perform obligations he will refund the amount received and interest. But the advance payment risk is assumed by the importer because the advance is granted as a result of the order given by the importer to the issuing bank; so, if the exporter does not return the advance received from the paying bank, the latter requires the reimbursement of the amounts paid, from the issuing bank.

The red clause letter of credit is a way by which the importer finances the exporter without receiving interest and is used in agency operations (when the exporter must buy the goods from several local suppliers with immediate payment of the price) and in production (when the manufacturer does not have financial resources to produce the goods and the importer is interested in those goods and finances the manufacturer so that it will be able to produce)[1].

c) The transferable letter of credit is the documentary credit under which the beneficiary (first beneficiary) may request from the paying bank to transfer to his supplier (second beneficiary), either totally or partially, the rights acquired by an irrevocable letter of credit (art. 38 of UCP 600).

A letter of credit can be transferred only if the issuing bank makes the express mention that it is "transferable", otherwise it is non-transferable.

Mentioning that a letter of credit is "transferable", the importer may state whether it is transferable only in the beneficiary's country, only in a

[1] Negruș, *Plăți și garanții internaționale*, 122; I. Macovei, *Tratat de drept al comerțului internațional*, 596-597.

specific country or only for a particular company. If there was no mention in this respect, the transfer may be made to any beneficiary chosen by the first beneficiary of the letter of credit. In any of these cases, to be transferred, the letter of credit must be irrevocable.

The transferable letter of credit is used mainly in agency operations. The intermediary must replace the supplier's invoice with its own invoice within the time limit established by the transferring bank because it must meet the requirements of the basic letter of credit (therefore, some banks claim from the intermediary to submit the invoice, even in blank, with the transfer order). If the main beneficiary is late in submitting the invoice, the transferring bank is entitled to send the issuing bank documents submitted by the secondary beneficiary, without any responsibility towards the first beneficiary.

Since the documents of the transferred letter of credit must allow the payment of the original letter of credit, the transferred letter of credit must include the terms and conditions specified in the original (basic) letter of credit, except as provided in art. 38 of UCP 600.

To use a "transferable" credit, the intermediary must obtain the consent of the bank by which he intends to make the transfer (transferring bank) because a bank will have the obligation to make such a transfer only within the limits and in the express manner in which it accepted.

Unless otherwise provided in the letter of credit, a transferable letter of credit can be transferred only once for one or more secondary beneficiaries.

In turn, they cannot require the transfer of the letter of credit to another beneficiary third party unless the basic letter of credit includes the express mention "transferable twice". But a transfer to the first beneficiary does not constitute a prohibited transfer.

If the original letter of credit contains the reference "partial deliveries allowed", it is possible that the only transfer may be split to several suppliers, while allowing the separate transfer of fractions of a transferable letter of credit (not exceeding, as a whole, the amount of the letter of credit), to several secondary beneficiaries, which is encountered in practice where the intermediary procures the goods from several suppliers.

The advantages of the transferable letter of credit reside in the fact that it allows a company to do business without using its own funds

and that it allows export operations, unrelated to the specific activity of the company. The disadvantage of this letter of credit is given by the risk arising from a relationship with the secondary beneficiaries (meaning that they can or cannot deliver quality merchandise, comply with the terms and conditions imposed by the letter of credit issued in their favour, etc., and the failure to observe the conditions of the second letter of credit makes it impossible to fulfil the terms and conditions of the original letter of credit) and the banking costs higher than in a normal letter of credit, which are entirely covered by the beneficiary of the letter of credit[1].

d) Compensation letters of credit are used for export-import counterparty operations. This technique used in trade and banking seeks to protect contracting parties from potential risks which may include non-delivery of compensation goods, late delivery, delivery of goods of poor quality, quantity, assortment, etc. To prevent these risks, mutual letters of credit and standby letters of credit are used[2].

In the case of mutual letters of credit, the two contracting parties, each having the double quality of exporter and importer, open a letter of credit for each other and, therefore, each of them is an applicant for the letter of credit opened by him for the other contracting party and beneficiary for the letter of credit opened by the partner of compensation in his favour. The two letters are irrevocable and can have the same value or different values, in which case the difference is covered by a payment in foreign currency. The two letters of credit are opened simultaneously or at different terms (if either partner intends to credit the other).

The standby letter of credit is characterized by the fact that it is issued by a bank at the request of a client who must offer his business partner a guarantee in the sense that, if he does not perform his contractual obligation to deliver goods in compensation, the other exporter, on the basis of the proof of export of the goods, may require the bank that issued the standby letter of credit to pay the equivalent value of the goods that the contracting partner was to deliver. In case the second exporter delivers the goods in due time, the standby letter of credit has no object.

[1] M. Negruș, *Plăți și garanții internaționale (1998)*, 115.
[2] M. Negruș, *Plăți și garanții internaționale (1998)*, 132 sqq.

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THE REFUGEE CRISIS IN THE EUROPEAN UNION

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Abstract:

This article aims to provide a positive, constructive critique of the European Union's shortcomings in addressing the refugee crisis. The analysis is divided into three parts: 1) A critical overview of past measures undertaken by the European Union to date, including Spanish policy concerning the refugee crisis. 2) An analysis of the European Union's funding and management to address the influx of refugees. 3) A global perspective on both the endogenous and exogenous factors that affect the further development of the European Union policies on this issue.

Keywords: *refugees, resettlement, xenophobia, european union, economic investment, solidarity, positive tolerance*

Since 2015, hundreds of thousands of refugees have reached the territory of the European Union, driven from their homes by war, famine, and poverty. The refugee crisis has taken on a dimension much larger than expected, which has led the EU and Member States to improvise measures to both deter more refugees from coming and resettle those refugees granted asylum. The measures undertaken might be short-term, but the legal and philosophical implications are profound. I will try to make a positive and constructive critique of the European Union's handling of the Refugee crisis.

In this article, I will address three topics:

1) First, I will give a critical overview of what the European Union has done until now. I will briefly cover Spanish policy on the refugee crisis.
2) Second, I will analyze the European Union's economic outlays to address and manage this problem.
3) Third, I will consider the main challenges for the EU in the near future.

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1. THE CURRENT SITUATION

1.1. WHAT HAS THE EUROPEAN UNION DONE UNTIL NOW?

Even though a migratory crisis cannot be reduced to mere numbers, a proper analysis requires a review of the facts. Let me describe here briefly the main policies that the European Union has applied since the beginning of the refugee crisis in 2015:

A) POLICIES TO REDUCE PRESSURE AND AVOID SYSTEMIC COLLAPSE IN PERIPHERAL COUNTRIES.

In 2015 75% of all asylum requests were registered in just 5 countries: Germany, Austria, Hungary, Sweden, and Italy. Faced with an onslaught of refugees, Germany decided to reinstate border controls, which were subsequently also adopted by France, Belgium and Poland. Such measures stand in stark contrast to two decades of free movement within the Schengen area. Other countries like Austria, followed soon by Finland, the Netherlands, Slovakia and the Czech Republic, sent thousands of soldiers to man their borders as the countries stepped up checks.

Going beyond these measures, Hungary built fences on the Serbian and Croatian border and passed laws in 2015 imposing harsh penalties for entering Hungary illegally.[1] A second, 150-kilometer-long fence on the Serbian border equipped with motion and heat sensors and other surveillance tools is planned to be completed by May 1, 2017.

B) POLICIES TO DEVELOP SAFE ROUTES AND REDUCE BOTH DEATHS AT SEA AND HUMAN TRAFFICKING.

The years 2015 and 2016 stand out for each setting a new record for the number of persons dead or missing at sea One of the stated goals of the agreement between Turkey and the EU, signed in March 2016, is to reduce the number of such deaths by interdicting the passage of refugees from the Near East through the Mediterranean.[2] Furthermore,

[1] Some 400,000 migrants passed through Hungary that year before the fences were in place, most on their way to Germany and other destinations in Western Europe.

[2] In order to stop the human trafficking and to offer an alternative to risking their lives for migrants, the EU and Turkey have decided to put an end to the irregular migration from Turkey to the EU in March 2016. All new irregular migrants crossing from Turkey

the EU is strengthening the role of the European Border and Coast Guard, based on an agreement reached between the Council, Parliament and Commission on June 21st, 2016[1], whose stated aim is to help save lives, while still reinforcing the respect of fundamental rights of refugees. The key goal of these measures is to "ensure effective control of our external border and stem illegal flows into the EU", as proclaimed in a communiqué from the recent EU Summit in Malta.

The new border controls in the Balkan states leave refugees stranded in Greece. As a consequence, the number of new migrants coming to the EU from Turkey has gone down significantly, also thanks to the European Union-Turkey agreement. In exchange for EU largesse, Turkey is urged to take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU.

The EU-Turkey deal has shifted the focus back to the Central Mediterranean route for refugees and asylum seekers from Africa.

In 2016 alone, 181.000 migrants and refugees reached Europe irregularly with the help of traffickers operating out of war-torn Libya and other countries including Egypt. Many died while making the perilous crossing.

C) MEASURES TO PROVIDE REFUGEE WITH SUITABLE LIVING CONDITIONS UPON ARRIVAL.

Although the EU provided 90 million Euros to Greece to improve the refugee camps and make them suitable for winter conditions, camps are overcrowded, access to water and electricity is limited, and heating was lacking in the winter time. This left refugees feeling unsafe and vulnerable. Just around 15.000 refugees were moved to camps prepared for low temperatures.

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to the Greek islands as of 20th March 2016 will be returned to Turkey. For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU.

[1] This measure had been announced even earlier, in September 2015 within the framework of the European Agenda on Migration, and was supposed to provide support to all Member States, identifying and intervening to address weaknesses in local border controls in advance, and not when it is too late. The agreement has the primary objective to ensure and implement, as a shared responsibility, the European integrated border management at the external borders, manage migration effectively, and ensure a high level of security within the EU, while safeguarding EU-internal free movement and maintaining full respect for fundamental rights.

As an example, in Moria (a camp on the island of Lesbos), designed to house 1.500 people, three times that number (4.500 people) are living in overcrowded conditions in thin summer tents. In this camp, 3 men died. When Pope Francis visited the Moria refugee camp, in April 2016, he said "We hope that the world will heed these scenes of tragic and indeed desperate need, and respond in a way worthy of our common humanity (...)".[1]

Many organizations, including the International Rescue Committee, have denounced the situation in the camps, claiming that they do not meet international humanitarian standards. Along with other NGO observers, they have documented long queues for food and water, and a lack of schooling and opportunities for work.

D) POLICIES TO ACCELERATE RELOCATION AND MITIGATE THE DESPAIR OF DELAY IN REFUGEE CAMPS.

The temporary emergency relocation scheme was established in two Council Decisions in September 2015, in which Member States committed to relocate persons in clear need of international protection from Italy and Greece by September 2017.

Since the presentation of its first report in March 2016, the Commission reports on the implementation of the relocation and resettlement schemes on a monthly basis. According to the tenth Report on Relocation and Resettlement,[2] while progress has been promising on resettlement, Member States need to renew their efforts to deliver on their relocation commitments.

Although there has been a progressive increase in the pace of relocations with 13.546 persons relocated as of February 28th, 2017 (9.610 from Greece and 3.936 from Italy), at the current pace, the total number of persons relocated will fall short of meeting the obligations set for September 2017.

According to the European Commission, up until February 7th 2017, Member States had relocated only 7% of the 160.000 asylum

[1]http://www.romereports.com/2016/04/18/pope-francis-full-speech-in-moria-refugee-camp-lesbos

[2] European Commission. Brussels, 2.3.2017 COM(2017) 202 final Report from the Commission to the European Parliament, the European Council and the Council and the Tenth report on relocation and resettlement. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_en.pdf

seekers that they promised to accept in their countries from Greece and Italy.

According to the Fifth Progress Report on the EU-Turkey Statement,[1] following almost a year of implementation of the Agreement, continued efforts are needed from Greece, Turkey and all EU Member States to accelerate the implementation of the Statement and to ensure results.

The data on relocations reveal a lack of responsible engagement in putting this European policy into practice. In the last Report, from March 2nd, 2017, the Commission has called for renewed efforts in implementing solidarity measures under the European Agenda on Migration.[2]

E) POLICIES TO PROVIDE THE RELOCATED REFUGEES WITH THE SAME CONDITIONS REGARDLESS OF THE HOST COUNTRY.

The status and rights given to resettled refugees vary depending on the host country. Resettled refugees arriving in Belgium, the Czech Republic, France, Finland, Ireland, Portugal, Sweden and the UK receive a permanent residence permit.

In contrast, refugees resettled to Denmark, Germany, Iceland, the Netherlands, Norway, Romania and Spain receive a temporary residence permit, and are able to apply for permanent residency after a specified period of legal residency (the number of years varies by country) and subject to satisfying a number of conditions related to language, civic knowledge, financial independence and good conduct (conditions also vary by country).

All European countries provide a pathway to citizenship for permanent residents, again after varying periods of legal residency and subject to satisfying varying conditions.[3]

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[1] European Union: European Commission, *Fifth Report on the Progress made in the implementation of the EU-Turkey Statement*, 3 March 2017, COM(2017) 204, available at: http://www.refworld.org/docid/58b98ba54.html [accessed 11 April 2017]

[2] European Commission: European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy. Brussels, 2 March 2017. http://europa.eu/rapid/press-release_IP-17-350_en.htm

[3] http://www.resettlement.eu/page/resettlement-relocation-or-humanitarian-admission-we-explain-terminology

F) INVESTMENT IN INTEGRATION PROGRAMS TO FIGHT AGAINST DISCRIMINATION AND INTOLERANCE.

Two approaches to integration exist: the first supports a framework of cosmopolitan generosity that entrusts to the population the mission of "imagining", both spontaneously and generously, other people, and doing such as a matter of course; the second tries to resolve the problem of human 'differences' through constitutional design and radically eliminating the structurally unfavorable position of 'foreignness'.[1]

From my point of view, these two approaches are not mutually exclusive, but rather form complementary perspectives, both of which are needed to resolve the issue affecting so many persons in Europe.

In my opinion, successful refugee policies of EU Member States, both as members of the whole and separately, depends not only whether demographic problems[2] can be solved or sustainable economic development can be achieved, but also on whether they can solve the important problems of social cohesion. We should be reminded that "cultural integration" is a key element of the migrant's life in their new homeland. Such a need is only too often met by indifference by policy makers and the general population, however. We need a paradigm change to counter the "globalization of indifference".[3]

Let us review the common basic principles for immigrant integration policy in the European Union, as summarized in a "Handbook on Integration for policy-makers and practitioners":

1) "Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.

2) Integration implies respect for the basic values of the European Union.

[1] E. Scarry, "La dificultad de imaginar a otras gentes", in Martha C. Nussbaum, *Los límites del patriotismo. Identidad, pertenencia y ciudadanía mundial* (Barcelona: Paidós, 1ª ed. 1999, cit. by ed. 2013), 129.

[2] M. Pachocka, "Population Matters? European Integration Process During a Demographic Change", in *How Borderless is Europe. Multi-disciplinary approach to European Studies*, István Tarrósy (ed.), (Jean Monnet Centre of Excellence, University of Pécs, Pécs, 2015), 61-72.

[3] C. Hermida, "Positive tolerance and solidarity. A paradigm change to counter the 'globalization of indifference'", in *Polish Law Review*, Vol. 2 (2016).

3) Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contribution visible.
4) Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
5) Efforts in education are critical to preparing immigrants and particularly their descendants, to be more successful and more active participants in society.
6) Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
7) Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrants culture, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member States citizens.
8) The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
9) The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
10) Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public-policy formation and implementation.
11) Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective".[1]

The problem herein is that the States do not respond to ethnic diversity in the same way. "For the 'Ethnic' model, belonging to the nation means sharing common descent, language and culture. For the 'Republican' or 'Civic' model it means a willingness to accept political rules and to adopt the national culture. For the 'Multicultural' model it means adherence to political rules, but with the ability to maintain

[1] *Handbook of Integration for policy-makers and practitioners* (2004 November). http://acidi.gov.pt.s3.amazonaws.com/docs/Publicacoes/Handbook_integration.pdf, 160.

cultural differences and to form ethnic communities and associations. These models should be regarded as "ideal types" because, in practice, elements of all three may be identified in most states".[1]

'Multi-ethnic' and 'multicultural' are not synonymous concepts. As Bodonyi said: "they may overlap each other and may differ, but anyway, both are related to the regulation of individual and collective rights inside a given country. The characteristics and relevance of problems, caused on one hand by historical minorities, and on the other hand but immigrant communities, are very different in different EU countries; partly because of historical reasons, partly because of actual political and economic reasons".[2] Seeing this variation, it is important to apply new techniques for living together and problem solving. From my point of view, we need to develop a personal attitude and a public norm of tolerance towards other, of friendly and supportive behavior towards immigrants and of a liberal and democratic attitude, based in part on learning from the errors and fatal consequences of nationalism, chauvinism, forced assimilation and ethnic persecution.[3]

Also, it is important to have a positive attitude towards minority rights, and towards the freedom to congregate, worship and to speak one's own language. To achieve this goal, we need a broader discourse on identifying the structural factors that underlie discrimination and creating policies to facilitate equality of opportunity and outcome.

We need more of a concept that I have called "positive tolerance", which is more ambitious than mere "negative tolerance". Positive tolerance starts from the precept that tolerance allows us to contrast our ideas with other thoughts, other ways of being and acting and other cultures distinct from our own. This stance maintains that this contrast can enrich our own conceptions of the world. In this manner, the thinking, conduct, or culture that is tolerated, even though different, can help us discover and eliminate "cultural prejudices" and fallacies, and serve to complement and improve

[1] D. Turton and J. González, *Ethnic Diversity in Europe: Challenges of the Nation Sate* (University of Deusto), 18.
http://www.deustopublicaciones.es/deusto/pedfs/hnet/hnet03.pdf
[2] I. Bodonyi, "Immigrants and Minorities. The Contradictions and Barriers of the Cultural Integration", in *How Borderless is Europe. Multi-disciplinary approach to European Studies*, 79.
[3] I. Bodonyi, "Immigrants and Minorities. The Contradictions and Barriers of the Cultural Integration", in *How Borderless is Europe. Multi-disciplinary approach to European Studies*, 82.

our points of view. In effect, it reflects an attitude that is more open, critical and skeptical than that of negative tolerance, even though it is more complex and difficult. I believe that we can accept, without a doubt, that the advantages of positive tolerance, resolutely defended by Francisco de Vitoria and other thinkers, outweigh those of negative tolerance for the development of knowledge and a life and culture that is freer and more equal.

In my opinion, solidarity is the other great virtue that is essential to constructing a strong European Union, and, as such, its reach should be global. As Fücks, Steenblock and Pütz said: "We understand European *solidarity* not just in terms of internal operations but also as an aspect of international policy geared to global justice (…) Solidarity has been –and remains- a motor for European integration".[1]

We should not ignore the fact that "European solidarity is a prerequisite for the inner cohesion of the EU, and strength is required to preserve the 'European way of life' in a globalized world with its rapidly changing balance of power. Cohesion within the Union and the capacity to engage with the outside world are intimately connected".[2]

It is the responsibility of everyone within the context of today's democratic Europe to fight for tolerance, respect, and full recognition of all the social, sexual, cultural, national, religious, political particularities that the diversity of free human beings express and do not deeply undermine the values and rules that form the basis of its unity and the conception, as Francisco de Vitoria would have put it, of "common justice".[3]

1.2. AND SPAIN?

Compared to other Member States, Spain is still far from building a coherent and effective policy to relocate refugees. Spain has admitted just 744 refugees since the beginning of the crisis, making it the sixth

[1] R. Fücks and R. Steenblock and C. Pütz, "Solidarity and Strength: The Future of the EU", *Solidarity and Strength. The Future of the European Union* (Berlin: Heinrich Böll Stiftung, Publication Series on Europe, Vol. 6, 2011), 8.

[2] R. Fücks and C. Pütz, "Preface", *Solidarity and Strength. The Future of the European Union*, 6.

[3] C. Hermida, "La aportación del pensamiento de Vitoria ante el fenómeno de la globalización y la realidad migratoria actual", *New Perspectives on Francisco de Vitoria. Does International Law lie at the heart of the origin of the modern World?*, José María Beneyto y Carmen Román Vaca (eds.), (ebook, CEU, Madrid, 2014), 210-238.

country in the European ranking of accepting refugees. This represents just 5% of what the Spanish government promised to admit.

Let me try to put this number into the context of Spanish public opinion and the role Spain plays within European institutions, which gives us grounds for optimism, despite the slow progress.

Spanish society has reacted remarkably to this crisis by pressuring authorities to make the relocation and resettlement process more effective, as well as showing solidarity, concern and empathy through demonstrations, social network activity and by creating NGOs and associations both in Spain and in receiving States such as Greece.

I should like to highlight the work done by the Spanish Committee to Help Refugees (CEAR in Spanish), which has helped the asylum procedures since 1979. Its campaigns to heighten awareness have increased since the beginning of this crisis.

From my point of view, Spanish society's empathy may be indebted to its history. During the Spanish Civil War (1936-1939), at least 440.000 Spanish refugees lived in camps under very hard living conditions in France. Latin America also played a role in accepting us as refugees: 20.000 in Mexico, and lower numbers in Colombia, in Cuba and in Argentina.

2. THE COST OF A REFUGEE

There are two opposing strategies to manage the refugee crisis. The first is to reinforce the external EU borders to keep refugees out. The second is to admit refugees and integrate them with good procedural guarantees. Both positions are associated with a cost.

We can compare the real cost of letting refugees come into the European Union, starting from the cost of refugee camps and ending with the cost of relocation in a Member State; on the other side, the total budget invested to stop the massive influx of arrivals into the EU by paying neighboring countries to control the borders more effectively.

THE FACILITY FOR REFUGEES IN TURKEY

"The Facility for Refugees in Turkey provides for a joint coordination mechanism for actions financed by the EU budget and national contributions made by the Member States, designed to ensure that the needs of refugees and host communities are addressed in a

comprehensive and coordinated manner. The resources of the Facility come from the EU budget and from EU Member States over 2016 and 2017, making a total so far of €3 billion over two years".[1]
Funding under the Facility for Refugees in Turkey supports refugees in the country - it is funding for refugees and not funding for Turkey. The support seeks to improve conditions for refugees in Turkey as part of the EU's comprehensive approach to addressing the refugee crisis inside and outside the EU".[2]

VALLETTA ACTION PLAN

On 12 November 2015, the European and African leaders signed the Valletta Action Plan[3] an agreement to set up an Emergency Trust Fund to help development in African countries as well as to encourage those countries to take back migrants who arrived in Europe. The underlying objective of the Plan is to stabilize the countries and make them able to control their borders, fight against smugglers and build refugee camps in suitable conditions.
Taking into account that the number of refugees who arrived through this route totaled more than 180.000 in 2016, European leaders wanted to stop a renewed massive influx and to instead promote regular migration channels and implement policies for integrating migrants into the EU society. The fund pledged €1.8 billion in aid, with other development assistance of €20 billion every year.

[1] As showed in the first Annual Report on the Facility published by the Commission on March, 2nd. 3 2017, "of the €3 billion, €2.2 billion has so far been allocated, for both humanitarian and non-humanitarian assistance. Of the €2.2 billion allocated, contracts have been signed for 39 projects worth €1.5 billion. Of this €1.5 billion, €750 million has been disbursed to date. The contracts signed represent half of the €3 billion total for 2016-2017 and are testimony to the swift and efficient implementation of the Facility. The humanitarian actions planned for agreement at the next Steering Committee in March will bring total allocation close to the €3 billion. Vid. Brussels, 2.3.2017 COM(2017) 130 final Communication from the Commission to the European Parliament and the Council. First Annual Report on the Facility for Refugees in Turkey.
[2] Vid. March 2nd, 2017, European Comission Report, which asks: What is the state of play as regards the implementation of the Facility for Refugees in Turkey?
[3] "Valletta Conference on Migration (Malta, 11–12 November 2015) – Orientation debate" (PDF). statewatch.org. Council of the European Union. 30 June 2015. Retrieved 12 November 2015.

Members of the European Council issued the Malta Declaration, dated February 3rd, 2017, on the external aspects of migration. At this summit, the President of the EU Council Donald Tusk promised the closure of the Central Mediterranean migration route into Europe, lending his support to a memorandum of understanding between the Italian and internationally-recognized Libyan government.

This new agreement has been compared to the 2016 EU-Turkey deal, but if the agreement with Turkish President Recep Tayyip Erdogan raised some questions over the respect of the human rights of migrants, in Libya's case continued violations of basic rights are almost certain, making the doubts about implementation of any agreement more than legitimate.

The memorandum does not truly constitute an EU-Libya deal, rather it reflects the EU endorsement of a bilateral memorandum of understanding between Italy and the Presidency Council of Libya headed by Faiez Serraj. The memorandum contains three main elements:

First, it restarts full implementation of the 2008 Friendship Treaty between Italy and Libya, which already included a major chapter (and funding) on migration containment;

Second, it boosts support to the Libyan Navy and Coast Guard in order to rescue as many migrant boats as possible in Libyan territorial waters;

Third, it provides funds to improve health care in the detention centers where migrants are kept once they are rescued by the Libyan Coast Guard.

The memorandum does not mention respect of international conventions (it only refers to International Customary Law), nor does it establish an independent monitoring mechanism.[1]

Some groups accuse the EU of making Libya seem safe and abandoning humanitarian values. They report bad conditions in refugee camps and continuing dangers faced by migrants. The most troubling

[1] Libyan law does not distinguish between migrants and asylum-seekers as Libya is not a party to the Geneva Convention. According to the laws approved under former Libyan leader Muammar Gaddafi, all individuals arriving without a permit are deemed illegal migrants and jailed.

report comes from the German embassy in Niger on the systematic abuse of human rights, including executions, in Libyan Camps.[1]

The new President of the EU Parliament Antonio Tajani has called for refugee camps in Libya and a billion-dollar "Marshall Plan" for Africa. "Either we are acting now, or millions of Africans are going to Europe in the next 20 years," he warned.[2]

EMERGENCY FUNDING FOR GREECE

The European Commission has awarded an additional €3.9 million in emergency funding to Greece under the Internal Security Fund (ISF) to help improve reception conditions for migrants on the Greek islands. This is to further support EU financed actions carried out by the Ministry of Defense to provide catering, accommodation, transportation to the migrants on the islands, and for emergency accommodation solutions, such as temporary accommodation in ships.

With this award, the overall amount of emergency assistance from the Home Affairs Funds made available for Greece since 2015 amounts to €356.8 million. This emergency funding comes on top of the €509 million allocated to Greece under the national programs for 2014-2020. In total, the Commission has made available over €1 billion in support for Greece since 2015 to support the country with migration and border management.

We could also add the costs the Member States may face if they continue imposing temporary border controls. In this way, the Commission has estimated that a full re-establishment of border controls within the Schengen area would generate immediate direct costs of between €5 and €18 billion annually.[3]

[1] Conditions for migrants and refugees in Libya are worse than in concentration camps, according to a paper sent to the German foreign ministry by its ambassador in Niger. Similar evidence of atrocities in Libya has emerged from a court case in Milan brought by the Italian state against a leading smuggler.

[2] "German and Austrian leaders call for European Union to close ranks". http://www.dw.com/en/german-and-austrian-leaders-call-for-european-union-to-close-ranks/a-37733811

[3] Member States such as Poland, the Netherlands or Germany would face more than €500 million of additional costs for the road transport of traded goods; Spain or the Czech Republic would see their businesses paying more than €200 million in additional costs; border controls would cost the 1.7 million cross-border workers between €1.3 and €5.2 billion in terms of time lost; at least 13 million tourist nights could be lost, with a total cost of €1.2 billion; between €0.6 and €5.8 billion of administrative costs would

The EU has also allocated funding to Member States for the last step in migration, namely relocation. According to the Council Decision 2015/1601, host States would receive 6000 € for each person that they admit in their countries and at the same time, the sending states, Greece, Italy and Hungary, will receive 500 € to cover the expenses of transport for each person who is relocated from them.

3. MAIN CHALLENGES FOR THE NEAR FUTURE

This part will cover some of the main challenges in the near future for finding a global approach to migration.

GEOPOLITICALLY

We refer here to both the exogenous and endogenous political factors that may affect European decisions. It would be a mistake for European countries to seek individual answers to current challenges, rather than EU-wide solutions.

We are witnessing a new delineation of the world, as the Germany's foreign minister, Sigmar Gabriel said. Donald Trump and Russia openly attempt to weaken the EU. In fact, Austria's chancellor, Christian Kern, has said recently that the US and Russia were openly trying to destabilize the EU. Both Sigmar Gabriel and Christian Kern called for European Union (EU) members to close ranks in the face of pressures from the new US administration and from Russia.

Another matter of concern is the electoral calendar in several European countries, including the elections in France or Germany, has fuelled populist parties who stoke fears of migrants.

In the case of Germany, Angela Merkel prepares for crucial elections this September 2017. For many voters, Merkel's tenure is associated with the record number of 900.000 refugees that came to Germany in 2015 (another 280.000 arrived in 2016). The chancellor is under pressure to keep the promise she made late last year: "A situation like we had in the late summer of 2015 can, should and must not repeat itself."

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have to be paid by governments due to the need for increased staff for border controls. Vid. http://europa.eu/rapid/press-release_IP-16-585_en.htm

This promise was Merkel's answer to the charge levied against her by critics from within her own party and the far-right Alternative for Germany (AfD) that Merkel had "lost control" of the situation.
Political leaders in Germany and beyond have realized that only if the EU can demonstrate to its citizens that it is in control of its external borders, the Schengen passport-free travel zone, one of the key achievements of European integration, can survive.

Controlling borders is a precondition for sustaining open societies in Europe. The need for control is an assessment widely shared across the political spectrum in Germany.
The idea is for asylum requests to be handled by EU authorities in North Africa. This would allow the EU to return migrants rescued by EU member state authorities in the Mediterranean to North Africa, thereby making illegal crossings less attractive and destroying the traffickers' business.

Cooperation with North African countries will remain the centerpiece of trying to reassert control. Indeed, the need to protect external borders and control migration flows is what unites all EU governments, from Germany to Hungary. What divides them is how they deal with the issue of refugees and migrants - especially of Muslim origin - domestically.

We should not forget that the European solidarity is a prerequisite for the inner cohesion of the EU, and strength is required to preserve the 'European way of life' in a globalized world with its rapidly changing balance of power.

In this context we need to reflect about the Brexit decision in United Kingdom. In my opinion[1], if we wish to construct a Europe of solidarity we need to strengthen the ties between the Member States of the European Union and empathize with those who are in a worse situation, lending credibility to the postulates of the Treaty of Lisbon.[2] There is no room for half-measures. The European Union has the opportunity now to demonstrate that the treaties that have cost so much

[1] C. Hermida, „The consequences of the United Kingdom's referéndum on leaving the European Union", *Aktualne Problemy Referendum*, Edit. by Beata Tokaj, Anna Feja-Paszkiewicz, Boguslaw Banaszak, (Varsovia: Krajowe Biuro Wyborcze, 2016), 203-212.
[2] J.C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (New York: Cambridge University Press, 2010, 4th printing 2011).

effort and compromise and form the backbone of its organizational power, given legal backing, have not been written in sand.

Europe needs to display more solidarity, but also more tolerance. Let us hope that, during Theresa May's leadership, the United Kingdom hews to these two values, in the knowledge that it cannot grow as a country simply based on self-sufficiency. We all need each other, both at the individual and group level. The ideas, conduct, or culture that we tolerate, even if it is different from our own, can help us to discover and eliminate "cultural prejudices". The principal advantage of defending the virtues and solidarity in the European Union is that this provides the basis for achieving a life that is more free and equal.

LEGISLATIVELY

The precarious development of Asylum Law within the European Union and the lack of a real strategy to guide the Member States to adopt a common policy, have led to palliative decisions[1]. For this reason, we need:

- Laws to guarantee safe routes.
-Common rules of protection of fundamental rights for the beneficiaries of international protection.
-Harmonization in the living conditions for refugees among the Member States.

With such proposals, the Commission expects to simplify the asylum procedures as well as the decision processes and hopes to discourage asylum seekers from secondary movements from one

[1] ACNUR (1992): Manual de procedimientos y criterios para determinar la condición de refugiado en virtud de la Convención 1951 y el Protocolo de 1967 sobre el Estatuto de los Refugiados.
Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. *Official Journal of the European Union* L 326/13, 13.12.2005.
Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. *Official Journal of the European Union* L 304 , 30.09.2004, 12–23.
Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. *Official Journal of the European Union* L 31, 06.02.2003, 18-25.

Member State to another and promote the integration perspectives of those with the right to be granted international protection.

The ultimate goal is to achieve a common, efficient, coherent asylum strategy, based on harmonized norms and mutual trust among the Member States of the EU, in accordance with international rights and mechanisms.

SOCIALLY

Citizens are divided: some go to demonstrations to pressure their governments to open their borders and ask for more safe routes to reach European territory, to increase resettlements, guarantee suitable conditions for refugees both in camps and in reception States. Others are reluctant to accept migrants, reacting with fear and intolerance, which has supported the growth of populist parties.

At the beginning of March 2017, Hungarian prime minister Viktor Orban called for "preserving ethnic homogeneity". Orban has consistently stoked fears of Muslim immigration, as a source of terrorism and a threat to Europe's cultural heritage, in order to consolidate his power.

Other governments, such as Poland, have used similar language, which has also been echoed by the right-wing AfD in Germany. The fight between the Orban-type ethnic nationalists and advocates of an inclusive nationalism is a decisive battlefront for preserving open societies in Europe.

In the eyes of Viktor Orban, migrants are a "Trojan horse of terrorism," which put his country under siege. He considers the migrants, many of whom are Muslims, as a threat to Europe's Christian identity and culture. While Orban has said often that Hungary will apply its Christian values to take in asylum-seekers, very few achieve protection in Hungary and only around sixteen a day are now allowed to apply for asylum at the border transit zones.

According to a recent report of the Government of Hungary (05-03-2017), "The number of illegal immigrants and asylum seekers in Hungary decreased last year, but we cannot uphold the illusion that the problems will be solved", said Zsuzsanna Végh, Director General of the

Immigration and Asylum Office, at a press conference in Budapest on 7.03.2017[1].

Hungary is still fifth with regard to the number of asylum seekers per 1000 citizens, with a ratio of 2.93, although it was in first place in 2015. Syria, Iraq, Pakistan and Iran continue to be the leading source countries in the EU as a whole, although the number of migrants arriving from Kosovo and Albania fell.

With regard to the situation in Hungary, Ms. Végh told reporters that while in 2015 over 400,000 illegal immigrants arrived in the country and 177,000 people submitted requests for asylum, the trend was reversed in 2016 and there were more asylum seekers than illegal immigrants.

In addition to international developments, the measures introduced by the Hungarian Government, such as the reinforcement of external border security, the amendment of regulations on detaining refugees, or the establishment of the so-called 8-kilometre rule, also played an important part in reducing the numbers of asylum seekers, she highlighted[2].

In my opinion, the EU should focus more on the most vulnerable members of society, and on delivering prosperity to all. The situation has become more complicated given a recent decision of the European Court of Justice (7.03.2017) that held that EU member states have the right to deny so-called "humanitarian visas" to asylum seekers.[3]

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[1] "29.432 people were registered as asylum seekers and 18.236 as illegal migrants", Ms. Végh said. "It looks like the European Union may be 'waking from its Sleeping Beauty dream' and has begun debating several European refugee systems", she pointed out, adding that we should not sustain any illusions about the fact that the required legislation will be adopted this year. Acts of terrorism and the crimes committed by immigrants have forced Member States to concentrate more on security and become more cooperative than previously was the case, she explained.
http://reliefweb.int/report/hungary/almost-30-thousand-asylum-requests-were-submitted-last-year

[2] In 2016, Hungary accepted 425 asylum-seekers, while registering 29.432 asylum claims. In 2015, 502 asylum-seekers were granted protection. Germany took in 890,000 asylum-seekers in 2015 and 280,000 in 2016.

[3] The EU court ruled against an Orthodox Christian Syrian family with three children from Aleppo who had applied for a visa at the Belgian embassy in Beirut last October. They planned to travel to Belgium and apply for refugee status once there.
One member of the Syrian family claimed to have been abducted, beaten and tortured by an armed group and later released after paying a ransom.

CONCLUSIONS

Failure by the Member States of the EU to cooperate leads to a lack of effective measures and makes it difficult to arrive at a common operational asylum strategy. But there is, above all, a clear lack of shared responsibility. In conclusion, there are four goals that we should set:

1) EU members need to restore the promise of prosperity as a primary issue and to transform the internal market into a social market economy.
2) It is worthwhile to invest in integration programs to fight against discrimination and intolerance. We need a paradigm change to counter the "globalization of indifference".
3) We need what I have called "positive tolerance and solidarity" to construct a strong European Union. Both concepts should have a global reach.
4) Increasing cohesion within the Union will enhance the capacity to engage with the outside world.

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DETENTION OF APPLICANTS FOR INTERNATIONAL PROTECTION FOR THE PURPOSE OF TRANSFER ACCORDING TO RECENT CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Constanța MĂTUȘESCU [1]

Abstract:

One of the most controversial aspects of European and national regulations on asylum and immigration is armed with the possibility of placing in detention ("public custody", according to the regulations of Romania) to applicants for international protection. In a series of recent judgments the CJEU circumstantiates recourse to this procedure, which requires a re-examination of national law and domestic judicial practice.

Key words: *detention; public custody; applicants for international protection; transfer; risk of absconding*

INTRODUCTION

The detention[2] of migrants and asylum seekers in the context of the migration management has become a widespread practice. Regularly the States apply, in relation to foreigners entering their territory or living there without authorization, some measures involving deprivation of liberty, whether for the purpose of expelling them, or pending the examination of an application for asylum.

At the level of the European Union (EU), using detention in immigration and asylum procedures, was until relatively recently, a

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[2]On the various meanings of this term, see European Union: European Commission, *Alternatives to Immigration and Asylum Detention in the EU - Time for Implementation*, January 2015, accessed May 5, 2017, http://www.refworld.org/docid/54f481094.html; Stephanie J. Silverman and Evelyne Massa, „Why Immigration Detention is Unique*"*, *Population, Space and Place* 18(2012): 679.

problem that has remained largely at the discretion of the Member States, being the only conditions which proceeded from the standards laid down in the relevant international law, in particular in the European Convention on human rights. Currently, there are a large number of legal instruments adopted in the area of freedom, security and justice that permit the Member States and, at the same time, establish the limits of their competence to deprive persons of their liberty for reasons related to their status as illegal immigrants or applicants for asylum. These tools are part of two distinct policy of the Union: migratory policy, which aims, inter alia, "the prevention of illegal immigration and support combating trafficking in human beings"[1], and a common policy on asylum, whose goal is "to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*"[2].

Thus, with regard to third-country citizens who are irregular stay, the possibility of the appeal in detention for the expulsion proceedings is governed by the Directive on the return[3].With regard to third-country citizens applying for international protection (to obtain refugee status or subsidiary protection[4]), the possibility of placing them in detention shall be subject to the Directive on common procedures for granting and withdrawing international protection[5], the Reception Directive[6] and the Dublin III Regulation[7].

[1]Article 79 of the Treaty on the Functioning of the European Union (TFEU), consolidated version, OJ C 326, 26.10.2012.
[2]Article 78 of TFEU.
[3]Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98.
[4]According to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337/9.
[5]Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60.
[6]Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96.
[7]Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State

The aim for detention use in the two categories is different. In the case of irregular migration[1], in accordance with article 15 (1) of the Directive on the returning, the goal of detention of "a third-country national who is the subject of return procedures" is to "prepare the return and/or carry out the removal process". Concerning the applicants for international protection, in accordance with the fundamental principle of non-returning, as set out in article 33 of the Geneva Convention of 1951 relating to the status of refugees[2], they may not be, as a rule, subject to the procedures for the return. The purpose of the appeal from detention, in this case, is aimed at ensuring the effectiveness of the European system of asylum (guaranteeing the carrying out of the procedure for the examination of the application for protection and limiting secondary movements of applicants) and immigration control (preventing unauthorized entries).

Considering the fact that both regimes of detention refers to deprivation of liberty for administrative reasons, the fundamental rules governing the two categories of legal instruments are similar: detention is a measure that is used as a last resort, if other less coercive alternative measures cannot be applied effectively, and subject to compliance with the principles of necessity and proportionality with regard both to the way and purpose of such detention; placement in detention decision must be taken on the basis of an individual analysis of each case; the irregular migrant status or the applicant for international protection of a person do not constitute, in itself, a sufficient reason for detention; the administrative procedures aimed at a person held are to be carried out as a priority within the shortest possible terms.

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responsible for examiningan application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), OJ L180/31.

[1]According to Recital 9 of the Preamble of the *Return Directive*, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as an asylum seeker has entered into force.

[2]1951 Geneva Convention Relating to the Status of Refugees (189 UNTS 150), as amended by the 1967 Protocol Relating to the Status of Refugees (606 UNTS 267). Article 31 of the Convention determines that asylum seekers shall not be penalized for illegal entry and that no other restrictions shall be placed on their movements than necessary.

However, the regulatory provisions and the jurisprudence of the Court of Justice of the European Union (CJEU) establish important limitations of power for the Member States to proceed to placement in detention of an applicant for international protection in relation to those applicable in a situation in which the measure relates to an illegal migrant.

Thus, the CJEU has pointed out in its case-law[1] that Member States are kept not to compromise the achievement of the objective pursued by the Directive on the returning, respectively the establishment of an effective policy of banish and return of third-country nationals who are in a situation of illegal residence, confirming that for this purpose the Member States are free to lay down criminal penalties, including imprisonment, with regard to the violation of rules concerning migration. The same jurisprudence, however, forbids the Member States to impose criminal sanctions solely on grounds of illegal residence in the territory of a Member State of the EU. As regards other conditions of use of detention, including the condition that it be used as a measure of last resort, the Court has been more reserved to examining the practices of the Member States through their prism[2], which led the doctrine to note the existence of a certain "pragmatism" of the Court indicating that its priority is rather to ensure rapidly the implementation of the procedure of returning than the rights of the persons in question[3].

As regards the detention of applicants for international protection, the Court of Justice offered a restrictive interpretation of the provisions which authorize the Member States to place an applicant in detention, this appearing as a measure to which it may be used in exceptional circumstances[4] and only under the conditions of the existence in the national law of certain objective criteria "defined by law"[5].

Although this line of jurisprudence comes within the context of the current immigration crisis, which was adopted at the EU level of further

[1]Case C-61/11 PPU, El Dridi, EU:C:2011:268, para 59; Case C-329/11, Achughbabian, EU:C: 2011:807, paras 43 and 45; Case C-430/11, Sagor, EU:C: 2012:277.
[2] See Case C-47/15, Affum, EU:C:2016:408.
[3]See Giovanni Zacaroni, „The Pragmatism of the Court of Justice on the Detention of Irregular Migrants: Comment on Affum", *European Papers, European Forum*, Insight of 2 February 2017: 1-8, accessed May 5, 2017, doi: 10.15166/2499-8249/116.
[4]Case C‑601/15 PPU, J. N., EU:C:2016:84, paras 52, 56 and 63.
[5]Case C‑528/15, Al Chodor, EU:C:2017:213.

measures to reduce the influx of immigrants and refugees, it sends a clear signal that the CJEU will exercise its legal authority to ensure that the measures taken to deal with the crisis of refugees and migration are compatible with human rights, particularly in relation to asylum seekers, implicitly rejecting the practice of extensive recourse to detention of asylum seekers as a means of settling this crisis[1].

We refer, in what follows, to one of the reasons for detention of applicants for international protection explicitly permitted by EU law and which is a common practice of most Member States – the detention pursuant to article 28 of the Dublin III Regulation in order to transfer by the Member State responsible for examining the application for international protection[2], when there is a significant risk of absconding of the procedure of transfer. We consider a brief analysis of the conditions under which this ground of detention can be invoked, according to recent jurisprudence of the Court of Luxembourg, highlighting the implications of this jurisprudence in the national law and in judicial practice.

II. THE BASIS OF DETENTION FOR THE PURPOSE OF THE TRANSFER IN ACCORDANCE WITH THE DUBLIN III REGULATION

Dublin III Regulation seeks to ensure that only one Member State is responsible for examining an application for international protection and establishes a series of criteria to determine which of the Member

[1]Steve Peers, „Detention of asylum-seekers: the first CJEU judgment", [Blog] *EU Law Analysis*, 9 March 2016, accessed May 6, 2017. http://eulawanalysis.blogspot.ro/2016/03/detention-of-asylum-seekers-first-cjeu.html.

[2]Under the Dublin system, a single Member State in the EU is determined as responsible for an asylum seeker under defined criteria (frequently, the Member State of the first entry) and has an obligation to receive that asylum seeker and examine his or her application for international protection, if the Member State in which she is present requests so. European documents note the existence of a fairly large number of 'secondary movements' whereby numerous applicants for international protection move from the Member State responsible for processing their application in accordance with the criteria laid down in the Dublin III Regulation to another Member State where they wish to settle and apply for international protection- see Communication from the Commission to the European Parliament and the Council "Towards a reform of the common european asylum system and enhancing legal avenues to Europe", COM(2016)197 final, p. 4.

States has the responsibility and the procedures to be followed to transfer applicants from one Member State to another.

Reaffirming the general prohibition of placing in detention an applicant only on the grounds for lodging an application for international protection, laid down in other regulations in the field of asylum[1], the regulation clarifies that Member States may not keep an applicant for the sole reason that it is subject to the Dublin procedure[2]. Article 28 (2) of the regulation allows the placement in detention to an applicant *only* to ensure the carrying out of procedures to the Member State responsible in case of the existence of a "high risk of absconding" of the procedure. The decision of placement in detention must be taken on the basis of an analysis of individual and only if that measure is a known activist in proportion, and if you cannot effectively apply alternative less coercive measures[3].

Detention on the basis of article 28 (2) of the Dublin III Regulation shall be within the reasons of detention provided for in the Reception Directive (article 8, paragraph 3, subparagraph (f)).

Through the entry into force of the Dublin III Regulation and Directive (recast) on reception (Directive 2013/33/I), the margin of discretion of the Member States regarding the relation to the deprivation of liberty of the applicants which were the subject of a procedure for the transfer was significantly restricted. On the basis of the previous legal instruments, the derived law of the EU limits the detention of applicants

[1]Article 8(1) Directive 2013/33/EU; article 26 (1) Directive 2013/32/EU .

[2]Article 28(1) Dublin III Regulation. Also, under Recital 20 Dublin III Regulation 'The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.'

[3]In particular, Recital 24 of the Dublin Regulation requires Member States to promote voluntary transfers.

only in a minimal way, was doing as detention to be widespread[1]. Thus, the Dublin Regulation II (Regulation (EC) No 343/2003) did not contained any provision on this aspect, being applicable to general guarantees referred to in article 7 (3) of the previous Directive on the reception, namely the Directive 2003/9/EC. It stipulated that, "[a] when it proves to be necessary to do so, for legal reasons or public order, for example, the Member States may oblige an applicant to remain in a place determined, in accordance with their national law". In relation to this formulation, the legal instruments applicable at present significantly reinforce the rights of applicants, their placement in detention being limited to "exceptional circumstances", as shown in the paragraph (15) of the Reception Directive.

In accordance with article 28 (2) of the Dublin III Regulation, the basis for the purpose of the transfer is represented solely by the existence of a "significant risk" of absconding of the applicant for international protection of the transfer procedure.

Article 2(n) of the Dublin III Regulation defines the „risk of absconding" as „the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond".

The regulation does not lay down the objective criteria itself, on which can be appreciated the risk of absconding (which in fact are not defined in another legal act of the Union), but also makes reference to this effect in the domestic legal orders of the Member States. Similarly, after listing the grounds for detention between applicants for international protection, the detention pursuant to article 28 of the Dublin Regulation, the Reception Directive (article 8, paragraph 3, subparagraph (f)) states that "The grounds for detention shall be laid down in national law".

However, the deliberate inclusion of the regulation of the term "significant" introduces a difference of degree between this ground and the "risk of absconding" ground laid down in Article 8(3)(b) of the recast Reception Directive in respect of detention of asylum seekers in general[2].

[1]European Council on Refugees and Exiles, „The Legality of Detention of Asylum Seekers under the Dublin III Regulation", AIDA Legal Briefing No. 1 (2015), accessed May 7, 2017, http://www.refworld.org/docid/5612210a4.html.
[2]Ibidem.

The freedom given to the Member States to define the objective reasons under national law, which can be appreciated by the risk of absconding, but raises a number of questions with regard to the possibility of an arbitrary detention of the applicants, in many cases those criteria was too general and unclear[1].

Recently, in the judgment *Al Chodor*[2], delivered on 15 March 2017, the Court of Justice of the European Union had the opportunity to decide upon the condition of the existence of a high risk of absconding of the procedure for transfer pursuant to article 28 of the Dublin III Regulation. Although the Court's analysis was limited to the requirement that the objective criteria concerning the risk of absconding of the procedure must be "defined by law", without looking at the validity of these criteria from the point of view of content, the arguments accepted this, as well as those contained in the conclusions of the General Advocate[3] provides a number of indications regarding the interpretation of the other two conditions of detention for transfer purposes, respectively the proportionality and the necessity of the measure.

Essentially, the Court found that "Article 2(n) and Article 28(2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, read in conjunction, must be interpreted as requiring Member States to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond. The absence of such a provision leads to the inapplicability of Article 28(2) of that regulation."

In other words, we must have recourse to the law in the formal sense to define the objective criteria on the basis of which it can be determined the risk of absconding, in the absence of such a consecration, a state cannot place an applicant in detention for the purpose of the transfer in Dublin procedure.

[1]European Union: European Commission, *Alternatives to Immigration and Asylum Detention in the EU - Time for Implementation*, 72-74.
[2]Case C‑528/15, EU:C:2017:213.
[3]EU:C:2016:865.

In order to reach this solution, the Court made reference to the overall economy of Dublin III Regulation, aimed to ensure a "high level of protection" granted to applicants, and that brings "significant limitations on the competence of Member States to proceed to the placement in detention" (para 34). Also, the court invoked article 6 (the right to liberty) and article 52 (1) of the Charter of fundamental rights of the EU, which requires that any restriction of the right to liberty to be prescribed by law, as well as the European Court of human rights relating to article 5 of the Convention, from which it follows that the guarantees objective concerning freedom consists, in particular, of the individual protection against arbitrariness. In the light of their considerations, the Court concludes that, "the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness" (para 40).Whereas only a universally applicable provision could fulfil these requirements, and not "settled case-law which confirms, as the case may be, a consistent administrative practice", "it is essential that the criteria which define the existence of such a risk, which constitute the basis for detention, are defined clearly by an act which is binding and foreseeable in its application" (para 42). In the absence of such criteria in such provision, placing in detention must be declared unlawful, which leads to the inapplicability of Article 28(2) of the Dublin III Regulation (para 46).

The risk of absconding for the procedure involves not just meeting one (or more) objective criteria to be defined by national law, but also an individual examination of each case of the situation of the person concerned, in order to establish the existence of such a risk of absconding. Making analogy with the previous decision of the Court based on the Directive on the returning[1], the General Advocate in the case *Al Chodor* believes that the competent administrative or judicial authorities of the Member States have the obligation "to examine on a case-by-case basis all the individual, specific circumstances which characterize each applicant's situation, while ensuring that that

[1]Case C-146/14 PPU, EU:C:2014:1320, paras 70-74.

examination is based on objective criteria defined generally and in the abstract"[1].

Judgment of the Court in the case *Al Chodor* has important implications in particular for those States (such as France) that have not defined in national law the objective criteria to define the high risk of absconding for the procedure of transfer, relying on the jurisprudential criteria. In the light of the Court's interpretation, the authorities of those States cannot proceed to detention in transfer procedures. At the same time, however, the decision has implications for the States defining such criteria into national law (as is also the case of Romania[2]), imposing a test of compatibility of these criteria with obligations arising from other provisions of the EU law on asylum, with the EU Charter of Fundamental Rights and the right to freedom as enshrined in the international law of human rights[3]. Or, if we are referring only to Romania case, itself defining detention (public custody) as a limitation of the right to liberty is problematic in the circumstances in which the law on asylum in Romania is not defined (by sending in this sense to the defining in the Dublin Regulation), and the law on the regime of foreigners in Romania[4] defines the public custody under article 101 (1), as "a temporary measure restricting freedom of movement on the territory of Romania"[5].This qualification has relevance in terms of standards of protection of the applicants[6]. In the case *Al Chodor,* the Luxembourg Court was clear from this point of view, qualifying the applicants' detention as a "serious interference with those applicants right to liberty" and stressing that the objective guarantees of freedom, as enshrined both in article 6 of the Charter and article 5 of the Convention, is constituted, in particular, on

[1]Opinion of Advocate General Saugmandsgaard Øe, delivered on 10 november 2016 (EU:C:2016:865), para 60.
[2]Article 19 ^14 (2) Law no. 122 of 4 May 2006 on asylum in Romania.
[3]For such a conclusion see also Case C‑601/15 PPU, J.N., para 60.
[4]G.E.O No 194 of 12 December on the regime of foreigners in Romania.
[5]See in this sense also the Constitutional Court of Romania, Decision No. 419/14.10.2004.
[6] On other inconsistencies of national legislation and judicial practice in Romania with EU law regarding the "risk of absconding" in return procedures, see Mădălina Moraru, Géraldine Renaudiere, *European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive – Pre-Removal Detention*, REDIAL RR 2016/05, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2016.

the protection of the individual against arbitrariness. The way they are formulated on the basis the criteria which they can appreciate the high risk of absconding in the Romanian legislation (article 19 index 14 (2) (a), (f) of the asylum law) is also questionable in relation to EU legislation and the CJEU jurisprudence, particularly with regard to the prohibition of detention for an applicant for the only reason that it is the subject of Dublin procedures. Thus, the courts of Romania also noted that the conditions are met, for the existence of a risk of absconding in understanding the provisions of Dublin III Regulation in which the applicant has entered illegally in Romania[1].

II. PROPORTIONALITY AND NECESSITY OF THE DETENTION MEASURE

Besides the existence of a significant risk of absconding, valued on the basis of objective conditions defined by law and which are the subject to individual examination, detention for the purposes of the transfer in accordance with article 28 of the Dublin Regulation III presupposes two other conditions: detention proportionality, and respectively, the necessity of it, as in other words, there are no coercive measures which can actually be substituted thereto.

Although the Court has not had the occasion to decide on these conditions in the context of detention for the aim of transfer, it has some relevance this judgment of 15 February 2016 in the *J.N. Case*[2]. Although this question aimed at the detention of an asylum seeker on the grounds of public order or national security (pursuant to article 8, paragraph 3 (e) of the Reception Directive), the Court's judgment also has implications for other grounds of detention (including detention in Dublin procedures), sending out a clear signal on how it intends to interpret the conditions under which the states can resort to such a measure.

Stating that the placement in detention of an applicant involves a restriction of the exercise of the right to freedom enshrined in article 6 of the Charter and that, in accordance with article 52 (1) of the Charter, any restriction of the rights and freedoms enshrined by this must be prescribed by law and comply with their substance, the Court considers that "In observance of the principle of proportionality, limitations may be

[1]See the Court of Appeal of Bucharest, Decision No. 2087/12.08.2015.
[2]Case C‑601/15 PPU, EU:C:2016:84.

imposed on the exercise of those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognized by the European Union or the need to protect the rights and freedoms of others" (para 50). Considering the importance of the right to freedom and severity of interference which a measure of placement in detention has in relation to that right, "limitations on the exercise of the right must apply only in so far as is strictly necessary" (para 56). The Court shall also send the article 8 (2) of the Reception Directive, whose content is similar to that of article 28 (2) of the Dublin Regulation, which requires that detention may not be ordered but when it proves necessary and on the basis of individual analysis for individual case, if other less coercive measures cannot be applied effectively, stating that these series of conditions aim to create a strictly circumscribed framework in which such a measure may be used.

Regarding the requirement of the detention measure, it must be determined on the basis of the individuals' conduct that the detention can not be justified „without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail" (para 69). In that regard, the Member States must also, in accordance with Article 8 (4) of the Reception Directive, ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Without being a completely new approach[1], with the exception of the reasoning on the exceptional nature of detention in relation to the fundamental right to liberty, the Court's interpretation of the requirements of proportionality and the need to detentionof the applicants for international protection is primarily relevant to the administrative and judicial authorities of the Member States requesting a more in-depth examination of the reasons for detention in transfer procedures and a more rigorous justification of the use of detention. This includes the judge's competence to carry out a full judicial review of the possibility of less coercive measures. Or, in most Member States, the courts continue

[1]See Case C-534/11, Arslan, 30 May 2013.

to give great discretion to the administration, which usually reproduces the motivation given by the administrative authorities without taking into account the possibility of alternative measures, and often reaches the point of view of the administration, on the basis of its judgments' reasoning[1].

CONCLUSIONS

Despite the interpretative difficulties, an adequate reading of Article 28 of the Dublin Regulation III should allow only the exceptional application of detention measures in transfer procedures. Such a conclusion is also apparent from the recent judgments of the Court of Justice of the European Union, which contradict the practice of the Member States, that regularly retain the persons subject to the Dublin procedure, particularly during the transfer phase[2].

Detention is, according to the Court, a serious interference with the fundamental right to liberty, which the Union legislature wished to confine to exceptional circumstances, giving to the national authorities the power to ensure that applicants for international protection are best protected against the deprivation of arbitrary freedom.

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THE INTERNATIONAL CONFERENCE
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EUROPEAN PUBLIC EMPLOYEE

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Abstract:

European Public Employee has a special figure in connection with the criteria of recruiting and employment, comparing with the status of Romanian Public Employee. This is the reason that leaded into research of this subject. We believe it is a very important issue to analyze and very actual for these days.

Key words: *public, European Institution, status, employee, deontology.*

INTRODUCTION

European Public Employee notion appeared for the first time, at the same moment when the European Union was born, so this was the way of creating the group of public employees in European Sphere. Their Status has specific elements of international figures in connection with the public employee, but also national figures of the public employees.

In time a lot of changes in their status were made, such as the juridical situation from the beginning, which was established by a contract, after that was settled by adopting a statutory regime.

Since 1st of December 2009, after the Reform Treaty of Lisbon, the term of Community Public Employee (clerk) was modified in European Public Employee, when it was about the official clerks form European Institutions.

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Regarding the legal norms that settles the Status of Public Clerks, we mention a few: The Council Regulation no. 259/1968, which was modified in time, The Status of European Community Clerks, adopted by the Council Regulation no. 723/2004[1].

In the beginning of this document are settled the legal reasons and *de facto* reasons that leaded to the necessity of a Status at European level. The communities should have a European public administration at a very high level to be able to fulfill all their missions. Also in the beginning of the document is provided that is necessary to have a very good enrolment strategy for public clerks, because they have to be very efficient in their work, to be with high integrity, to have a lot of specific professional abilities, to come from different geographical areas so they could represent a lot of European citizens, to be very loyal, impartial etc., all of these to assure the unicity of the public function of European Communities.

The most important European Institutions are: The Council of Europe, The European Parliament, The European Commission, The Court of Justice and The Tribunal as a first competence, Court of Auditors, The Public Function Tribunal of European Union. To these, we can add organisms such as: European Mediator, European Central Bank, Economic and Social Committee, Investments European Bank.

Each of these institutions has their own personal politics, but with accents from the common status of all public clerks. We can bring to attention in these conditions, the definition of the public clerk: "*'official of the Communities' means any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the Appointing Authority of that institution.*"[2] "*This definition in paragraph 1 shall also apply to persons appointed by Community bodies to whom these Staff Regulations apply under the Community acts establishing them (hereinafter 'agencies'). Any references to 'institutions'*

[1]Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

[2] Article 1a (1) - Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

in these Staff Regulations shall apply to agencies, save as otherwise provided in these Staff Regulations."[1]

The public servants are recruited by a unilateral act of the competent authority to which we referred already, and they have to obey exclusively to the community law.

So, the appointing act in a European public service is known as being the unilateral legal act made by the competent authority from a European institution, which confers to the concerned person a legal statutory situation, as the quality of European public servant (clerk).

The institution administration took as a model the French rules, in most of the cases, this aspect being obvious, if we analyze the European Commission and the appointment of the first two presidents of this institution.

In connection with the European institutions, we have to notice that the fundamental differences between them, are regarding their competences and the staff numbers.

So, on the first place, talking about the staff numbers is taken by the Commission, with a number of 20.000 employees, than the European Parliament, who has around 6.000 employees. Lower is the European Council, with 2.000 employees, and the General Secretariat of the Court of Justice, with almost 700 servants.

The European Parliament personnel have some specific figures, in connection with their activity, activity which is based on the principle of transparency and multilingualism. This last principle confers to each euro parliamentary to speak in his own language which will be translated in all of 23 official languages of EU. So this is the reason that the most of the staff is formed by translators and interpreters.

Also the staff of European Parliament is composed by people who serve the political groups from the institution.

The Commission includes the also the class of detached national experts, who are helping the experience exchange, in two ways: from European administration to national administration, and vice-versa.

A special character of the requirements for the recruitment of personnel is the age limit of 35, when in other institutions this limitation

[1] Article 1a (2) - Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

requirement is not available. Above all this, it is appreciated that the non-discrimination principle is not violated.

Private offices of the commissioners are formed from another category of clerks, whom main purpose is to assist the commissioner, with attributes in public image and political image.

The European Public Clerks have variate services in the competence area of each institution, every one of them having as a final purpose the fulfillment of the required activities for the citizens of the states that belongs to the European Union, in a proper manner.

When we talk about the labor legal relation of the public clerks, they have common elements with the permanent clerk's labor legal relation. So, each European institution has administrator clerks and assistant clerks. The general Secretaries have as managers General Directors, and the subordinate directions have in charge clerks with Director's degree[1].

1. THE RIGHTS OF EUROPEAN PUBLIC EMPLOYEE

By the Status, the EU Clerks benefits of the petition right by the invested authority for appointing the clerks. They also have the possibility to contest the acts of the authority in front of the Public Function Tribunal of EU. To put in practice these rights have to be fulfilled the following conditions: the dead-line for introducing the request to be respected, the existence of a decision that reject the reclamation, fulfilling the preliminary procedures.

In 2004 the Status of European Public Clerks has been modified and conducted to the first specialized Tribunal on this domain, but also to some changes in connection with the material law for the public clerks. Modifications have been made also for the legal procedures norms for litigations between public clerks and European institutions. So we can talk about a System Reform.

Another right that we would like to bring to attention is the salary right. The salary for the European public clerk is established by the Status, according to the grade and professional steps, to the responsibilities they have. The advancing in rank it is possible once at two years.

[1]P. Mares, *PublicAdministration in European Union and Romania,* (Targoviste: Bibliotheca, 2009), 6-8.

The carrier right, annual leave, medical leave and other types of leaves, retirement right are similar to those that we find in the national laws of the states that belong to EU. Freedom of association it is an evident rightwhich is sustained by the existence of European Public Clerks Union, which is a part of International Public Clerks Union, an independent organism, even if, based on some studies, just a percent of 30 from Community personnel are enrolled in this Union.

If we are talking about professional training, the European framework treats this aspect as being an important right, which works for the clerk's interest but also for the institution's interest as well. The professional training is defined as the continuous training of the public clerks, which consists of in their permanent documentation, to be aware of all legal changes and new information.

The strike right and the opinion right are very well described in the European Convention of Human Rights[1]. We are talking about the article 10 and 11 of the Convention:

(10)"Freedom of expression 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[1] "The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Since its adoption in 1950 the Convention has been amended a number of times and supplemented with many rights in addition to those set forth in the original text" - http://www.echr.coe.int.

(11)"Freedom of assembly and association 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

The right to candidate for elective functions is a specific right, ruled by the Status. The candidate has the right to candidate and the right for permission in his own interest in the winning hypotheses. According to art. 44 from the Status, the public clerk that has 2 years already in the field can be automatically passed in the superior rank, but not when a suspension sanction was applied. The promotion before the 2 years mentioned is possible just by competition. The only situation that can happen without competition is that created by moving to another institution[1].

The right to get any "in writing" official communication is the way to prove for the public clerk that he is acting by the received indications, with no personal guilt. So, on one hand, the requirement of the writing form is used as a proving way, and on the other hand, is applied the transparency principle, the control for the activity of the public clerk being in this manner much easier.

2. THE OBLIGATIONS OF EUROPEAN PUBLIC EMPLOYEE

The fidelity of public clerk, at European institutions level, is in connection with the loyalty sphere for his own public function, nation and institution that he represents. The loyalty and fidelity represents also a proper professional behavior in relation with the subalterns and superiors, but also in relation with the people from outside institution. As a result, this obligation consists in the fact that all the explanations and

[1]A. Stangaciu, *Comparative studies regarding public function in EU,* (ClujNapoca, 2015).

services that the public clerks are offering have to be in accordance with the law. If some improper gesture is required, he has the right to turn it down.

The reserve obligation, in accordance with the Status of Public Clerks from European Community, is defined like this: no public clerk can deal with an activity that consists in a personal interest for him or for his family. Also, he has the obligation to keep the reserve in connection with political opinions in public places or at work.

The damages repair obligation is the general obligation of each employee, which comes from contractual liability, settled by the common law. It is very clear provided by the art. 20 from the Status of European public clerks, which specifies the obligation for the public employees to repair the damages produced by them or with their quilt in the institution patrimony and it settles the competence for eventual litigations for the First Instance Tribunal.

The neutrality and the independence obligation are provided for the public clerk but also for his/her family. If one of the husbands is developing a private profitable activity, the public clerk has to bring this situation to authority's attention. If the profit is not compatible with the public function, the public clerk will have to renounce to the function for a period of time or to resign from that function.

It is forbidden for the European public clerk to accept or to ask for instructions from another government, institution or other organizations that is not their own. Also, they cannot receive or ask for gifts or other benefits in the name of their job (example: bribery for their own promotion).

The European public clerks have the obligation of an annual medical check, so they have to be in normal health and mental condition for the job, without discrimination. The persons with physical deficiency have the right to occupy certain jobs which permit these conditions, with the approval of a specialist.

Another obligation for the European clerk is to be very efficient professionally speaking, with the duty of being very serious about the job and with continuous professional preparation. For more efficiency he is allowed to have just one function, to concentrate on that. He is not allowed to miss the job groundless, in this case is interfering the disciplinary liability with all the legal consequences.

A specific obligation is the residence obligation. So, the European public clerks have the obligation to establish their residence in the same place where the institutions where they work have the social location.

The obligation of keeping the professional secret is a general one, applicable to all the clerks, which is connected with the job legal relation.

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THE INTERNATIONAL CONFERENCE
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THE IMPACT OF THE EUROPEAN UNION ON POLAND'S CONSTITUTIONAL IDENTITY

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Abstract:

In the supranational legal order of the European Union it is of growing importance to keep intact the member States "constitutional identities". This is clearly expressed, as a basic principle, by article 4 EU Treaty. European Union as a community of States needs to respect the identities of its members. The concept of a "Union" requires as a basic condition that all the members of the Union remain intact in their statehood identity, and this means above all intact in the nucleus of their legal orders, namely in the basic elements of their Constitutions. EU membership (i.a. Poland) has as a consequence an adequate limitation of sovereignty, the integration of the national and supranational legal orders and the primacy of supranational law.

Key words: *constitutional identity, national identity, Polish Constitutional Court, guardians of constitutional identity, sovereignty, European Union.*

The idea of confirmation of one's own constitutional identity in solidarity with other nations and not against them constitutes the essential axiological basis of the European Union. The term equivalent to the concept of constitutional identity in the European primary law is that of national identity[3]. At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept ofEuropean identity into their common foreign relations.According to the Declaration on European Identity the Meber

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States are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is theultimate goal of economic progress — and of respect for human rights[1]. Also one of the objectives of the European Union, indicated in the Preamble to the Treaty on European Union, is to satisfy the desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions"[2]. The idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union, in the light of the Treaty of Lisbon. The Treaty of Lisbon in Article 4(2) of the Treaty on European Union, stipulates that: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (...)".Thus, the term national identity not only encompasses the specific nature of culture, language, customs or religion, but also a relationship with national identity expressed in the preservation of primary state functions necessary to ensure the existence of a state as a separate entity[3]. Therefore, in a broader sense, the concept of national identity should be understood as an obligation to respect the continuity of existence of member states as sovereign entities, national cultures, national laws or rules governing the socio-economic system of a state[4]. Also Miguel Poiares Maduro held that national identity encompasses the constitutional identity of a member state and its preservation constitutes an obligation of the European Union. The said obligation results from the substance of the European project initiated in early 1950s, which consists in the deepening of integration whilst preserving the political existence of countries. In consequence, a member state may demand protection of its national identity, *inter alia*, in the case of a derogation from the

[1] Dainius Žalimas, „Wieczyste postanowienia konstytucyjne podstawą demokratycznej tożsamości konstytucyjnej", *Aktualne problemy polskiego i litewskiego prawa konstytucyjnego*, ed. by D.Górecki (Łódź 2015), 171.
[2] Ibidem.
[3]Anna Młynarska-Sobaczewska, „Normatywizacja tożsamości zbiorowej w preambułach do konstytucji państw postkomunistycznych", *Filozofia Publiczna i Edukacja Demokratyczna* 2(2013): 107-109.
[4]Aleksandra Kustra, „Sądy konstytucyjne a ochrona tożsamości narodowej i konstytucyjnej państw członkowskich Unii Europejskiej" in Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich, ed. by S. Dudzik and N. Półtorak (Warszawa 2013), 53.

fundamental freedoms of movement, in particular cases and under the control of the Court. Moreover the required preservation of constitutional identity of member states may constitute a legitimate interest capable of justifying an obstacle to duties imposed by Union law[1]. All the more, a country may refer to such an interest to support its assessment of constitutional measures which should complement the EU legislation in order to ensure within its territory the respect of principles and rules contained therein or underlying it. However, Miguel Poiares Maduro emphasised that the preservation of constitutional identity of member states cannot be understood as an absolute respect for all national constitutional principles. If this were the case, national constitutions could become an instrument enabling member states to release themselves from the Union law in particular areas. Therefore, constitutional identity remains in a close connection with the concept of national identity[2].

From the perspective of the member states the question whether it is possible to outline the limits of the EU's competences, mainly the legislative ones and particularly in the context of an obligation to respect the national identity, seems to be well-founded. In the rulings of constitutional courts regarding the issue of conformity with the constitution of the Treaty of Lisbon we may distinguish two approaches to such issues. The first consists in the acceptance of the transfer of competences (sovereign rights) with the reservation of that there are certain limits to such a transfer. Nonetheless, the said limits are defined in a very general manner and in reference to a general profile of systemic relations between the two legal orders – national and Community law. The Czech Federal Constitutional Court should be included in the firts group.The judgment of the Constitutional Court of the Czech Republic of 26 November 2008[3] refers to the previous German constitutional jurisprudence, by indicating in the reasoning that, after the entry into force of the Treaty of Lisbon, the Member States still remain "the masters of the treaties". This view reflects the importance the Court

[1] See more Miguel Poiares Maduro, „Wykładnia prawa wspólnotowego – funkcja orzecznicza w kontekście pluralizmu konstytucyjnego" in *Europejska przestrzeń sądowa*, ed. by A. Frąckowiak-Adamska and R. Grzeszczak, (Wrocław, 2010), 33-50.
[2] Ibidem.
[3] See the judgment of the Constitutional Court of the Czech Republic of 26 November 2008 (Ref. No. Pl. ÚS 19/08).

assigns to the constitutional order of the Czech Republic, which remains the criterion for the assessment of admissibility of conferral of competences and determines the scope of such conferral[1]. The Constitutional Court stressed thatit would be the obligation of the Czech legislator to adopt the legal provisions which would correspond with the requirements of the constitutional order, which the Treatyof Lisbon referred to. It also drew attention to the fact that the said Treaty did notchange the concept of European integration, which meant that the Union remainedan international organisation, and the Member States retained their constitutionalidentities, and thus the Czech Constitution remained the supreme law of the state[2].Emphasising the significance of the state's sovereignty, the Court pointed out that itplayed the role of the supreme body for protection of constitutionality of the Czechlaw, also in the context of possible exploitation of competence by the EU bodies andthe EU law. The EU law which is inconsistent with the essence of constitutionalityand of a democratic state ruled by law, both understood substantively, could not havea binding character in the Czech Republic[3].

For the second method is it crucial to identify the material limits of competence transfer, thus, to define the core of sovereignty or national identity. Although the latter approach is less open to integration, it seems to meet the requirements of the principle of legal certainty to a greater extent, as it leads to more predictable rulings in possible future conflicts between national and Union law. The German Federal Constitutional Court and the French Constitutional Council should be included in the group of constitutional courts which are actively involved in defining the

[1] Katarzyna Witkowska-Chrzczonowicz, „Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w sprawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony (sygn. Pl. ÚS 19/08)", *Przegląd Sejmowy* 2(2009): 271-90.

[2] Katarzyna Witkowska-Chrzczonowicz, „Czeski sąd konstytucyjny wobec procesów integracyjnych w Unii Europejskiej i tzw. wspólnych wartości europejskich (ze szczególnym uwzględnieniem orzecznictwa dotyczącego konstytucyjności Traktatu z Lizbony)" In *Konferencja Unia Europejska: zjednoczeni w różnorodności, Warszawa, 14-15 grudnia 2010 r.*, ed. by C. Mik (Warszawa, 2012), 180-201.

[3] Katarzyna Witkowska – Chrzczonowicz, Zbigniew Witkowski, „Konstytucje narodowe a zasada prymatu prawa wspólnotowego na tle orzecznictwa Trybunału Konstytucyjnego RP oraz Sądu Konstytucyjnego Republiki Czeskiej" In *Pocta Jánu Gronskému*, ed. by K. Klima and J. Jirásek (Plzeň 2008), 439 – 457.

Union's limits of competence, inter alia, by making use of the concept of national identity[1].

It is best reflected by the Decision of the Constitutional Council of the French Republic dated 20 December 2007[2], preceding the ratification of the Treaty, which made the possibility of ratification contingent – due to the formulation of the European clause in the Constitution of the French Republic – upon the previous amendment to the Constitution. At the same time, the Constitutional Council points to the numerous Treaty provisions repeating the solutions contained in the Constitution for Europe, rejected in a referendum. However, it does not indicate that the inclusion of those solutions in the Treaty of Lisbon is inadmissible[3]. The Constitutional Council indicates in the motives for its decision that the solutions provided for in the Treaty may "not suffice to preclude any transfers of powers authorised by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercise of national sovereignty" (thesis 16). The "powers inherent in the exercising of national sovereignty" in particular include, according to the Constitutional Council, competences as regards the fight against terrorism and related activities, the fight against trafficking in human beings, as wellas judicial cooperation on civil and criminal matters, which are connected with the establishment of the office of European Public Prosecutor (theses 18 and 19). depriving France of any power of acting on its own initiative" (thesis 20). Interpreting the constitutional European clause in the wording which was binding at the time ofadjudicating, and in particular Article 88-1 ("The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common"), the Constitutional Council states that the clause confirms "the place of the Constitution at the summit of the domestic legal order", and at the same time it enables "France to participate in the creation and

[1] Aleksandra Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studium wpływu* (Toruń 2013), 282-283.
[2] The opinion of the French State Council of 20 December 2007 (Ref. No. 2007-560 DC).
[3] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Oxford, 2010), 49.

development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States".

Also, in the judgment of the Federal Constitutional Court of Germany of 30 June 2009[1], the issue of "constitutional identity" constitutes an essential reason for recognising that the European Union, being "a union of sovereign states under the Treaties", may not lead to the situation where there will be not enough room for the political debate in the Member States, which in reference to amendments of the Treaties constituting the Union does not have the binding force of a revised treaty, but pursuant to other legal regulations (the so-called bridging clause) which are not subject to ratification; this means that the federal government and legislative bodies bear special "responsibility for integration", which is generally manifested in the form of expressing consent by relevant statute[2]. Therefore, there is no possibility of assuming that the membership in the European Union, for its effectiveness, requires allowing for almost automatic acceptance of conferral of competences needed by the Union by way of simple exercise of the Treaty. In the light of the said judgment, constitutionally accepted accession to that type of organisation does not mean that it may grant itself the necessary competences falling within the remit of the Member States and gradually undermine the significance of their sovereignty. What is worth noting at this point is the fact that the Federal Constitutional Court redefined ist own role as a guard of "constitutional identity", in the light of the Treaty of Lisbon;courts with a constitutional function may not be deprived of the responsibility "for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity" (thesis 336). In the opinion of the Federal Constitutional Court, its competences arise from the sovereignty of Germany as a Member State of the Union. Due to the fact, the Court declares the inapplicability of an EU legal instrument in Germany, in the clear absence of a constitutive order to apply the law (thesis 339). The German law is the source of theprinciple of primacy of the EU law over the German law. The Federal Constitutional Court also

[1] The judgment of the Federal Constitutional Court of Germany of 30 June 2009 (Ref. No. 2 BvE 2/08).
[2] Maciej Serowaniec, *Parlamentarne komisje do spraw europejskich* (Warszawa 2016), 138.

stated in that judgment that failure to meet the requirements providedfor in the German law concerning the participation of the houses of Parliament in the course of determining the stance of Germany in the European Council and the Council of the European Union, in the process of transferring "sovereign powers" would be an infringement on "constitutional identity" of the state, which indeed is not undermined by the constitutional consent to the membership in the EU[1]. TheFederal Constitutional Court stated that the principle of primacy of the EU law solely referred to the primacy of its application in relation to the German law, and did not mean the obligation to repeal that law if it endangered the effectiveness of the EU law. The Court indicated that the constitutional court of a Member State might declarethe non-conformity of an EU legal instrument to its own constitution, retaining the "right to the final word", but at the same time agreeing to bear "consequences in international relations" (thesis 340). The Court indicated that the infringement on Germany's constitutional identity was inadmissible, since the constitution-maker had not granted the right to decide about sovereignty to the representatives and bodies of the Nation. It is the Federal Constitutional Court that should ensure the respect for that restriction, being one of the unchanging provisions in the Basic Law of Germany as a state (theses 234 and 235)[2]. Since the Treaty of Lisbon makes reference to the national identity of the Member States, then, according to the Federal Constitutional Court, the essential areas of democratic formative action comprise: citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing, encroachments on fundamental rights (such as deprivation of liberty in the administration of criminal law), the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.

[1] Katharina Berner, „Sovereignty of Parliament' under the Grundgesetz: How the German Constitutional Court Discovers Parliamentary Participation as a Means of Controlling European Integration", *European Public Law* 19 (2013): 249-62.

[2] Paweł Bała, „Tożsamość konstytucyjna a Traktat z Lizbony. Tezy wyroku Federalnego Trybunału Konstytucyjnego z 30 czerwca 2009 r.", *Ius Novum* 2(2010): 7-37.

The understanding of the elements of identity arises from the context of historical and cultural experiences (thesis 249)[1].

Also in the judgment of the Federal Constitutional Court of Germany dated 6 July 2010, it was stated that, making reference in its jurisprudence to the legal acts of the EU institutions, the said Court should follow the jurisprudence of the European Court of Justice, which determines the binding interpretation of the EU law. At the same time, the Federal Constitutional Court stated that the judgment of the European Court of Justice in the case C-144/04 (the judgment of 22 November 2005, Werner Mangold v Rüdiger Helm) did not go beyond the scope of competence of the Union in a way that would raise constitutional doubts[2].

The Constitution of the Republic of Poland specifies "the scope and essence of integration", allowing for conferral of the competences of state organs with regardto certain matters upon the subjects indicated in the Constitution. The NationalAssembly, when enacting the Constitution, provided for a possibility of limited andconditioned conferral of competences, with all its consequences, also related to theconferral on international organisations which, "due to founding agreements, havethe competences interfering with the scope of competences of the Polish state organs,especially the power to enact law which will be directly applied in the national legalorder"[3].Creating constitutional bases of the accession to the European Union, with thepreservation of the state's constitutional and national identity, as a solemn constitutionalclause, but without connections with the content of a particular internationalagreement in that respect – was accepted by the Nation in the nationwide referendumheld on 25 May 1997, and then was again approved by the Nation in the nationwidereferendum concerning consent to the ratification of the Treaty of Accession, whichwas held on 7 and 8 June 2003. The conferral of competences is the basicconsequence of the process of European integration, being supported by the provisionsof the Constitution, and the directly expressed will of the Nation. Generally,the

[1] Katarzyna Witkowska – Chrzczonowicz, Jakub Rutynowski, „Polityczne i ustrojowe problemy ratyfikacji Traktatu z Lizbony w RFN – wybrane zagadnienia", *Przegląd Sejmowy* 1(2011): 184-207.

[2]The judgment of the Federal Constitutional Court of Germany of 6 July 2010 (Ref. No. 2 BvR 2661/06).

[3] Kazimierz Działocha, „Komentarz do art. 90" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. by L. Garlicki (Warszawa, 1999), 14.

process of European integration meets the standards of constitutionality as wellas the requirements related to the democratic legitimacy of such actions. They alsohave a historical dimension and context, connected with the European roots of ournational identity.

The values being expressed in the Constitution and the Treaty of Lisbon determinethe axiological identity of Poland and the European Union[1]. The draft of economic,social and political systems contained in the Treaty, which stipulates the respect fordignity and freedom of the individual, as well as respect for the national identityof the Member States, is fully consistent with the basic values of the Constitution,confirmed in the Preamble to the Constitution, which includes the indication ofhistorical, traditional and cultural context that determines national identity, whichis respected in the EU within the meaning of Article 4(2) of the Treaty on EuropeanUnion. These values include the most important aims which the Constitution serves,i.e. the concern for "the existence and future of our Homeland". The aim of the Union– within the meaning of Article 3(1) of the Treaty on European Union – aim is topromote peace, its values and the well-being of its peoples. The Preamble enumeratesthe following aims which the Constitution is to serve: "to guarantee the rights of thecitizens for all time" and "to ensure diligence and efficiency in the work of publicbodies", as well as to pay "respect to the inherent dignity of the person, his or her rightto freedom, the obligation of solidarity with others". These aims, and at the same timethe basic constitutional values, fully correspond to the aims of the Union, specifiedin the Preamble to the Treaty on European Union as well as in Articles 2, 3 and 6 ofthat Treaty, and in particular correspond to the preoccupation with "the principlesof liberty, democracy and respect for human rights and fundamental freedoms andof the rule of law" and the desire to "enhance further the democratic and efficientfunctioning of the institutions", as well as the approach that the EU is based on thefoundation of "values of respect for human dignity" (Article 2), the inclusion of thenational security within the scope of "the sole responsibility of each Member State"(Article 3), the assumption that the fundamental rights which are guaranteed bythe European Convention for the Protection of Human Rights and

[1] Maciej Serowaniec, „Europeanisation of the traditional (ordinary) functions of the Parliament of the Republic of Poland after the Lisbon Treaty", *Annales Universitatis Apulensis. Series Jurisprudentia* 17 (2014): 92-103.

FundamentalFreedoms and which arise from the constitutional traditions common to the MemberStates, "shall constitute general principles of the Union's law" (Article 6(3)). TheTreaty on European Union stipulates, in Article 6(1), that "the Union recognisesthe rights, freedoms and principles" set out in the Charter of Fundamental Rightsof the European Union, "which shall have the same legal value as the Treaties".Within the meaning of Article 6(2) of the Treaty on European Union, the Unionshall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.The provisions of the Preamble to the Constitution are also, at the same time, apremiss of formulating the principle of favourable predisposition towards the processof European integration and the cooperation between States. From that perspective,the interpretation of constitutional provisions concerning the membership in theEU should be carried out.Adjudicating with regard to the application requires taking into account boththe principle of protection of the state's sovereignty in the process of Europeanintegration and the principle of favourable predisposition towards the process ofEuropean integration and the cooperation between States[1]. From the pointof view of that principle, reconstructing a higher-level norm, in the light of whichthe assessment of constitutionality is carried out, one should not only refer to thetext of the Constitution, but also – to the extent the said text refers to the terms,concepts and principles present in the EU law – refer to those meanings[2]. However, on no account may an interpretationwhich favours the EU law lead to "the results which are contrary to the explicitwording of constitutional norms and are impossible to reconcile with the minimumof the guarantee functions fulfilled by the Constitution"[3].

In the view of the Constitutional Tribunal, the sovereignty of the Republic ofPoland and its independence – construed as the separateness of Poland's statehoodwithin its present borders, in the circumstances of the membership in the EU inaccordance with the rules specified in the Constitution – mean confirmation of theprimacy of the Polish Nation to

[1]The statement of reasons for the judgment dated 27 May 2003 (Ref. No. K 11/03). See Selected rulings of the PolishConstitutional Tribunal concerning the law of The European Union(2003-2014), (Warszawa 2014), 9-15.

[2] The statement of reasons for the judgment dated 28 January 2003, (Ref. No. K 2/02). See Selected rulings of the PolishConstitutional Tribunal, 208.

[3] The statement of reasons for the judgment dated 11 May 2005, (Ref. No. K 18/04). See Selected rulings of the Polish Constitutional Tribunal, 208.

determine its own fate[1]. The normative manifestationof that principle is the Constitution, and in particular the provisions of thePreamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) andArticle 126(1), in the light of which the sovereignty of the Republic of Poland isexpressed in the inalienable competences of the organs of the state, constituting theconstitutional identity of the state. The principle of sovereignty has been reflected inthe Constitution, not only in the provisions of the Preamble. The manifestation ofthat principle is the sole existence of the Constitution, as well as the existence of theRepublic of Poland as a democratic state ruled by law (Article 2 of the Constitution).Article 4 of the Constitution stipulates that supreme power in the Republic of Poland"shall be vested in the Nation", which excludes the possibility of conferring it toanother entity. Within the meaning of Article 5 of the Constitution, the Republicof Poland safeguards the independence and integrity of its territory, and ensuresthe freedoms and rights of persons and citizens. The provisions of Articles 4 and 5of the Constitution in conjunction with the Preamble set the fundamental relationbetween sovereignty and the guarantee of the constitutional status of the individual,and at the same time exclude the possibility of surrendering sovereignty, the regainingof which the Constitution regards as the premiss of the Nation's independence todetermine its own fate[2].The provisions of Article 90 should be applied with regard to the amendments tothe provisions of the Treaties constituting the basis of the European Union, whichtake place in a different manner than by virtue of international agreements, if theamendments lead to the conferral of competences on the European Union[3].

In the view of the Polish Constitutional Tribunal, incurring international liabilities andmanaging them do not lead to the loss or limitation of the state's sovereignty, butit is its confirmation, and the membership in the European structures does not, infact, constitute a limitation of the state's sovereignty, but it is its manifestation. Forthe assessment of the state of Poland's sovereignty after its accession to the

[1] Krzysztof Wójtowicz, „Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r. (K 32/09)" *Europejski Przegląd Sądowy* 11(2011): 6-10.

[2]The statement of reasons for the judgment dated 24 November 2010, (Ref. No. K 32/09).See Selected rulings of the Polish Constitutional Tribunal, 202-204.

[3] Krzysztof Wójtowicz, *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej*, (Warszawa, 2010), 28.

EuropeanUnion, it is vital to create the basis for the membership in the Constitution, as alegal act of the nation's sovereign power. Moreover, the basis of the membership inthe European Union is an international agreement, ratified – in accordance with theconstitutional requirements – upon consent granted in a nationwide referendum[1]. In Article 90, the Constitution provides for conferring the competences of state organsonly relation to certain matters, which – in the light of the Polish constitutionaljurisprudence – means a prohibition to: confer all the competences of a given organof the state, confer competences in relation to all matters in a given field and conferthe competences in relation to the essence of the matters determining the remit of agiven state organ; a possible change of the manner and object of conferral requiresobservance of the requirements for amending the Constitution[2].The Constitutional Tribunal shares the view expressed in the doctrine of constitutionallaw that accession to the European Union is perceived as some sort of limitationof sovereignty of a given state, but it does not mean its loss and is related with thecompensatory effect in the form of a possibility of partaking in the decision-makingprocess in the European Union[3]. The EU Member States retain their sovereigntydue to the fact that their constitutions, being manifestation of the state's sovereignty,retain their significance.

The Polish Constitutional Tribunal shares the view expressed in the doctrine that thecompetences, under the prohibition of conferral, manifest about a constitutionalidentity, and thus they reflect the values the Constitution is based on[4]. Therefore, constitutionalidentity is a concept which determines the scope of "excluding – from the competenceto confer competences – the matters which constitute (...) 'the heart of the matter', i.e.are fundamental to the basis of the political system of a given state", the conferral of which would not be possible pursuant to Article 90 ofthe Constitution. Regardless of the difficulties related to setting a detailed catalogueof inalienable competences, the following should be included among the mattersunder the complete

[1] As the Constitutional Tribunal stated in the statement of reasons for the judgment in the case K 18/04.See Selected rulings of the Polish Constitutional Tribunal concerning the law of The European Union (2003-2014), (Warszawa, 2014), 201.
[2] Ibidem.
[3] Leszek Garlicki, *Polskie prawo konstytucyjne* (Warszawa, 2009), 57.
[4] Leszek Garlicki, „Normy konstytucyjne relatywnie niezmienialne" in: *Charakter i struktura norm Konstytucji*, ed. by J. Trzciński (Warszawa 1997), 148.

prohibition of conferral: decisions specifying the fundamentalprinciples of the Constitution and decisions concerning the rights of the individualwhich determine the identity of the state, including, in particular, the requirement ofprotection of human dignity and constitutional rights, the principle of statehood, theprinciple of democratic governance, the principle of a state ruled by law, the principleof social justice, the principle of subsidiarity, as well as the requirement of ensuringbetter implementation of constitutional values and the prohibition to confer thepower to amend the Constitution and the competence to determine competences[1].

The guarantee of preserving the constitutional identity of the Republic of Polandhas been Article 90 of the Constitution and the limits of conferral of competencesspecified therein. Article 90 of the Constitution may not be understood in a waythat it exhausts its meaning after one application. Such an interpretation would arisefrom the assumption that conferral of competences on the European Union in theTreaty of Lisbon is a one-time occurrence and paves the way for further conferral,bypassing the requirements specified in Article 90. Such understanding of Article 90would deprive that part of the Constitution of the characteristics of a normative act[2].Therefore, the constitutional courts of the Member States share the conviction of fundamental significance of the constitution as a reflection and guarantee of national sovereignty in the current phase of European integration, as well as that regarding the special role of constitutional judicature in the area of protection of constitutional identity of Member States, which simultaneously designates the treaty-based identity of the European Union.An equivalent of the concept of constitutional identity in the primary EU law isthe concept of national identity.

[1] Krzysztof Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym* (Kraków, 2007), 284 sp.

[2] Krzysztof Wójtowicz, „Rola sądów konstytucyjnych w tworzeniu zintegrowanej europejskiej przestrzeni prawnej" in *Europejska przestrzeń sądowa*, ed. by A. Frąckowiak-Adamska and R. Grzeszczak (Wrocław, 2010), 14-17.

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PARLIAMENTARY INVESTIGATIVE COMMITTEE IN THE REPUBLIC OF POLAND

Andrzej SZMYT[1]

Abstract:

The parliamentary committee of inquiry is an institution which have been introduced to the Polish constitutional system by the current Constitution of 1997. The Author presents the parliamentary commission of inquiry in the light of constitutional provisions, the law on parliamentary committee of inquiry, the Standing Orders of the Parliament and a very significant case law of the Constitutional Tribunal.

Key words: *parliamentary control, commission of inquiry, Polish constitution, Sejm, Constitutional Tribunal*

1. An investigative committee as a legal institution belongs to the classical instruments of parliamentary law. It is known in most democratic states. In Poland the institution of the investigative committee was provided by the March Constitution of 1921 (art. 34), but also by the July Constitution of 1952 (art. 21) and the Small Constitution of 1992 (art. 11). In political practice, such committees were already known in the period of the Legislative Sejm (1919 - 1922), however they did not function under the April Constitution of 1935 and during the Polish People's Republic. The idea of an investigative committee was restored during the democratic transformation of the political system.

The Constitution of the Republic of Poland of 2 April 1997[2] in art. 111 provides that "the Sejm may appoint an investigative committee to examine a particular matter" (para. 1) and "the procedure for work by an investigative committee shall be specified by a statute"(para. 2). On 21 January 1999 the Sejm passed the Act on Sejm Investigative

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[2]The Official Journal of Laws „Dziennik Ustaw", No 78, item 486, with later amendments

Committees[1]. In matters not covered by its provisionsthe law refers to the Standing Orders of the Sejm[2]and in some strictly defined scope also to other laws (such as the Code of Criminal Procedure). References to laws result from the scope of matters that can be subject to the proceedings before the investigative committees, namely the status of the entities whose rights and duties can be regulated only by acts with a legal power of a statute (for example in matters of calling and questioning persons summoned by an investigative committee). From the very beginning, it was also clear that the jurisprudence of the Constitutional Tribunal shall be an important factor in developing the constitutional practices in this field.

The right to establish an investigative committee has been granted only to the Sejm. So there is no legal possibility to establish such committee by the Senate (the upper chamber of the Polish parliament). The practice of appointing investigative committees can be generallyassessed as quite intensive. However, there were also many unsuccessful attempts to appoint such committees.

According to the art. 111 of the Constitution, the issue that is to be examined by an investigative committee must be "specific", which excludes its vagueness (or blanket nature). This requirement has been repeated by the Act on Sejm Investigative Committees (art. 1 para. 2). The Sejm's resolution on the appointment of an investigative committee shall define its scope of action, but it can also determine the detailed rules of the operation of the committee and the deadline for submission of its report (art. 2 para. 3). The committee is bound by the subjective scope specified in the resolution of the Sejm on its appointment (art. 7 para. 1).In the political practice, the Constitutional Tribunal declared its jurisdiction with respect to the resolution of the Sejm on the appointment of an investigative committee, although there were initially major disputes and controversies as to the normative nature of such resolution of the Sejm[3].

[1]Unified text – the Official Journal of Laws „Dziennik Ustaw", No 151, item 1218, with later amendments

[2]The resolution of the Sejm of 30 July 1992 (unified text – the Official Journal of Laws „Monitor Polski" 2012, item 32, with later amendments)

[3]Precedent meaning in that context is attributed to the judgement of the Constitutional Tribunal of 22 September 2006 in case U 4/06; See: A. Szmyt, *Elementy praktyki sejmowej pod rządami Konstytucji RP (1997-2007)*, (Gdańsk, 2008), 202.

According to the Act on Sejm Investigative Committees, the Sejm appoints an investigative committee and elects and dismisses its members by an absolute majority of votes. The committee may be composed of up to eleven members. Its composition should reflect the representation of deputies' clubs and circles in the Sejmwhich have their representatives in the Council of Seniors according to their number (art. 2 para. 1-2). According to the Standing Orders of the Sejm, a draft resolution on the appointment of an investigative committee may be proposed by the Presidium of the Sejm or a group of at least 46 deputies (10% of the Sejm). Candidates for the members of the committee can be nominated and proposed to the Marshal of the Sejm by the presidents of deputies clubs and circles who are included in the Council of Seniors.

According to the Act (art. 8 para. 1 and 3-4), the conduct of legal proceedings - or even final decision in the case - by other public authority does not exclude the possibility of proceedings before the investigative committee. However, the committee may, with the consent of the Marshal of the Sejm, temporarily suspend its activities in connection with the proceedings before another body. In order to obtain expertise,the investigative committee may appoint experts (art. 12a). It may also ask the Attorney General to carry out specific activities (art. 15 para. 1). The committee may allow the representatives of the press to record an image or sound at the committee's meetings if it is justified by the public interest, it does not hinder the course of the meeting and it does not affect the important interests of the person summoned at the meeting (art. 16a). In many important matters mentioned in the Act, the chairman of the committee acts only on the basis of the committee's resolution (art. 10 para. 3).

The Act clearly stipulates that the assessment of the legality of judicial decisions cannot be subject to the committee's work (art. 8 para. 2). What's more, the committee can use its powers under the provisions of the Act only to the extent necessary to explain the matter subject of its work in a way which does not violate the personal rights of third parties (art. 7 para. 2).

According to art. 14 of the Act, public authorities (and the bodies of other legal persons and organizational units without legal personality) - at the request of the investigative committee –submit written explanations or present documents at their disposal, as well as the records of cases conducted by them. The investigative committee may consult

documents or acts while examining the issue on the spot. At the request of a court or a prosecutor, the investigative committee provides these authorities with materials it has collected if they relate to pending criminal proceedings. With the consent of the Marshal of the Sejm the investigative committee may also share collected materials with other bodies of public authority, if it deems it necessary for the good of the proceedings conducted by these other bodies.

Art. 11 of the Act is of particular importance. It provides that any person summoned by an investigative committee is obliged to appear at the scheduled date and make a statement. If the person summoned cannot appear in order to testify because of illness, disability or other obstacles which cannot be overcome, the committee can question this person at the place of his/her residence. The person summoned can establish his/her representative, but it does not exempt him/her from the obligation to appear in person before the committee and testify (art. 11b para. 1 and 5). Subsequent provisions of the Act govern the admissibility of hearings as to the circumstances covered by different kinds of secrecy and undisclosed information (art. 11e - 11f). In such case the committee may decide to hold meetings behind closed doors. The information acquired in the course of such hearings is a secret protected by law (art. 11h). In case of unjustified failure to appear at the request of the investigative committee, the committee may apply to the District Court in Warsaw in order to impose a disciplinary penalty. The same applies to cases of leaving the place where committee's activities are performed prior to their conclusion without the consent of the committee, as well as cases of unjustified refraining from testifying. Within the Sejm, the activities related to the application of disciplinary penalties–at the court order –are carried by the Marshal's Guard (art. 12 and art. 13).

It should be emphasized that art. 11cof the Act provides an extensive catalog of rights that can be used by the summoned person in proceedings before the investigative committee. This regulation is supposed to guarantee the person's status in relations with the committee. In particular, the summoned person is granted a right to:

1. abstain from replying to questions, if answering might expose the summoned person (or the person closest to him/her –according to the meaning of the relevant provisions of the Criminal Code) to criminal or financial liability for the offense (or a fiscal offense),

2. refuse to testify if the summoned person is suspected of committing a crime which remains in close connection with the act subject to the proceedings before the investigative committee (or has been already convicted for this crime),
3. demand to be interrogated at the meeting closed to the public, if the content of the testimony could expose the summoned person (or a person closest to him/her) to shame,
4. refuse to testify as to the circumstances covered by the obligation of secrecy protected by law,
5. submit a request for a break in the meeting of the investigative committee,
6. submit a request to get the opportunity to express an unrestricted opinion about the matter subject to hearing,
7. request to repeal questions that - in the opinion of the summoned person - suggest the content of the response, are irrelevant or inappropriate,
8. request to change the date of the hearing,
9. request to perform actions that the investigative committee may or has an obligation to take *ex officio*,
10. request to exclude the member of the committee (as provided for in art. 5-6 of the Act).

The summoned person must be informed about the above privileges before the beginning of the hearing. If the requestsubmitted by the summoned person is rejected by the chairman of the committee, he/she can appeal to the committee with regard to matters referred to in paragraphs 5-9 of the Act. The investigative committee shall decide on the appeal by a simple majority of votes.

According to art. 18 of the Act, the investigative committee may submit to the Sejm the initial application to hold certain persons to constitutional liability before the Tribunal of State. It can take place ifthe investigative committee considers that the findings made in the course of proceedings indicate the breach of the Constitution or the law by the entities defined in the Act of 26 March 1982 on the Tribunal of State[1]. The violation of the Constitution or of a statute must be committed culpably within the office or in connection with the position of persons pointed out in art. 198 of the Constitution. The decision to submit such

[1]Unified text – the Official Journal of Law „Dziennik Ustaw" 2002, No 101, item 925, with later amendments.

request is made by the majority of 2/3 in the presence of at least half of the committee members.

The investigative committee does not have, however, the right of legislative initiative and the initiative to propose draft resolutions, which directly results fromart. 136e of the Standing Orders of the Sejm.

According to the art. 19a-c of the Acton Sejm Investigative Committees, the committee shall prepare a report on its activities. It should include the committee's position on the matter determined in the Sejm's resolution on the appointment of that committee. The draft of such a position is prepared and submitted to the committee by its chairman. Then, the members of the committee can propose amendments to the draft and present them in writing. The investigative committee adopts its position in a resolution. The report of the investigative committee may also include, at the request of applicants, the dissenting opinions of deputies who are members of the committee. A dissenting opinion may reflecta different position as to the whole or the part of the committee's positionexpressed in the resolution. The committee's report is presented at the plenary session of the Sejm by the rapporteur selected from its composition. He/she is obliged to present the position of the investigative committeetogether with dissenting opinions in an objective way. It is not possible to propose amendments to the report of the investigative committee during its consideration by the Sejm. There is also no voting on the report of the committee.

The Act separately regulates (art. 20-21) the issue of the discontinuation of works of the investigative committee and the exceptions to this rule. The provisions of the Act provide that if an investigative committee has not completed its activities before the end of the term of office of the Sejm which established that committee, the proceedings conducted by the committee are closed on the day of the end of the Sejm's term of office. However, if the committee has already given its report to the Marshal of the Sejm but the Sejm has not considered it before the end of its term of office, such statements may be examined by the Sejm of the next term. In such case, the Marshal of the Sejm after consulting the Presidium of the Sejm and the Council of Seniors appoints a deputy rapporteur who will present the report.

II. For the legal perception of the institution of an investigative committee the judgement of the Constitutional Tribunal of 22 September 2006 (U 4/06) is fundamental[1]. It has established a comprehensive standard of requirements concerning the appointment and functioning of investigative committees. It also provided a reference point for the assessment of further resolutions of the Sejm on the appointment of investigative committees, as well as draft resolutions on this matter. The content of the Constitutional Tribunal's decision may be recapitulated as follows[2]:

1) extensive or improper use of instruments (competences) by an investigative committee may involve the threat of constitutionally protected values and a significant weakening of the principle of legality; it would put third parties - in case of insufficient determination of investigated matter- in a situation of uncertainty as to the scope of their rights and obligations,

2) specificity of the case, understood as the identification and individualization of a legal problem, is the condition of the constitutionality of investigative committees' actions; its manifestation must occur at the stage preceding the adoption of the relevant resolution by the Sejm; the Sejm cannot start such special mode (control and investigative) only on the basis of non-specific grounds,

3) subject of investigative committees' actions must be identified, as well as well-defined and understandable for all potential entities obliged to appear before the committee or obligated to provide materials and information,

4) provisions of the Sejm's resolution cannot refer to situations which concern countless events that make up the multitude of long-term processes of various types, instead of indicating a "specific" case,

5) if the Sejm's resolution provides members of the investigative committee with vast possibilities to determine the actual scope of its activities, it is not constitutionally correct (the sub-delegation of competences)

[1] The judgement was announced in the Official Journal of Laws „Monitor Polski" No 66, item 680; full text with the explanatory note: OTK ZU 2006, No 8A, item 109.

[2]The synthesiswas formulated by the author of the article in the w ekspertyzie in the report of 23 November 2006devoted to standards established by the Constitutional Tribunal's judgement in the case U 4/06, published in: A. Szmyt: *Elementy praktyki…,* pp. 193-196.

6) despite the fact that high standard of specificity is expected from legal provisions, the use of general concepts sometimes is almost inevitable; This statement, however, should be referred to situations in which vague concepts and general clauses are filled with content by courts and in which the independence of courts and judges as well as instance verification are respected; These attributes cannot be applied to the members of investigative committees who are elected on political basis rather than their skills to make the exegesis of legal provisions,

7) use of vague concepts in order to formulate the scope of activity of an investigative committee is unacceptable in a democratic state ruled by law because it creates a real threat of uncontrolled and inconsistent with the Constitution overturning of the principle of separation and balance of powers as well as excessive interference with the freedoms of individuals summoned by the committee,

8) if the determination by the Sejm of the "scope" of matter subject to the investigation is unclear,it is not possible to apply appropriate legal measures by the committee;The vagueness of the scope of the committee's activity prevents the achievement of purposes for which it was established; Both the uncertainty (indeterminacy) of matters entrusted to investigative committeesand the determination of thismatter by means of parameters (subject, object, the scope of investigation) which practically make the investigation impossible are unacceptable; Inability to achieve the purpose for which the committee has been established means the violation of the constitutional obligation that public authorities shall work reliably and efficiently,

9) timeframe of the period investigated by the committee must have a significant and direct connection to the legal outcomes or events, which are the subject matter investigated by the committee. In particular, the investigation of future events that would have preventive nature, in practice could be used in order to create unacceptable pressure on investigated authorities or to interfere with pending cases,

10) clarification of ambiguous concepts used inthe resolution of the Sejm in the course of the committee's work infringes the principle that the object and scope of the investigative committee's activity should be specified *ex ante*. This cannot be made by the committee itself (but by the Sejm *in pleno*),

11) "investigative" powers cannot be used in order to perform tasks to which other commonly known methods of scientific and analytical

research are applied. In particular, they cannot be used in order to make comprehensive assessments which can be done by ordinary parliamentary committees. The investigative forms of parliamentary control are the exception in relation to the form of ordinary Sejm control and - as an exception - they cannot be subject to broadening interpretation,

12) activities of private entities which do not perform any tasks in the field of public administration (or do not benefit from state aid), do not fall within the control of the Sejm. The fundamental sphere of autonomy of individuals and entrepreneurs is established by constitutional and statutory norms. The Sejm by its resolution cannot make any matter - indicated as the object of the investigative committee's activity –the subject of its control carried out with the use of measures appropriate for investigation, bypassing courts. Investigative committees can only investigate activities of public bodies and institutions which are clearly under the control of the Parliament according to the Constitution and statutes. Their findings regarding the illegal actions of individuals and entrepreneurs made in the course of the proceedings, in which the subject of the investigative committee's work would be the activities of these bodies and public institutions, can be verified in the procedural mode by competent state authorities (the prosecution).

The vast majority of conclusions here concerns the Constitutional Tribunal's position concerning the need of clear definition of not only the "scope of activity" of the investigative committee, but also clear and unambiguous "determination of the case" which is supposed to be examined by the committee. The Tribunal in its ruling U 4/06 has seta very high "standard" for the requirement of such "connection" - the way of wording the scope of the committee's activity in the Sejm's resolution - so that the boundaries of the case are precisely defined at the same time.

Unfortunately, the Constitutional Tribunal has later modified its position on how to understand the "specificity" of the matter, by "loosening" the relationship between the indicated concepts[1]. It was a signal threatening the destabilization of the parliamentary practiceby enabling more instrumental activities. It lowered the above mentioned standard. The controversy of this modification was expressed by five

[1]The case U 1/08; See more: A. Szmyt, „Opinia prawna o projektach uchwał Sejmu w sprawie powołania komisji śledczej", *Zeszyty Prawnicze* Biura Analiz Sejmowych. 3-4 (2009).

dissenting opinions to the judgment. The doctrine, however, sustained the demand for the adoption of standards which better implement the constitutional requirement of "specificity" of the matter subject to investigation. However, the "specific" matter could be also understood as the "set of circumstances" concerning various manifestations of the investigated activity which only together make up the "separate" mechanism of proceedings. The later parliamentary practice confirmed these fears.

In the case U 4/06, the Constitutional Tribunal emphatically and clearly prejudged also the way of understanding the constitutional model of the parliamentary control. The judgment clearly stated that the scope of the "parliamentary investigation" cannot be unlimited.

According to the Constitutional Tribunal, the activity of an investigative committee must comply with constitutional norms and principles in order to set limits of the Sejm control. The investigated matter must fall within the objective and subjective scope of the parliamentary control, as defined in the Constitution and laws. The investigative committee is thus one of the forms of parliamentary control which boundaries have been established by law. The scope of its activity is determined by the art. 95 para. 2 of the Constitution. So the "matter" - in the meaning of art. 95 para. 2 in connection with art. 111 para. 1 of the Constitution - can only include activities and omissions of authorities which are a part of organization system subordinate to the Council of Ministers. Therefore, independent constitutional bodies (courts and tribunals) or bodies which are fully or partially independent from other state authorities (for example the Polish National Bank) remain outside the scope of activity of the investigative committee. The committee may examine the activities of "private" persons only to the extent to which they perform tasks in the field of public administration or benefit from state aid. The relation of art. 95 para. 2 and art. 111 para. 1 of the Polish Constitution also excludes the activities of the Sejm or its internal organs form the scope of activity of the investigative committee. Similarly, this also applies to the Senate, the European Parliament and matters falling within the exclusive competence of the European Union.

However, the fact that the Constitutional Tribunal refers the jurisdiction of the investigative committee to art. 95 para. 2 of the Constitution has also unexpected consequences. The decision of the legislator to combinea particular stateorgan with the structures of governmental administration

or separate it from these structures (the case of the prosecutor's office in recent years) widens or narrows the scope of the control powers of the Sejm. Each time, it changes the admissible scope of activity of the investigative committee[1]. The limitation resulting from art. 95 para. 2 of the Constitution indicated by the Constitutional Tribunal with respect to the subjective scope of jurisdiction of investigative committees sometimes arouses reservations of the doctrine. It takes into account the experience of other countries. It should be pointed out that taking into account the contemporary role of the parliament it is more appropriate to assume that it may investigate all matters "of a public nature"[2].However, this would require a complete change of the Constitutional Tribunal's jurisdiction line concerning the investigative committee thathas been established by the judgment U 4/06.

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TREATIES AS SOURCES OF CONSTITUTIONAL LAW

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Abstract:

The sources of constitutional law present themselves under a certain hierarchy, where, at the top, we find the Constitution. The next ones in the hierarchy, before the laws, are the binding acts of the European Union and the international treaties and conventions in the field of human rights. The question that arises is whether the principle of primacy of EU law also applies to constitutional rules, in other words, if the EU rules have a value which is not only supra-legal, but also supra-constitutional.

The present study concludes that the position of the European rules is also a supra-constitutional one because it is not the EU institutions that have to observe that their acts are not contrary to the constitutions of the Member States, but the latter will be modified whenever there is contradictoriality. This conclusion is also confirmed by the consecration of the European citizenship, the doctrine agreeing in the qualification of citizenship as the legal status resulting from the affiliation of a natural person to a determined state.

Key words: *sources of law, Constitutional law, European Union law, international law rules.*

INTRODUCTION

The problem of the sources of Law is approached and solved differently in the theory of law in general and in the doctrine of each branch of law in particular. On the one hand, reference is made to the practical needs, the realities of social life, which determine the legislator's intervention and a certain regulation[2]. The law owes to these realities not only its birth, but also its structure, the form that it will take[3]. On the other hand, the notion of *source of law* covers the concrete form taken by the rules intended to regulate the realities of the social life of

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[2] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: Actami, 1998), 191.

[3] Gheorghe Boboş, *Teoria generală a dreptului* (Cluj-Napoca: Argonaut, 1999), 182.

which we have already spoken because, as Professor Nicolae Popa notes, "the legal rules do not present themselves in a nude form"[1].

In order to distinguish between the two meanings of the same notion, the doctrine qualifies the former as the *material* source of law, and the latter as the *formal* source of law. In fact, if we accept that the Law represents the ordering factor of society, we can see that there is a link between the two: the first meaning refers to the impulse received, and the second to the answer which is given[2]. Law exists in order to shape the social behaviour in relation to certain realities, and it does so by means of legal rules that take on specific forms. If we consider the question regarding the *necessity* to regulate the social behaviour, we have in mind the material source, whilst if we ask ourselves which is the source of the concrete regulation (the *answer*), then we are referring to the formal source of law. But since a thing can one have one source, we believe that when we speak of a source of Law, we should have in mind the meaning of material source, whilst what the doctrine calls formal sources of the Law should be considered as being forms of expression of the Law.

1. THE FORMS OF EXPRESSION OF CONSTITUTIONAL LAW

The forms of expression of Constitutional law are those specific forms embraced by the rules that make up this branch of law and which regulate the social relations born in connection with everything related to the exercise of Power: the formation of state authority bodies, their

[1] Some authors identify even four meanings of the notion of *source of law*: material sources, formal sources, documentary sources and "real" sources of law - Dan Claudiu Dănișor, Ion Dogaru and Gheorghe Dănișor, *Teoria generală a dreptului*, 2nd edition, (Bucharest: C.H. Beck, 2008), 119-121.

[2] "The sources of law are manifestations of the social relations that generate the legal rule, regardless of its nature (public or private law, etc.)... The richer in meanings social life is, the more numerous and powerful are the objective and subjective determinations of the appearance of the legal rule... On the other hand, the social consciousness, in the formation of which the individual consciousness has a strong contribution (obviously, we do not refer to an arithmetical addition of the latter) generates, in its turn, the legal consciousness. From the latter emerges the law, so that the social legal consciousness is prefigured as being the material source of law... The relationship between the material fact and the Law which it generates has been considered by the doctrine as a relation between "given" and "built"- Boboș, *Teoria generală a dreptului*., 182-184.

powers and their relations, the status of citizen, including their rights and obligations, as well as the protection of the Constitution against any possible abuse of power.

The forms of expression of Constitutional law have a certain hierarchy[1], and the highest position is held by the Constitution which, in Romania, has a written form. It receives this qualification, of supreme or fundamental rule, not only in relation to the Constitutional law branch, but also constitutes the highest and most important form of expression for the entire system of Law and for each legal branch in particular. It is at the top of the normative hierarchy and conditions all the other legal rules to exclusively contain provisions that are consistent with its letter and spirit. It must be said, however, that this character has not always been recognized. Starting from the principle formulated by Jean-Jacques Rousseau, namely that lawmakers have powers delegated from the people and, thus, the law represents the sovereign will of the people, the doctrine, especially the French one and those that have been influenced by it, has absolutized the power of the law, putting it on the same level as the Constitution. Immediately following, in the hierarchy of the forms of expression of Constitutional law, are the binding acts of the European Union and the international treaties and conventions in the field of human rights. This re-ordering of the forms of manifestation of Constitutional law was determined by the status obtained by Romania, in 2007, namely that of a Member State of the European Union, which resulted in the European law becoming an integral part of the domestic legal order.

Another reality of modern constitutionalism makes the laws to lose even the third place in the hierarchy of the forms of expression of Constitutional law in favour of the decisions of the Constitutional Court,

[1] The distribution of these rules has a specific aspect in federal states, where a single and all-encompassing (at the federal level) legal order overlaps and imposes itself over a multiplied legal order for each composing entity (at the federate level). Thus, in the first instance, we will distinguish a legal order and normative acts edited at the level of each constituent state of the federation, ordered in accordance with the logic of the normative hierarchy, but with a limited action within the limits of that particular state and with the obligation to comply with the norms enacted at the federal level (also arranged in a hierarchical order) and, first of all, with the federal constitution. Actually, we will have normative acts in a double set, federal and federate laws, a federal and a federate constitution, edited according to competencies established by the federal constitution and respecting a double rule: the lower normative acts must conform to the higher ones, and the federate acts to the federal ones.

which have become an important source of Romanian Constitutional law. Although, as a general rule, case law is not considered as generating law, the analysis of the evolution of Constitutional law in other countries, particularly in countries endowed with a constitutional justice, entitles us to affirm that this form of law, on the one hand, transforms itself into a jurisprudential form of law and, on the other hand, that its approach must be necessarily made from the angle of Comparative law.

Laws are situated on the next level in the hierarchy of the forms of expression of Constitutional law and represent those rules whose adoption constitutes the exclusive attribute of Parliament (Article 73 of the Romanian Constitution)[1]. We distinguish in this category the organic laws, which regulate areas of major importance for society, and ordinary laws, which constitute a formal source of Constitutional law, in so far as they come to transpose into practice provisions having a general character, principles or guarantees stipulated in the Constitution (for example, Articles 6 and 9 of the Romanian Constitution). The hierarchy of the forms of expression of Constitutional law continues with the Parliament's rulings, in particular those concerning the Parliament's Regulations and the Government Ordinances, as well as the custom (the habit). A series of rules and/or Constitutional law institutions were born from the repeatability of a certain behaviour, beyond any written regulation, as has happened in the United Kingdom with some Constitutional law institutions, such as the Prime Minister or the motion of no confidence (censure motion).

2. THE JUSTIFICATION OF QUALIFYING INTERNATIONAL TREATIES AS SOURCES OF LAW

The European law is organized on two levels: primary law and derived law[2]. The first contains the constitutive treaties, which include the fundamental rules on which was based the European construction, and which have been characterized as constitutional acts even in the case law of the Luxembourg Court of Justice. The derived law consists of all

[1] Some authors place laws immediately below the Constitution in the hierarchy of the formal sources of constitutional law - Bianca Selejan-Guțan, *Drept constituțional și instituții politice*, 2nd edition (Bucharest: Hamangiu, 2008), 9.

[2] See Raluca Bercea, *Drept comunitar. Istoric, izvoare, instituții* (Timișoara: Mirton, 2009), 52 et seq.

the other normative acts of the European Union, namely the directives, regulations and decisions adopted according to the rules provided by the constitutive treaties. These acts are adopted according to a legislative procedure involving the European Parliament and the Council of the Union, in most cases the two institutions acting in association at the adoption of the act[1].

According to a constant case law of the European Court of Justice, the treaties and the law adopted by the Union on the basis of the treaties applies directly in the national law of the Member States and have precedence over it. Therefore, they are in a position of supra-legality. In *Van Gend en Loos vs. Nederlandse Administratie der Belastingen* from February 5th 1963[2], the Luxembourg Court qualified the European Community as a new international legal order in favour of which the Member States had limited, in certain areas, their sovereign rights and which imposes itself not only upon these states, but also upon their citizens. The latter are entitled to claim before the national courts the direct application of the clear and unconditional European rules, even when they are not enforced by the national law. On July 15th 1964, the Luxembourg Court issued a new historic decision in *Costa vs. Enel*[3], in which was stated that the rules of European law apply as a matter of priority over the national rules, by integrating themselves into the legal systems of the Member States, whilst the latter are bound to respect and apply the European provision, even if it was adopted after the national rule. The primacy of EU law concerns, on the one hand, all the European acts which have a binding nature, both from the primary and the secondary legislation and, on the other hand, it takes into account all national acts, irrespective of their issuing authority.

[1]The co-decision procedure was promoted by the Maastricht Treaty of 1992 and reaffirmed by the Amsterdam Treaty of 1999. With the 2009 Treaty of Lisbon, this procedure became the ordinary legislative procedure, the rule of the legislative process in the European Union.

[2]http://eur-lex.europa.eu/Notice.do?val=3705:cs&lang=fr&list=3708:cs,3704:cs,3751:cs,3707:cs,3703:cs,3705:cs,&pos=7&page=2&nbl=17&pgs=10&hwords=.

[3]http://eur-lex.europa.eu/Notice.do?val=5203%3Acs&lang=ro&list=5188%3Acs%2C5190%3Acs%2C5204%3Acs%2C5181%3Acs%2C5203%3Acs%2C5186%3Acs%2C5170%3Acs%2C5185%3Acs%2C5203%3Acs%2C5186%3Acs%2C5170%3Acs%2C5185%3cs%2C5183%3Acs%2C5180%3Acs%2C&pos=5&page=1&nbl=31&pgs=10&hword=.

The affirmation of the principle of the primacy of the European Union law, which makes the Constitutional law to be called upon to examine the relations between the European and the national rules, even the constitutional ones, corroborated with the understanding of Constitutional law as a set of rules concerning the organization and functioning of the power or the drafting of other rules, has facilitated the formulation of the opinion that the European Union law is linked to the legal branch of Constitutional law. This is all the more so given the evident similarity between the European and the national rules concerning the regulation of the organization and functioning of power[1].

3. THE RELATIONSHIP BETWEEN THE CONSTITUTION AND THE EUROPEAN LAW RULE

The question that arises is whether the principle of primacy also applies to constitutional rules, in other words, if the EU rules have not only a supra-legal, but also a supra-constitutional value, and the answer seems to be negative, justified by invoking either the national sovereignty, or the better protection that the national fundamental law offers as opposed to the European legislation[2].

On the other hand, we cannot fail to notice that when the constitutional judge found a contradiction between the text of the Constitution and an act of the Union, it was not the latter which was reformed in order to have consistency, but the Constitution was revised or, in some cases, it received an interpretation which removed any mismatch[3], which reveals a relationship between the European Union legislation and the legislation of the Member States similar to that existing in the federal states, between the federal and the federate legislation, as regards the distribution and observance of competences. Thus, when the draft of a European Constitution was promoted, the Spanish Constitutional Court decided, on December 13th 2004, with three separate opinions, that there is no incompatibility between the Spanish

[1] Francis Hamon and Michel Troper, *Droit constitutionnel*, ed. 31 (Paris : LGDJ, 2009), 315.
[2] This tendency to compare the degree of protection offered by the EU law and the one provided by the national law was stated in the judgment of the German Federal Constitutional Court of May 29th 1974, also called Solange I.
[3] See Mircea Criste, „Traité ou Constitution?", in, *Institutions Européennes*, serie EuPA, Blanc et al. (Miskolc: Ed. University Press, 2008), 51 et seq.

Constitution and Articles I-6, II-111 and II-112 of the Constitutional Treaty, and that Article 93 of the Spanish Constitution would allow the ratification of this treaty without a prior amendment of the Constitution. In order to reach this conclusion, the Spanish Court considered that the inclusion of the principle of the primacy of EU law in the Treaty complied with the limits laid down for its application by the European Constitutional Courts, was limited to the exercise of the competences reserved to the Union and did not contradict the principle of the supremacy of the Spanish Constitution: "Article 93 is undoubtedly a basic constitutional support for the integration of other legislations into our own, through the transfer of the exercise of competences resulting from the Constitution, legislations that are required to coexist with internal legislation and legislations that are of a regional origin. Metaphorically, it could be said that Article 93 operates as a door through which the Constitution itself allows the entry of other legislations into our constitutional system through the transfer of the exercise of competences. Consequently, Article 93 is given a substantive or material dimension which must not be ignored"[1].

Almost at the same time, on November 19th 2004, the French Constitutional Council pronounced its decision on the question of whether the authorization to ratify the Treaty on a European Constitution should be preceded by a revision of the Constitution. The French Constitutional Court has been called upon to rule on the compatibility of the Treaty with the French Constitution, mainly on the principle of the primacy of the EU law on national law, provided in Article I-6 of the Treaty, which would make the whole Constitution to be removed by Union law, whilst the Constitution would remain the fundamental law. However, the Constitutional Council did not see any contradiction between the provisions of the Constitution and the provisions of the Constitutional Treaty, concluding that "Article I-6 of the Treaty under the control of the Council does not imply a revision of the Constitution". In so doing, the French constitutional judge considered that it was the

[1] *Apud* Laurence Burgorgue-Larsen, La déclaration du 13 décembre 2004 (DTC nr 1/2004) : "Un Solange II à l'espagnole", *Cahiers du Conseil constitutionnel*, no. 18/2005, www.conseil-constitutionnel.fr/cahiers/ccc18/ etudes6.htm. This decision arises after the moment when, in 1992, the Spanish Constitutional Judge (Decision of July 1st 1992 of the Spanish Constitutional Court on the constitutionality of the Treaty on the European Union) has made a restrictive and literary interpretation of Article 93 of the Constitution.

constituent's own will to consecrate "the existence of a community legal order integrated with the national legal order and distinct from the international legal order".

Moreover, the Constitutional Council found arguments in the very text of the Treaty, in Article I-1, which states that the European Union only has the powers that have been conferred on it, and in Article I-5, which binds the Union to respect the national identity of the Member States, "inherent to their fundamental political and constitutional structures". However, the Constitutional Council found some inconsistencies between the Treaty and the French Constitution in other places. Thus, it is contrary to the Constitution the transfer towards the Union of new matters affecting the essential conditions for the exercise of national sovereignty, such as the transfer of powers to create an area of freedom, security and justice. The same effect is given by the modification by treaty of the manner of exercising some previously transferred competences, such as the change from unanimity to a qualified majority. Also, the attribution of a decision-making power to the European Parliament was considered contrary to the Constitution, because it is not part of the national institutional system and, thus, is not the emanation of national sovereignty. These considerations of the Constitutional Council have led to the constitutional review of March 1st 2005 to make the Constitution compatible with the Constitutional Treaty, which was however rejected by the referendum of May 19th 2005, thus opening the way for a crisis which was solved only two years later.

From these examples we can conclude that the position of the European rules is also a supra-constitutional one because it is not the EU institutions that have to observe that their acts are not contrary to the constitutions of the Member States, but that the latter are to be changed whenever there is contradictory. Indeed, in several cases, the Union's treaties have been qualified as constitutional from a material point of view[1].

Another question arises: what is the European Union? A number of qualifications have been advanced in the doctrine, seeing the Union as a federal state, confederation, international organization, supra-national structure, intergovernmental structure or as a public power in which the

[1] See Selejan-Guțan, *Drept constituțional și instituții politice,* 29.

sovereignty is exercised jointly by the Member States[1]. According to an opinion formulated in the specialized literature, the Union cannot be qualified as a federal state or as a confederation, remaining an international organization, even if it has other competences than the international organizations[2]. However, a firm answer in favour of the first variant of the question is difficult to accept, precisely because of this *sui-generis* organization. This is why a less categorical variant has been formulated, in the sense that "in the middle of the road between confederation and federation, the European Union is an original formula deriving from the Treaties of Maastrich (1992)"[3], presenting itself "as an atypical international organization, with strong supra-statal valences and manifest federalist tendencies, based on the integration of the Member States and not on the classic principle of international cooperation"[4]. According to the settled case law of the Luxembourg Court of Justice, the Union represents a community of law in which both the Member States and its institutions have to comply with **the Constitutional Charter, which is the Treaty** (emphasis added)[5]. Considering that, under the terms of *post-nationalism*, the notion of constitution is no longer linked to the existence of a state[6], the recognition of a unional constitutional law no longer appears to be unacceptable, be it concealed under the form of a multi-stratified constitutionalism (*multilevel constitutionalism*),

[1] Raluca Bercea, *Drept comunitar* (Bucharest: C.H. Beck, 2007), 27, Hamon and Troper, *Droit constitutionnel*, 80, Clive Archer, *The european Union* (New York: Routledge, 2008), 5, Ramona Delia Popescu, *Răspunderea Parlamentului în Dreptul constitutional* (Bucharest: C.H. Beck, 2011), 187.

[2] Hamon and Troper, *Droit constitutionnel*, 80.

[3] Dominique Chagnollaud, *Droit constitutionnel contemporain*, vol. 1 (Théorie générale. Les régimes étrangers), 4th edition (Paris : Dalloz, 2005), 127.

[4] Ioan Muraru and Simina Tănăsescu, *Drept constituţional şi instituţii politice*, vol. 1 (București: C. H. Beck, 2008), 12.

[5] Judgment of the ECJ of 23 April 1986. - Parti écologiste "Les Verts" vs. European Parliament, ECLI:EU:C:1986:166.

[6] Ingolf Pernice, *Fondements du droit constitutionnel européen* (Paris : A. Pedone, 2004), 7. In a contrary opinion, it is affirmed the necessity of the existence of a state in order to be in the presence of a legal system - Ștefan Deaconu, *Drept constituțional*, 2nd edition (Bucharest: C.H. Beck, 2013), 4.

constituted by the legal rules governing the exercise of power on several decision-making levels[1].

4. GLOBAL CONSTITUTIONAL ORDER

Professor Arnold distinguishes three levels of Constitutional law in Europe: the first, representing the constitutional order of each Member State of the Council of Europe (which also includes the Member States of the European Union), the second, constituted by the European Union's legal order, including the Charter of Fundamental Rights, and the third, represented by the European Convention on Human Rights[2]. These levels, although autonomous, are interconnected and even interactive[3].

All this doctrinal debate, as well as the belief that the adoption of a constitution is always linked to the existence of a certain state form, makes us reflect whether the European Union does not resemble more and more the functions of a state, partially replacing those of the Member States[4], constituting a compound state, in the form of a Union. Our conclusion also seems to be confirmed by the consecration of the *European* citizenship, if we consider that the whole doctrine agrees in qualifying citizenship as "the legal status resulting from **the affiliation of a natural person to a determined state**"[5] (emphasis added). This

[1] Muraru and Tănăsescu, *Drept constituţional şi instituţii politice*, vol. 1, 13. Professor Pernice qualifies the European constitutional law as a composite constitutional system (Verfassungsverbund) –Pernice, *Fondements du droit constitutionnel européen,* 1.

[2] Rainer Arnold, "European Constitutional Law: Its notion, scope and finalities", in *New Directions in Comparative Law*, ed. Antonina Bakardjieva Engelbrekt and Joakim Nergelius, (Northampton-Massachusetts: Edward Elgar, 2009), 99-107.

[3] Rainer Arnold and Manuel Strunz, "Judicial Dialogue in the Process of Europeanization: the Perspective of Constitutional Justice", in , *Europeanization and Judicial Culture in Contemporary Democracies,* ed. Manuel Guțan and Bianca Selejan Guțan (Bucharest: Hamangiu, 2014), 30.

[4] Pernice, *Fondements du droit constitutionnel européen,* 7.

[5] Tudor Drăganu, *Drept constituţional şi instituţii politice*, tratat elementar, vol. I (Bucharest: Lumina LEX, 1998), 132. In the same sense, Ion Deleanu, *Instituţii şi proceduri constituţionale – în dreptul român şi în dreptul constituţional (* Bucharest : C.H. Beck, 2006), 349, Dan Claudiu Dănişor, *Drept constituțional și instituții politice*, vol. I - Teoria generală (Bucharest: C.H. Beck, 2007), 189, Cristian Ionescu, *Tratat de drept constitutional contemporan*, ed. a 2-a (Bucharest : C.H. Beck, 2008), 656, Marius Bălan, in *Organizarea politico-etatică a României*, 4th edition, Genoveva Vrabie, Marius Bălan, (Iași : Institutul European, seria Drept public, 2004), 308, Deaconu, *Drept constituțional,* 118, Muraru and Tănăsescu, *Drept constituţional şi instituţii*

development[1] seems to be favoured by the process of Europeanization of the national law and the nationalization of the European law[2]. The characterization that the doctrine gives to the European Union, that of "community constituted by law"[3], sends us to the very definition of the state. We cannot but find that the Union has bodies of power, it has European citizens, it has its own currency, a hymn and a flag, it has a customs union, as well as a Supreme Court, which, although it is not at the top of a hierarchy of courts, imposes itself before any union or national authority through its decisions. Moreover, by way of the preliminary questions, its case law is binding on the national judge.

One cannot ignore the affirmation of a trend named *universal* or *cosmopolitan constitutionalism*[4], in contrast to the state constitutionalism, which does not necessarily link the constitutional authority to the expression of the will of a constitutive power, namely the popular will, but to the existence and affirmation of moral values which are universally valid and/or inherent to the human nature and the development of human personality. Universal constitutionalism is, in fact, the expression of an autonomous (constitutional) legal order which, in the case of the European Union, would encompass certain essential constitutional principles (human rights, the rule of law and democracy), a well-

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politice, vol. 1, 114, Selejan-Guțan, *Drept constituțional și instituții politice,* , 104. See also Mircea Criste, "Romanian Citizenship in the European Framework", in *The International Conference European Union's History, Culture And Citizenship*, 9th edition Pitesti, 13th – 14th May 2016 (Bucharest: C.H. Beck, 2016), https://poseidon01.ssrn.com/delivery.php?ID=957071013119005017025014096105122028102002091013060033119005100076089005027114117068038052119037116098008084085084010123123089018036047019065104096011014112067099118029026064116112002121012019024096095073106028105026083097109005115094010020093113103097&EXT=pdf

[1] For professor Deaconu, the European Union finds itself midway between a state and an international law association - Deaconu, *Drept constituțional,* 112.

[2] Idem, 114.

[3] Idem, 113. Attila Varga considers that "the cooperative, intergovernmental aspect has left the place for a quasi-hierarchical, supra-national organization similar to the one existing in federations" - Attila Varga, *Constituționalitatea procesului legislativ* (Bucharest: Hamangiu, 2007), 15.

[4] See Mattias Kumm, "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly so Called", *American Journal of Comparative Law* 54 (2006): 514 et seq., Matej Abbelj, "Questioning EU Constitutionalisms." *German Law Journal* 9(19) (2008): 15 et seq., Michael A. Wilkinson, "Political Constitutionalism and the European Union", *Modern Law Review* 76 (2013): 197 et seq.

articulated and transnational judicial system (the Court of Justice of the European Union and the national courts) to ensure the respect for these principles and the existence of a multilevel constitutionalism (at the union, as well as national level). A particularly important place is given by this trend to the constitutional courts, as well as to those in Strasbourg and Luxembourg[1]. Another trend that could constitute support for a European constitutionalism is that of the *democratic constitutionalism*[2]. It sees the constitution not as a negotiated document, in the contractual sense, between the political factors of a society, but as a result of a discussion held between all interested parties, including those who would affirm themselves later, and on all social issues, including those that might appear later on. From this perspective, the constitution no longer constitutes a final, static and generally unchanging point, but a path, a reality in constant change and evolution, so that the future generations will no longer be conditioned by the will of the previous generations.

5.THE RELATIONSHIP BETWEEN THE CONSTITUTION AND THE INTERNATIONAL LAW RULE

Also within the forms of expression of Constitutional law and also on a step immediately below the Constitution, but above the laws, we include the covenants and treaties regarding fundamental human rights, to which Romania is a party. This positioning within the forms of expression results from the provisions of Article 20 para.(2) of the Constitution, which stipulate that in case of inconsistencies between this category of international acts and the national laws, the international regulations shall prevail. However, this priority shall not intervene if

[1] See Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State", in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 305.

[2] See Vivian Hart, *Democratic Constitution Making*, United States Institute for Peace, 2003, http://www.usip.org, Jo Shaw, "Process, Responsibility and Inclusion in EU Constitutionalism", in *European Law Journal* 9 (2003): 45 et seq., James Tully "A New Kind of Europe? Democratic Integration in the European Union", in *Critical Review of International Social and Political Philosophy* 10 (2007): 71 et seq, Joel Colon-Rios, "The Three Waves of the Constitutionalism-Democracy Debate in the United States (And an Invitation to Return to the First)", in *Willamette Journal of International Law and Dispute Resolution* 18 (2011): 1 et seq.

national laws contain more favourable provisions or if, although national laws do not have such provisions or do not exist at all, the Constitution contains provisions which are more favourable than those contained in the international acts. This constitutional provision is also an argument in favour of the direct application of constitutional provisions, without legislative mediation.

The consecration through Article 20 of the primacy of international law leads us to the conclusion that the so-called conventional review is, in fact, a review of constitutionality[1]. If a law is adopted and it is contrary to an international act on fundamental human rights, to which Romania is a party, "the Constitutional Court shall have the right to declare it as unconstitutional on the grounds of the primacy in this matter of international law, as enshrined in Article 20 para.(2) of the Constitution"[2], i.e. it will verify the conformity of the law with the constitutional provisions, respectively those of Article 20[3].

International regulations are imposed indirectly only to the constitutional rules on the rights and freedoms of citizens, in that the latter must be *interpreted and applied* in accordance with the Universal Declaration of Human Rights, the pacts and other treaties to which Romania is party (Article 20, para.(1))[4]. However, the constitutional rules on citizens' rights and freedoms will not be fully replaced by international regulations in the field, even if they are more favourable, for two reasons:

[1] See Mircea Criste, "Le contrôle de conventionalité: l'ultime frontière", in *Curentul Juridic* Anul XIX, 1 (64) (2016), http://revcurentjur.ro/old/arhiva/attachments_201601/recjurid161_3F.pdf.

[2] Drăganu, *Drept constituţional şi instituţii politice,* 95.

[3] The abstention of constitutional judges to perform a review of the laws in relation to the provisions of an international act merely constituted "an invitation for the ordinary judges to do so. The conventional review exercised by all ordinary judges has thus become a substitute from which everyone can benefit from, replacing the interdiction to venture on the grounds of the review of constitutionality. The advantage for ordinary judges was all the more remarkable as the law could thus be controlled by reference to all treaties relating to the protection of human rights, giving individuals a comfortable way of circumventing the impossibility of invoking an exception of unconstitutionality"- Patrick Gaia, "Chestiunea prioritară de constituționalitate și controlul de convenționalitate", in *Excepția de neconstituționalitate în România și în Franța,* ed. Elena Simina Tănăsescu (Bucharest: Universul Juridic, 2013), 230.

[4] In this respect, also Selejan-Guțan, *Drept constituțional și instituții politice,* , 10.

1) From Article 20 of the Constitution, it results that it refers to the contradiction between the international regulations and the *national laws*, taken in their narrow sense, as distinguished from the Constitution (para.(2), final thesis);

2) According to Article 11 para.(3) of the Constitution, the international acts to which Romania is to become a party, without distinction, may not contain provisions contrary to the Constitution. If, however, the ratification of such an act is desired, then the Constitution must be revised in order to bring it into line with the international treaty.

CONCLUSION

Consequently, we consider that if the provisions of an international rule[1] in the matter of fundamental rights appear to be contrary to the Constitution of Romania, the ordinary judge will have to refer the matter to the Constitutional Court. The latter will either eliminate the contradictory claim by interpreting the constitutional text in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party, as did the Spanish Constitutional Court through its decision of December 13th 2004 on the ratification of the European Constitutional Treaty or, if such an interpretation is not possible, will block the application of the treaty. In the latter hypothesis, the application of the international rule will only be possible following a constitutional review eliminating the contradictory claim between itself and the Constitution.

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[1] We are not referring here to the rules of Union law, which have another regime given by the provisions of Article 148 of the Constitution and the case law of the Court of Justice of the European Union.

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THE UNILATERAL JURIDICAL ACT AND THE VICES OF CONSENT

Eugen CHELARU[1]

Abstract:

The new Civil Code entails a comprehensive settlement of the contract. At the same time, it entails a succinct regulation of unilateral juridical acts, within which one can distinguish the category of unilateral juridical acts that are sources of obligations. This regulation is to be completed in compliance with the legal provisions on contracts, unless the law provides otherwise.

Throughout our study we have attempted to identify the specific way in which consent is created at the conclusion of a unilateral juridical act, focusing on the issues of the vices of consent. So we have attempted to find out whether and to what extent the vices of consent subject to the Code - error, deceit, violence and lesion - are also applicable to unilateral juridical acts and, if so, what the remedies are.

Key words: *unilateral juridical act, consent, vices of consent, error, deceit, violence, lesion.*

INTRODUCTION

Although the term "juridical act" has been frequently employed by the legislator, the latter has not seen it fit to define it. This was no exception even when the legislator drafted the new Civil Code, which abounds in definitions, some of which would easily find their place in university lectures. What was defined was the contract, which is the juridical act most often resorted to in practice.

Based on the regulations that were consecrated to the contract, an integral theory of the civil juridical act was developed, and a definition was designed as well. Regarding the definition of the juridical act, there were considered the provisions of Art. 942 of the 1864 Civil Code, according to which "The contract represents the agreement between two or more persons to establish or extinguish a juridical relationship

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between themselves." This agreement involves an expression of consensus between the parties, which means that the will constitutes an essential element of the contract. Based on these findings, the doctrine made an effort to generalize and has developed several definitions designed to summarize the essential features of any juridical act, including the contract, among which we should mention here that according to which "the civil juridical act means a manifestation of will made with the intention to produce juridical effects, that is to create, modify or extinguish a concrete civil juridical relation."[1]

As all civil juridical acts are the result of expressions of will, this is also the first criterion that is employed for their classification.[2] Thus, if the juridical act arises from a single manifestation of will, i.e. it has one single author, it is unilateral, if it is the result of an agreement of will between two parties, it is a bilateral act or contract, and if it is the result of an agreement of will made between three or more parties, it is a multilateral act.

The existence of the unilateral juridical act has not been a subject of controversy, but it has not always been recognized the quality of source of obligations. Various unilateral juridical acts which are considered to be sources of obligations are called *unilateral commitments.*[3]

The importance of the unilateral civil juridical act increased after the entry into force of the new Civil Code, not only because, for the first time, it was devoted a specific regulation, through Art. 1324-1329, but also because some expressions of will whose juridical nature was controversial were classified as unilateral juridical acts. This is applicable to the offer to contract and to acceptance, the manner in which these were

[1] Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil (Romanian Civil Law. Introduction to Civil Law. Civil Law Subjects)*, XIth edition, revised and enlarged by M. Nicolae, P. Truşcă, Bucharest: Universul Juridic, 2007, 129.
[2] For a classification of civil juridical acts, please see O. Ungureanu, C. Munteanu, *Drept civil. Partea generală (Civil Law. The General Part)*, Bucharest: Universul Juridic, 2013, 171-188.
[3] Please see P. Vasilescu, in I. Renghini, Ş. Diaconescu, P. Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)*, Bucharest: Hamagiu, 2013, 445.

covered leading to the conclusion that the legislator included them in the category of unilateral juridical acts.[1]

According to those already outlined in the doctrine, Art. 1324 of the Civil Code stipulates that the juridical act which involves only the manifestation of its author's will is a unilateral act. Of the unilateral juridical acts that constitute sources of obligations, the Civil Code governs unilateral promise (Art. 1327) and the public promise of a reward (Art. 1328).[2]

In addition to the above-mentioned acts, the doctrine includes the following in the category of unilateral juridical acts: the testament, the acknowledgments of paternity, the act of inheritance option, the testimony, the renunciation of a right to ownership, resignation, holiday housing, dismissal, unilateral cancellations.[3]

Regarding the juridical status of the unilateral act, Art. 1325 of the Civil states that the legal provisions on contracts properly apply, unless the law provides otherwise. The statement should not be interpreted *tale quale* because, as we will demonstrate in the content of our study, the particularity of the unilateral juridical act to involve one will in its formation also influences the process of consent formation and the qualities that it must meet in order to be valid, particularly as regards the requirement not to be affected by any vice.

1. CONSENT

Along with the cause, consent is a part of the juridical will[4]. Consent is defined as *the background condition, essential and*

[1] Please see L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile (An Elementary Treaty of Civil Law. Obligations)*, Bucharest: Universul Juridic, 2012, 104-105 and 116.

[2] Even in the doctrine before the adoption of the new Civil Code it was highlighted that public promise of a reward is a unilateral juridical act, even if achieving the performance depends on hazard, because, as opposed to the game contract, there are no chances of mutual loss and gain. Please see M. Avram, „Natura juridică a promisiunii publice de recompensă (The Juridical Nature of the Public Promise of a Reward)", in *Dreptul* no 6/2001, 21.

[3] Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)*, 445.

[4] Please see E. Chelaru, *Teoria generală a dreptului civil, în reglementarea NCC (The General Theory of Civil Law in NCC Regulation)*, Bucharest: C.H. Beck, 2014, p. 110.

general of the civil juridical act, which is the externalization of the decision to conclude a certain juridical act.

Article 1179 of the Civil Code ranks consent among the essential conditions for the validity of the contract. According to Art. 1204 and Art. 1205 of the Civil Code, in order to be valid, consent must cumulatively fulfil five conditions:

- to come from a person with judgment;
- to be expressed with the intent to produce juridical effects (to be serious);
- to be externalized;
- not to be altered by any vice of consent (to be free);
- to be expressed knowingly.

All of the above are equally applicable to unilateral juridical acts. However, it should be noted that, in contractual matters, the legislator refers to the notion of *consent* in terms of agreement achieved between the two parties. Thus, Art. 1204 of the Civil Code, quoted above, uses the phrase "consent of the parties", suggested by the etymology of the term under analysis, which derives from the Latin *cum sentire.*

In the case of the unilateral juridical act one cannot talk about *parties*, so the notion of *consent* is provided with a restricted meaning, namely externalization of the author's will to conclude a juridical act. Moreover, in the doctrine it is shown that consent is will manifested in a juridical sense[1] and its external form measures the distance between the will as psychological expression and the juridically-expressed will.[2]

2. VICES OF CONSENT

From the way in which are regulated the conditions that must be met by consent in order to be validly expressed, it can be inferred that only the will that is free and is expressed knowingly gives rise to valid juridical commitments.

Only the consent that is expressed in the absence of any constraints that may cause a person to agree to the conclusion of a civil juridical act or to consent to a certain content of its provisions is free. The

[1] Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)* 479.

[2] M.A. Frison-Roche, „Remarques sur la distinction entre la volonté et le consentement en droit des contrats", in *RTDciv*. no 3/1995, 572.

existence of violence in any of the forms that the legislator intended to suppress shall affect the nature of consent.

By regulating the conscious nature of consent, the legislator intended to ensure that the author of any juridical commitment has an accurate representation of the context in which the juridical act is about to be concluded and of the meaning of its terms. This nature will be altered if the Party who agreed was in deceit on circumstances that were essential and decisive for the contract, if it was misled or if it consented to committing to certain obligations that were disproportionate from the point of view of value relative to those it receives as a counterpformance from a contractor who took advantage of its state of need, lack of experience or lack of knowledge. The first case is the consent vice of error, the second is the case of fraud and the third is the case of lesion.

There is a close interdependence between the two juridical characters that we mentioned above, because the consent that is not expressed knowingly is not free! Thus, only consent that is the result of deliberation is made knowingly and freely, so that the mention by the legislator of the conscious nature of consent seems to be unnecessary. The mentioning in the law of the conscious nature of consent, along with the characteristic of being free, is justified, nonetheless, for the cases where a person, although capable, is, even temporarily, in a state that makes it unable to realize the consequences of its act, which are covered by Art. 1205 Civil Code. It is true that, according to the law cited, in these situations annulment may be requested because of the lack of judgment, but it is undeniable that the consent expressed without judgment is not conscious as well.[1]

That is why we can say that by regulating the vices of consent the legislator established a protection system of the juridical will of that who is about to consent to the conclusion of a definite juridical act.

As demonstrated in juridical literature, because it relates only to the consent that could be formed in each individual case, this system is individualistic, which explains its mediocre social yield in relation to mainstream contemporary contracts, where the free and informed character is ensured through the legislation that protects consumers' rights.[2] Correct in itself, this statement does not decrease the importance

[1] Please see E. Chelaru, *Despre viciul de consimțământ al erorii (On the Consent Vice of Error),* Craiova
[2] Ph. Malaurie, L. Aynès, *Droit civil. Obligations,* 9th edition, Paris: Cujas, 1998, 238.

of regulating the vices of consent, but only underlines the need to draft new juridical instruments for the protection of the vulnerable Party from the respective category of contract.

The vices of consent that are governed by the current Civil Code are error, deceit, violence and lesion. Even if in the case of the contract as well each of these flaws affects only the consent of one party, therefore one single will, without being necessary for the other Party to be a victim, in the case of the unilateral juridical act there a number of features which can attract some changes of the conditions for the application of penalties provided by law or even make them incompatible with it.

In what follows we will see how things stand for each vice of consent.

3. ERROR

Error is the vice of consent which is a false representation of reality on the occasion of concluding a civil juridical act.

This vice of consent is spontaneous, with no contribution to its installation in the victim's mind neither from the other Party to the juridical act, nor from any other person, the result being a mismatch between the internal will and declared will.[1]

The provisions of Art. 1207-1213 of the Civil Code that govern error stipulate that, in order for it to be a vice of consent punishable by law, error must be essential, decisive, excusable and not assumed.

While in paragraph (4) of Art. 1207 of the Civil Code the legislator provides that the error that is aimed at the mere reasons of the contract is not essential, except where through the parties' will those reasons were considered crucial, in paragraph (2) it presents two cases where error is considered to be essential. It is essential the error that bears on the nature or object of the contract; aims at the identity of the performance object, or at the quality thereof or at other circumstances considered essential by the parties, without which the contract would not have been concluded; refers to the person or the quality of it, without which the contract would not have been concluded.

It follows from these legal provisions that essential error may assume one of the following forms: error on the nature or object of the

[1] Malaurie, Aynès, *Droit civil. Obligations*, 239.

juridical act (*error in negotio*); error on the identity of the performance object (*error in corpore*) or on some substantial qualities of it (*error in substantiam*) and error on the identity of the person or of a quality of it (*error in personam*).[1]

The victim of error on the nature or object of the juridical act believes he/she participates in the conclusion of a certain juridical act (or juridical operation), whilst the other considers that a juridical act of a different nature was concluded. We consider that, according to Art. 1225 of the Civil Code, the contract is "the juridical operation, such as the sale, lease, loan, and the like, agreed by the parties, as revealed by all rights and contractual obligations."

In the case of the unilateral juridical act, since there is not "other Party", we should relate exclusively to the author's will. Although it is more difficult to conceive, we do not exclude the applicability of the consent vice of error, in this form. For example, the author of the act wants to promise the establishment of a right of passage, according to Art. 619 of the Civil Code, but because of the inability of expression, the nature of the juridical act, as it results from its contents, is that of promise to establish an easement of passage. Of course, the difficulties of evidence may be so high as to deprive the author of the act of the possibility of obtaining juridical protection in this case, but they are not likely to make us totally exclude unilateral juridical acts from the scope of the error-vice of consent.

Nevertheless, there are also unilateral juridical acts, such as the promise of a public reward, the testament, the acknowledgment of paternity, the act of inheritance option, the testimony, the renouncing of a right to ownership, resignation, holiday housing, unilateral cancellation, where it is unthinkable to retain an error on the nature of the juridical act because this nature is clear from their very subject.

The same applies to the offer to contract and to the acceptance of the offer, but the reason is different. Thus, if, for any reason, the offer or the acceptance of the offer has not produced its effects, respectively the contract was not concluded, invoking error becomes unnecessary. If, on the contrary, the contract was concluded, the offer and the acceptance lose their individuality and the error can be invoked only to get it annulled.

[1] Please see Chelaru, *Despre viciul de consimțământ al erorii (On the Consent Vice of Error),* 119.

In the case of the contract, the error on the identity of the performance object (*error in corpore*) occurs when the performance refers to an asset, as external object of the contract, and the victim thinks he/she will receive or transmit a different asset than that foreseen in the contract. This fact follows from the provision of Art. 1225 paragraph (1) of the Civil Code, according to which "the object of obligation is the performance that engages the debtor." This form of error can also be encountered in the case of the unilateral juridical acts which are sources of obligations.

For example, the author of a unilateral promise to purchase may be in error on the identity of the object that would be subject to sale. However, in the case of the promise to buy an individual and definite asset referred to by Art. 1669 paragraph (4) of the Civil Code, it will be more difficult to prove the existence of error, precisely because of the circumstance that the identifiers of the asset on the point of being bought, if the owner decides to sell it, will be mentioned in the act. But we can imagine there are situations when this information is incomplete or incorrect.

The interest of invoking error in this case occurs when the promisee calls the conclusion of the contract, knowing that, in case of a refusal of the promissory, the former may request the court either the ruling of a judgment that acts as a contract under Art. 1669 Civil Code, or the payment of a certain amount of damages.

The error on certain substantial qualities of the object of performance (*error in substantiam*) usually concerns the substance which the asset that is the subject of performance is made of or its physico-chemical properties, but it can also refer to other qualities that the victim of error had in mind for the counterperformance due to the other Party to the contract.[1] Only the first form of this error may be encountered in the unilateral juridical act because in its case counterperformance is missing.

The error on the identity of the person (*error in personam*) can be found in the case of juridical acts that are sources of obligations. For example, it could be claimed in case of a promise of donation, knowing that the favourite area of this type of error is made up of juridical acts free of charge. Of course, the promise of donation is not a donation in itself, but, like any promise of a contract, it borrows from the features of

[1] Please see Chelaru, *Despre viciul de consimțământ al erorii (On the Consent Vice of Error)*

a promised contract. This also explains the fact that Art. 1014 paragraph (1) of the Civil Code subjects the promise of donation to the authentic form, under reserve of nullity.

It is true that, according to Art. 1014 paragraph (2) of the Civil Code, the promisee cannot obtain enforcement of a promise through a judgment which takes place of a donation contract, but he/she could claim payment of damages-interests equivalent to the costs incurred and the benefits granted to third Parties in consideration of the promise, so the interest of the claim subsists.

According to Art. 1207 paragraph (1) of the Civil Code, essential error can void the contract if the other Party knew or, where appropriate, should have known that the fact upon which the error bore was essential for its conclusion. In the case of the unilateral juridical act which is the source of obligations, the stated condition is met if its recipient knew or, where appropriate, should have known that the fact upon which the error bore was essential for its conclusion.

The error of law can also be invoked to obtain the annullment of a unilateral juridical act constituting a source of obligations if the juridical standard for determining its conclusion was inaccessible or unpredictable.[1]

Of course, in all cases where the author's consent to the conclusion of the unilateral juridical act was vitiated by error, the penalty applicable will be relative nullity. But can the application of this penalty be avoided by resorting to the mechanism of adapting the contract, governed by Art. 1213 of the Civil Code? In other words, can this mechanism be "adapted" in order to reach salvation of the unilateral juridical act?

From the outset it must be stated that, in our opinion, the problem could be raised only in the case of the promises to contract and only if we reached the conclusion that the text of Art. 1213 of the Civil Code, which explicitly stipulates that the procedure to adapt the contract may be resorted to by the other Party to the contract, respectively that Party

[1] For conditions to be met for the error of law to constitute a vice of consent, please see D. Cosma, *Teoria generală a actului juridic civil (The General Theory of the Civil Juridical Act)*, Bucharest: Scientific, 1969, 162-163; J. Kocsis, „Unele aspecte teoretice şi practice privind eroarea de drept (Some Theoretical and Practical Consideration of the Error of Law)", *Dreptul* 8 (1992): 39-42; Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)*, 498-499; O. Ungureanu, C. Munteanu, *Drept civil. Partea generală (Civil Law. The General Part),* Bucharest: Universul Juridic, 2013, 213-15.

which was not the victim of error, can be read as referring to the recipient of the promise.

In order to find the answer to this question it is necessary to sketch a brief overview of the manner in which the adaptation of the contract functions.

According to Art. 1213 of the Civil Code, the Party that seeks to avoid the annullment of the contract, other than the victim of error, declares himself/herself willing to perform or even performs the contract as it was understood by the Party entitled to annulability. In these cases, the contract is deemed to have been concluded as the latter Party understood it.

To this end, after being informed on how the Party entitled to annulability understood the contract and before he/she has obtained the annulment, the other Party shall, no later than three months from the date he/she was notified or from the date the summons was served, declare that he/she agrees with execution or execute the contract without delay, as understood by the Party in error. If the statement was made and communicated to the Party in error within the period prescribed by law or the contract was executed, the right to obtain annullment is extinguished and the notification by means of thich the victim of the error has informed the other Party about how he/she understood the contract is considered to be without effect.

As in the case of unilateral juridical acts the "other Party" is missing, we would be tempted to state that the use of the adaptive mechanism governed by the legal text quoted is excluded in its case. We believe that this is an insufficient argument, because, if that were the case, we would have to admit that nothing that the law governs in the matter of contract is applicable to unilateral juridical acts. However, as already stated, Art. 1325 of the Civil Code stipulates that the legal provisions on contracts properly apply to unilateral acts, unless the law provides otherwise. Since there is no legal provision prohibiting the adaptation of unilateral promises to contract, we dare to resist temptation and say that these too can come within the scope of the mechanism of adaptation.

Specifically, annulment of a promise to contract could be avoided if its Beneficiary declared that he/she agrees with the contract as it was understood by the author of the promise. With reference to the example of error on the nature of the juridical act that we provided, where the

author of the act wanted to promise the creation of a right of passage, according to Art. 619 of the Civil Code, but, due to the inability of expression, the nature of the juridical act resulting from its content is that of a promise to establish an easement of passage, the promisee could avoid annulment if he/she declares to agree with the conclusion of a contract to determine only the scope and the exercise of a right of passage.

4. DECEIT

According to Art. 1214 paragraph (1) of the Civil Code, "consent is vitiated by deceit when the error was a deception caused by the other Party or where the latter has fraudulently failed to inform the contractor on circumstances which he/she should have disclosed."

The expression that deceit is an error caused is well known. It reflects reality, so many of those mentioned above for error are applicable in the case of deceit as well. But deceit is not only a vice of consent, but also a civil offense so that it can be invoked not only for the annulment of unilateral juridical acts which constitute sources of obligations, but rather for any unilateral juridical acts.

However, is deceit by reluctance conceivable, as referred to in the second sentence of Art. 1214 paragraph (1) of the Civil Code, quoted above, in the case of unilateral juridical acts? We think the answer is positive, when it is about either a promise of donation, or about a legate, if deceit assumed the form of captation or suggestion.

A second question that may arise is whether deceit can come only from a third Party because, by definition, in the case of unilateral juridical acts there is only one party. We believe that, in the case of unilateral juridical acts, the proper application of Art. 1214 paragraph (1) of the Civil Code, referred to in Art. 1325 of the same Code, requires to accept the idea that deceit can come from the Beneficiary of the unilateral juridical act, which can be not only the Beneficiary of a promise to contract, but also that of a legacy or that of an acknowledgment of paternity.

5. VIOLENCE

Violence is the vice of consent that consists of the fear induced to a person by the use of violent means, physical or moral, a fear which determines him/her to close a juridical act that he/she would otherwise not have completed.

This definition is founded in Art. 1216 paragraph (1) of the Civil Code, according to which "The Party that has contracted subject to a well-founded fear that was induced, without right, by the other Party or by a third Party can request the annulment of the contract."

The victim of violence is aware that he/she must not conclude, alter or extinguish a juridical act, but cannot resist violence, so he/she prefers to do so in order to avoid the harm with which he/she is threatened, unlike the position of error and that of deceit, when the victim does not realize that he/she acts under their influence.[1]

The Civil Code distinguishes between *physical violence (vis)*, which is a threat with a harm that is aimed at the physical integrity or personal property of the person, and *moral violence (metus)*, when the respective threat concerns the person's honor, fairness or feelings. In both its forms, violence is both a vice of consent and a civil offense. Therefore, what has been shown in relation to deceit is also applicable to violence.

Thus, violence can be invoked in case of any unilateral juridical act and not only in the case of acts which constitute sources of obligations.

Meanwhile, violence is a vice of consent when it comes from the Beneficiary of the unilateral juridical act, if any, as well as from a third Party itself.

[1] Please see: Cosma, *Teoria generală a actului juridic civil (The General Theory of the Civil Juridical Act),* 172; H. Diaconescu, „Violenţa – viciu al voinţei juridice şi efectele ei în dreptul civil şi penal, cu privire specială la sancţiunea juridică a acesteia (Violence - Vice of Juridical Will and Its Effects on Civil and Criminal Law, with Special Regard to Its Juridical Sanction)", in *Dreptul* no 6/2003, 66.

6. LESION

Although in doctrine there is a controversy on the juridical nature of lesion[1], Art. 1222 paragraph (1) the Civil Code expressly qualifies it as a vice of consent.

Taking into account the new regulation, the doctrine stipulated that *lesion is that vice of consent which consists of the injury suffered by one Party to the contract (which is usually in a weaker position) and, under the law, may lead to legal sanctions available to the protected Party.*[2] We criticize this definition for omitting the essential information, i.e. the cause and timing of the injury. Thus, Art. 1221 paragraph (1) of the Civil Code stipulates that the damage is due to the value disparity between the performances of the two Parties, existing even when the contract was concluded.

The Code distinctly regulates the conditions that must be met in order to retain the existence of lesion, function of the victim being a major or a minor. The common element is the value disparity between the performance of the victim and the counterperformance the latter obtained, specifying that the child can invoke the excessive nature of the obligation it assumed, in relation to its patrimonial state, to the advantages it gets from the contract or to the entire set of circumstances.

It follows from here that only bilateral contracts with an onerous and commutative character are prone to lesion. In the case of unilateral juridical acts, even of those which constitute a source of obligations, because there is no counterperformance, lesion cannot be conceived.

CONCLUSIONS

The unilateral juridical act arises from the expression of will of a single party. This is the reason why the fulfilment of the conditions that consent must meet in order to be valid is analysed exclusively by reference to its author.

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[1] For presenting the opinions expressed, please see Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)* 518-520; Ilie, *Leziunea în reglementarea noului Cod civil (Lesion in the new Civil Code Regulation),* 113-114.

[2] Ilie, *Leziunea în reglementarea noului Cod civil (Lesion in the new Civil Code Regulation)*114.

The consequence is that lesion, for whose retaining the core thing is an imbalance between the performance to which one of the Parties obliged itself and the counter performance, is inapplicable in the case of unilateral juridical acts.

Error, deceit and violence are applicable to unilateral juridical acts, but not of a general nature and only following an appropriate interpretation of the provisions governing these vices of consent in the case of contracts.

Thus, as we have seen, in the case of error it is necessary to distinguish between unilateral juridical acts that are sources of obligations and those that do not have this effect. Even within the former category we must distinguish between the public promise of a reward, which is not susceptible to error, as well as juridical acts which are not sources of obligations.

Then, in the case of the promises to contract, the retaining of the vice of consent of error can only be done in relation to the contract promised, meaning that the fulfilment of the condition that the other Party knew or, where appropriate, should have known that the fact upon which the error bore was essential for the conclusion of act is analyzed in the person of the Beneficiary.

In a similar way, we must consider the attitude of the promisee to contract when discussing the use of the mechanism of adaptation of the juridical act, in order to avoid the annulment of the promise to contract.
As far as deceit and violence are concerned, the application to unilateral juridical acts is facilitated by the fact that they are not only vices of consent, but also civil offenses.

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ORIGINS AND DEVELOPMENT OF EUROPEAN COMMERCIAL LAW

Rafael Sánchez DOMINGO [1]

Abstract:

One can speak of commercial law in those societies where there are rules to regulate commercial activity. From the twelfth century onwards, through the practice of concrete exchanges, Europe began to speak of a "commercial law" separate from the law that regulated other types of relations. Trade fairs and markets are held by merchants from many countries, and attention is paid not only to sales but also to other aspects such as finance, shipping insurance or transport. Already in the Modern Era, the opening to oceanic trade and the development of the technique and the affirmation of the centralized and interventionist states, will produce great innovations. Due to the impulses of the European codification activity, in Spain the Commercial Code of 1885 was approved, of objective scope when delimiting the commercial matter.

Keywords: *commercial law, codification*

ORIGINS OF THE "IUS MERCATORUM"

In those societies where a specific set of rules whose purpose was to regulate commercial activity is practiced, it is possible to preach mercantile law, for this reason Galgano affirms that "Roman civilization, despite knowing a flourishing commercial traffic, did not have a commercial law"[2]. On the other hand, it is complex to specify the moment when the notion of credit appears, and it is normal to think that the moment when a society, more or less organized, becomes sufficiently economically complex, is when the need arises for some mechanisms that allow the exchange of goods. As T. Ascarelli states, "*in Roman law there is no thing such as commercial law, understood in the sense of a specific*

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[2] F. Galgano, *Historia del Derecho Mercanti*l (Barcelona, 1981), 31

branch of the legal system"[1]. But in Rome, as P. Ourliac and J. Malfosse affirm, there was an internal commercial law, in which the jurists, because of a class prejudice, were not interested at all, and they refer to the mercantile specialization of some institutions integrated in a special mercantile law, that is, as a separate branch immersed in Roman law[2]. It should be borne in mind that the primitive ius civile was not at all adverse with trade practices, and in time it had to be perfected because of Rome's important trade traffic, apart from the formulas introduced by praetors to settle disputes arising from commercial practice. And it was due to the commercial traffic that the ius gentium was adapted to the new institutions to better regulate the relations between the citizens[3]. The increase in relations between Romans and foreigners and even among the Romans themselves led to the enrichment of the legal system, especially in the part concerning obligations and contracts. Each class of population, with different characteristics from the rest, had its own political traditions and a system that regulated their unique relations, thus distinguishing a written right and a traditional or oral right. In each of the stages of formation, the domain that was achieved in the society born in Lazio with an important ethnocultural content, was interpreted by a concrete social class, starting from an intimate scale of values and that managed to create the proper right.

MEDIEVAL EXPANSION OF COMMERCIAL LAW

It will be from the twelfth century onwards that, within a feudal society, through the practice of specific exchanges, one can begin to speak of a "mercantile law" separated from the law that regulated other types of relations. It must be emphasized that *"economic categories alone are insufficient for a complete historical knowledge of commercial law, since when faced with an economy of change, they are unable to explain the absence of a law as well as its origin unrelated to the intensity of the exchange. The categories necessary for the historical knowledge of*

1Tullio Ascarelli, *Corso di Dirito Commerciale. Introduzione e Teoria dell´impresa* (Milán, 1962), 4; Cfr. Joaquín Garrigues, *Curso de Derecho Mercantil,* t. 1 (Madrid, 1936), 24.
2Cfr. Paul Ourliac y J. de Malfosse, *Histoire du Droit Privé*, vol. I - *Les Obligations* (París, 1969).
3Francesco Ferrara, *Gli imprenditore e la societâ* (Milán, 1962), 4.

commercial law are those of social history and those of political history.[1]" Gradually, there was a tendency towards uniformity and homogenization in relation to obligations and rights related to commercial law and this was due to several causes, such as the supranational condition of a large volume of business during that time.

It is at the moment of the rebirth of cities when trade expands and mercantile law develops, at the same time that the urban law evolves and thus the medieval mercantile law regulated other aspects appart from the simple sale of products or goods, but transport, finance and maritime insurance[2]. In Europe, fairs were held during specific periods, and cities and towns where there were permanent markets attended by merchants from numerous countries began to be marked on the Old Continent, and as H.J. Berman, "Often, transnational trade dominated the local market, providing an important model for commercial transactions in general.[3]"

For this reason, to the object of a broad historical knowledge of mercantile law, we must bear in mind the postulates of social history and political history, and it can be stated, as T. Ascarelli does, that *"a bourgeois and urban civilization is the one that develops a new spirit of enterprise and a new organization of business"*[4]. And it would be the new bourgeoisie that would lead to a new political and urban transformation, decisively influencing the law that regulated these relations, and due to the crisis of the feudal system, this stately economy made possible the adequate conditions to increase the commercial relations and the consolidation of a new social group, which soon acquired class consciousness and this helped him to become an influential class on political and commercial decisions.

However, this new class was aware that new economic values could create wealth and it was necessary to legally arrange the external relations of their class, which meant regulating their activities and responsibilities towards third parties, which would be the creditors, holders of credits related to the business and while protecting, under the principle of joint responsibility, the interest of the partners, the

1Tullio Ascarelli, "La funziones del diritto speciale e la transformazioni del diritto commerciale", *Revista del Diritto commerciale* (1934): 1.
2Harold J. Berman, *La formación de la tradición jurídica de Occidente* (México, 1996), 349.
3Berman, *La formación de la tradición jurídica de Occidente*, 358.
4Tullio Ascarellli, *Iniciación al estudio del Derecho Mercantil* (Barcelona, 1964), 31.

possibilities of business were extended. But this generated other legal disadvantages, as it was that the ius mercatorum demanded certain guarantees for the merchant who broke, and this involved a harsh response of a criminal nature, since in the end what must be repaired is a social damage. But on the good side, it should be remembered that *"in twentieth-century Europe, the international character of commercial law constituted an important protection against the obstacles placed by foreigners by local laws, as well as against other whims of the laws and customs of each place ... the shift to uniformity in this and other aspects was a gradual process"* [1].

After the prolonged period of instability in Europe, and due to the emergence of the cities, the beginning of a commercial and mercantile revival of international nature was observed in Western Europe. This was followed by the first papal appeal in 1095, made by Urban II in order to recover the holy places. The scenarios of the geographical areas in which these commercial activities are carried out, consolidating routes, initially short and with maritime traffic, characterized by simple commercial techniques are: the Atlantic façade of Europe: Ireland, southern England, Brittany and the coasts of north of Spain; The Baltic Sea and the Scandinavian peninsula and the Mediterranean, with the maritime republics: Venice, Pisa, Amalfi, Genoa[2].

It will be from the 13th century when real intervention in economic activity is developed, which implied the appearance of new rules in order to arrange and promote trade exchanges, to increase and protect trade from foreign competition, so there was an import promotion, with exports banned in order to promote domestic consumption, although the derogation, through the commercial license procedure, would serve to repeal this ban on several occasions. Subsequently, immersed in the Modern Age, the legal systems of the Middle Ages will gradually be eliminated, since these were characteristic of the plurality of legislative sources that emanated from a plurality of political powers, therefore corporations will lose the ability to dictate their own Legal or customary rules. The great events that coincide with the beginning of the Modern Age, such as the opening of ocean trade, the development of technology and the affirmation of centralized and interventionist states, will produce

1Berman, *La formación de la tradición jurídica de Occidente*, 358-359.

2Manuel Flores Díaz, *El Mar, fuente de Derecho en la España medieval. Expansión comercial y desarrollo legal. Siglos XI-XIII* (Madrid, 2000), 30-32.

great innovations[1]. This is the moment when the legal doctrine of commercial law appears with its representatives. Like Benvenuto Stracca, lawyer in the Italian city of Ancona, author of Tractatus of Mercatura siue Mercature, published in Venice in 1553; Sigismund Scaccia, lawyer in Genoa, author of the Tractatus of Commerciis et Cambio, published in 1618 or Casaregis, native of Genoa and author of the Legal Discursus of Commerce, printed in 1740[2].
It will be in France with the Ordinances of 1673 or Code Savary, where there is an evolution of the broader commercial law with respect to other European states, since it is the first systematic compilation of a special right of the merchants applicable to a national territory and Constitutes the immediate antecedent of the French Commercial Code of 1807, important legal source to be able to explain the evolution of the mercantile law until the present time in the countries of codified law. This Ordinance continues the medieval tradition with respect to the principles and professional characteristics that were applied to the merchants and traders, establishing a special regulation of the mercantile judges -consules- for the resolution of the differences between the artisans and merchants by the facts realized in the Exercise of their profession.

However, it also extends the application of commercial jurisdiction to persons who do not have the status of merchants when they carry out acts of commerce and it can be said that this Ordinance regulates the act submitted to the commercial jurisdiction, even when whoever did the deed was not a trader and this is called an "objective trade act". Gradually, the development of commercial law is extended to industrial activity. The objective act of trade arose for historical reasons.

THE CODIFICATION OF COMMERCIAL LAW IN SPAIN

With regard to the Castilian maritime trade and the Crown of Aragon, from the influence of a common maritime trade right to the Mediterranean.

Mercantile law in Spain before the Ordinance was divided in two areas, due to the mercantile interests of Spain: The Atlantic area and the

1Rogelio Pérez Bustamante, *Historia del Derecho español. Las fuentes del Derecho* (Madrid, 1994), 200.
2Bustamante, *Historia del Derecho español. Las fuentes del Derecho*, 201.

Mediterranian area, and thus it is described by Dionisio A. Perona Tomás: *"The Atlantic area represented the traditional markets of Castile both in northern Europe, in decline since the Reformation and the constant European wars, as the monopoly, theoretical more often than real, of American trade; The Mediterranean area symbolized the interests of the Crown of Aragon"*[1]. Each territory had its own regulations since the Middle Ages. In the Mediterranean it was organized by the Book of the Consulate[2] of the Sea and in the Modern Age, the legal regulation of all areas was structured in a system of ordinances, which were applied by a special jurisdiction[3]. We have already specified that in the Mediterranean, from the fourteenth century, there will be a regulation of activities centered on commercial practice, since the customs of the sea and the Ordinacions de Cors operated, which consisted of a common law to the consulates of the Crown of Aragon. But due to the variety of rules, a law was collected in a single book, called Llibre de Consolat de Mar. In relation to the commercial maritime law of the Atlantic zone, a customary law was applied there, as a result of the custom observed during Centuries ago. The base of this zone was the island of Olerón, in France, where an important collection was found, related to the juridical activity that the court of the island applied and that is known as Rôles d'Oleron, and it can be dated between the end of the twelfth century and the early thirteenth century.

Due to the important development of Castile expansion in the Cantabrian Sea, a factor linked to the progress of the wool trade, the Catholic Monarchs create in Burgos, head of Castile In 1494, the Consulate of Burgos, with a specific court to settle mercantile causes[4]. The ordinances of the Consulate of Burgos were approved in 1538 and those of the Consulate of Bilbao, constituted in 1511, were approved in 1570, although they were consolidated in the year 1737. New consulates

1Dionisio A. Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX* (Madrid, 2015), 9.

2José Antonio Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas* (Madrid, 2003), 349 y 652.

3Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 9. Enrique Gacto Fernández, „Historia de la jurisdicción mercantil en España", *Anales de la Universidad Hispalense* (1971).

4 Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas,* 347.

were founded: the one of Seville in 1639, the one of Madrid in 1632[1]. It will be under the reign of the monarch Carlos III when the free trade of the Indies will be allowed, consequently the Consulates of Corunna, Santander, Alicante, Málaga, etc. would be created in the year 1785 and the one of Palm in year 1800.

The Ordinances of the Consulate of Bilbao of 1737, approved by Felipe V were inspired by those of other Consulates, for example of Burgos and Seville, as they were influenced by the French Commercial Ordinance of 1673 and the Ordinance of Navy of 1681, which regulated the Maritime Courts as Well as the administration of justice of the Admiralty, which came to inspire the French Code of Commerce of 1807[2].

As Professor Escudero affirms, mercantile law had originally been the special right of merchants, that is, a trade or class right, and over time "an objective conception, which extended this order to the Acts of commerce, whatever the interveners[3], "and the so-called objective act of commerce, after the French Revolution, was assimilated to an egalitarian conception, where one might ask what is the characteristic of commercial law in relation to traditional civil law. It is true that the codes of commerce approved in Spain during the nineteenth century were when the development of modern enterprise had yet not occurred.

It was the Statute of Bayonne of 1808 which ordered the confection of a single Code of Commerce for Spain and the Indies. It was Sáinz de Andino who presented, after 164 meetings, a Project to the Minister of Finance in May 1829, to present it to the king. The project contained 887 articles, divided into seven books and subdivided into titles[4].

The Code of Commerce of Spain of 1829 is characterized by its subjective criterion, whereas the Code of Commerce of 1885 is of objective scope when delimiting the commercial matter. The latter

1Rogelio Pérez-Bustamante, *Historia del Derecho Español. Las fuentes del Derecho* (Madrid, 1994), 204-205.

2Pérez-Bustamante, *Historia del Derecho Español. Las fuentes del Derecho*, 205.

3Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas*, 897.

4Jesús Rubio Garcia-Mina, *Sáinz de Andino y la Codificación mercantil* (Madrid, 1950), 112. Cit. Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 31. Este autor hace un magnífico estudio del primer Código de Comercio en España en 24-77.

establishes a generic definition to define *"acts of commerce, should be traders or not who execute them, and are or are not specified in the Code"*, so it is noted that it departs from giving a doctrinal definition as well as an enumeration of acts of commerce, which on the other hand was the system chosen by the French Commercial Code of 1807. We know that the Commercial law was channeled through an *"objective conception that extended that order to acts of commerce, whatever the Interveners*[1]*"* and due to the new philosophical currents emanating from the French Revolution, it is possible to be questioned by the characteristics of the mercantile law with respect to the civil right.

The Codes of commerce of Spain date from 1829 and 1885. The one of 1829 is of the last stage of the reign of Carlos V when "the preoccupation for the commercial codification persists in these years"[2]. It was influenced by the French Code and "undermined the conception of commercial law as a system of its professional trader sector, to shape this new legal system of trade acts"[3]. The Sáinz de Andino project consisted of 887 articles, divided into seven books, subdivided into titles[4].

It was the currents of economic liberalism that emerged from the Revolution of the Glorious that made possible a new Code of commerce in Spain, that of 1885 that "was a necessary instrument for the development of diverse economic activities in an expanding market, as a consequence of the growth and diversification of these activities "[5]. It takes the structure of the code of 1829 and the book V referring to the mercantile jurisdiction disappears, since it had already been eliminated. For some authors, "it was born out of step with regard to the needs of the

1Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas*, 897.

2 Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 26. Este autor nos presenta en una magnífica monografía todo el proceso de la Codificación mercantil de la España del siglo XIX., por lo que se refier al Código de 1829, ver 25-77.

3Escudero, *Curso de Historia del Derecho. Fuentes e Instituciones Político-Administrativas*, 899.

4Rubio Garcia-Mina, *Sáinz de Andino y la Codificación mercantil*, 112. Cit. Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 31.

5Fernando Sánchez Calero, *Instituciones de Derecho Mercantil* (Madrid, 1994), 10. Cit. Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 149.

traffic of the time and of the order that served as a model"[1] while other authors see the influence of the French Code of Commerce, "not directly, as much as through the Code of Commerce of 1829, strongly inspired in it"[2].

CONCLUSIONS

From the above, it can be deduced that commercial law always had an international projection, a characteristic inherited from its beginnings, both in the Atlantic area and in the Mediterranean area, in which the Crowns of Aragon and Castile participated, and was characterized by a vocation of homogenization. We subscribe to what Farrando Miguel says: *"Today we are in an era where the unifying efforts have returned to new heights, both due to the globalization of the economy driven by the global expansion of the market economy system, multiplying technical advances that shorten distances and reduce communication and transportation difficulties"*[3]. This author puts as an example of supranational integration the one developed by the European Union, that has put into practice a unifying task in various subjects, such as finance, corporate law, insurance market issues, stock market, etc., [4].

Thus the harmonizing task of corporate law is recorded, from which it is stated that "Community harmonization is not an end in itself, but an element of a legislative policy of the Community"[5] This standardization task is achieved through the Treaties establishing the European Communities and the mechanisms which determine other

1Evelio Verdera y Tuelss, „Código de Comercio y Letra de Cambio", *Centenario del Código de Comercio* 1, 261-262. Cit. Perona Tomás, *Notas sobre el proceso de la codificación mercantil en la España del siglo XIX*, 152.

2Justino Duque Domínguez, "El Código de Comercio de 1885 en el marco de la Codificación mercantil de la época", *Centenario de Código de Comercio* 1, 94. Cit. Dionisio A. Perona Tomás, "La influencia francesa en la codificación mercantil española del siglo XIX", *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extanjeras, y la francesa en particular* (Aniceto Masferrer (de.) (2014): 409.

3I. Farrando Miguel, "El Derecho mercantil y la armonización y unificación comunitaria", *Revista de Derecho Privado* 6 (2000): 59.

4Farrando Miguel, "El Derecho mercantil y la armonización y unificación comunitaria", 60.

5Farrando Miguel, "El Derecho mercantil y la armonización y unificación comunitaria", 60

general legislative instruments, such as the Community regulations. This impulse of harmonization of European private law is developed by countries such as Germany, which has expanded a set of rules[1].

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CHILDREN'S RIGHTS IN ROMANIA TEN YEARS AFTER ACCESSION TO EUROPEAN UNION – OLD AND NEW ISSUES

Mihaela STĂNCIULESCU [1]

Abstract:

To Romania, specifically and differently from other countries, children's situation represented a political criterion for assessing EU membership negotiations. The European integration process still involves the need of understanding what the national and international communities expect from the public policies and from the social stakeholders' attitudes regarding the children's rights protection.

Implementation of the UN Convention regarding the Children's Rights is a legal and moral process. It is legal because our country has ratified this international document since 1990, so that, according to the Constitution, the UN Convention is preeminent to any other national regulation in the domain. It is also moral, because it refers to an important part of the population in the country, to children and teenagers aged 0 to 17, and the Convention represents a means to permanent improvement of the children's condition; understanding the attitudes which are comprised in this international document is a present task with a large projection upon the future vitality and strength of our people. ***ANY CHILD IS AN INDIVIDUAL ENDOWED WITH ALL THE HUMAN RIGHTS SINCE BIRTH.*** *What have we done for the quality of children's life in Romania since 2007, what do we have to do next?*

Key words: *children`s rights, Constitution of Romania, UN Convention for Children`s Rights, Social politics, law, quality of children`s life*

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I. THE PEOPLE'S LAWYER IS THE CONSTITUTIONAL NAME WITH WHICH THE INSTITUTION OF OMBUDSMAN HAS BEEN ORGANIZED, FUNCTIONS AND IS KNOWN IN ROMANIA.

This institution with Swedish origin has been spread with different names in Europe: parliamentary commissary, the people's defender (Sweden), public defender, public mediator, "provedor de justicia" (Portugal), the republic mediator (France), the people's lawyer, parliamentary prosecutor. In fact, Ombudsman is an independent person who is usually nominated by the Parliament in order to supervise the administration in relation to the citizen. Ombudsman tries to solve the conflicts between citizen and public administration which are generated especially by the bureaucracy, as this is still a serious illness of the administration[1].

Due to the limitations and the challenges inherent to the Parliament's control over the lawfulness of the administrative acts, but also due to the need of deeper and better involvement of the prestige of the representative body at national level to ensuring legality in the state administration, the institution of ombudsman has been introduced in some countries with parliamentary regime[2].

A special chapter in the Constitution of Romania is dedicated to the People's Lawyer and the articles 58-60 regulate the constitutional aspects regarding nomination, role, exerting the attributions and the report in front of the Parliament. The Law no. 35/1997 regarding the organization and functioning of the People's Lawyer, republished with the subsequent modifications and additions, is the normative act which the basis for its activity and competences. The citizens who consider their rights and legitimate interests to be endangered by the actions or the acts of administrative authorities could address petitions to the people's lawyer. The activity of the institution of People's Lawyer was two decades in March 2017.

Considering the legal stipulations, the institution has been organized and

[1]Ioan Muraru, *Avocatul Poporului – instituție de tip ombudsman*, (Bucharest: All Beck, 2014), 1

[2]Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, vol. I, (Bucharest: Lumina Lex, 1998), 344-345

it covers a large series of issues which occur with the relation between citizen and state authorities, so they are now grouped in four departments which include the whole set of human rights in the Constitution of Romania, in the Universal Declaration of Human Rights and in other conventions and treaties which Romania participated in. Thus, nowadays, a department deals with the human rights, equality of chances for men and women, religious cults and ethnic minorities; another department deals with army, police, justice and prisons; another one, with issues related to property, labour, social protection, taxes and duties, while the last one deals with preventing torture and other cruel, inhuman or degrading punishments or treatments in the prisons. At the regional level there are 15 bureaus. In 2000, for example, the People's Lawyer worked only at the central level and it was organized as follows: the department for the issues of central and local public administration, for urbanism and environment protection; another for social protection of labour and property; another department for issues regarding public security, military and special services, prisons, as well as protection of minorities, cults and foreigners. One of the departments dealt with issues regarding the protection of children, women and family, of education and culture, as well as of the institutions of education of juvenile delinquents. Currently, this department deals with the children's rights, the rights of the family, youngsters, pensioners and disabled people.

II. TEN YEARS AFTER ROMANIA BECAME MEMBER OF THE EUROPEAN UNION AND 27 YEARS AFTER THE RATIFICATION OF UN CONVENTION REGARDING THE CHILDREN'S RIGHTS (LAW NO. 18/SEPTEMBER 27, 1990, REPUBLISHED IN 2001) AND AFTER THE FIRST WORLD SUMMIT IN NEW YORK DEDICATED TO CHILDREN, THE ISSUE OF PROTECTING THE CHILDREN'S RIGHTS IN ROMANIA IS STILL A SUBJECT IN PUBLIC DEBATE.

The rights established by Convention comprise principles and universal rules regarding the children's status, according to the international treaty regarding the human rights that include civil and political rights, as well as economic, social and cultural rights. In 2012, the European Chart of Fundamental Rights of European Union asserts once again the rights that emerge from the constitutional traditions and

from the international commitments common for its members, as the children's rights are regulated in the articles 24 and 32. By ratifying the UN Convention regarding the children's rights, Romania engaged to respect these rights and to promote social policies favorable to children. The United Nations Committee for Children's Rights is empowered to monitor the way the part states implement the Convention, they may also formulate suggestions or recommendations to the part states, but they are not empowered to receive and examine individual complaints regarding the violation of children's rights.

The Constitution of Romania establishes the protection of children and youngsters in article 49, and, among the national laws that regulate these issues, we can identify the republished Law no.272/2004 regarding the protection and promotion of children's rights, the republished Law no.273/2004 regarding the adoption procedure, the republished Law no.61/1993 regarding the child benefit paid by the state, the republished Law no.277/2010 regarding the family support benefit, the republished Law no.292/2011 of social assistance, the Labor Code– the republished Law no. 53/2003, (art.13).

The first ex officio intimations, at the beginning of the activity of the People's Lawyer institution (March 1997), referred to the protection of children's rights, and they represented the basis for the special Report regarding the protection of children's rights, the first document in this category that was developed by the People's Lawyer in 2000.

In Romanian society, the needs, interests and rights of children and youngsters have been continuously talked about. *Every authority have to prove determination in recognizing and assuming all the responsibilities they have related to children, and the policy of promotion and activism for children support must become the responsibility and the aim of each citizen.*

We should keep in mind that the situation of children was a political criterion of evaluation of Romania during the process of negotiation for EU membership, in a distinct and specific way compared to other candidate countries. If we analyze thoroughly the file for European integration, we shall understand better which the expectations of European community from Romanians were. Besides the international constraints before Romania became member of EU, our country had its own internal, strictly national reasons for releasing again the discussion about children issues within a strategy which is to contain the diversity of

the aspects which are relevant to children and, thus, to the continuity, vigor and development of our nation.

The data offered by the National Institute for Statistics show that, in Romania, due to a decreasing birth rate, the percent of children compared to the whole population decreased from 28.6%, in 1990 to 18.9%, in 2008 and to 18.2% in 2012. While over 5 million children aged 0 to 17 (24% of the population in the country) lived in Romania 16 years ago (in 2001) and the estimations showed that the population aged 0 to 17 would represent only 18% of the whole population in 2010, the number of people aged 0 to 18 living in Romania was 3,976 million in 2016.

The sufficiency of these statistics proves there is a need for a national strategy referring to all the children and all the problems it has been talked about since 2001, as this is an imperative document with the role of stimulating the implementation of the UN Convention regarding the children's rights. The implementation of the UN Convention regarding the children's rights in Romania is a legal and moral process. It is legal because our country has ratified this international document since 1990, so that, according to the Constitution of Romania, the UN Convention is preeminent to any other national regulation in the domain. It is moral because it refers to almost a quarter of the population in the country, as this is the present percent of the children and youngsters aged 0 to 17. The Convention represents a means to gradual improvement of the children's condition, and understanding the attitudes which are comprised in this international document is a present task with a large projection upon the future vitality and strength of our people. **Any child is an individual endowed with all the human rights since birth.** According to the Convention, children need special care, protection suitable for its needs and, moreover, it requires that the desirable measures for accomplishing this projection to refer to all children, disregarding their race, gender, religion or nationality.

The dynamics of legislation in Romania and the need for a coherent and effective strategy in the domain of social protection of children, of protection and ensuring children fundamental rights necessarily require to put the children in the center of all multiple and urgent efforts to raise the awareness of this issue, both with the stakeholders, the adults working with children and with the children and youngsters themselves. Only this way the perspective of children related

issues could be developed so that **children's rights become a real national priority**.

The implementation and observance of fundamental principles formulated in the UN Convention regarding the children's rights are still very important and actual, and also the national laws regarding the protection and promotion of children's rights (e.g. the republished Law no. 272/2004 regarding the protection and promotion of children's rights) include them, i.e.:

- respecting the priority of the interest;
- asserting the right to grow up in a family;
- asserting the principle of children non-discrimination;
- considering the children's opinions referring to the issues related to him/her;
- priority of children's security and the possibility of taking some urgent actions to accomplish this request;
- necessity of the existence of a perspective and a long-term planning regarding the children's development;
- ensuring the participation of specialists in the activities of children's protection;
- ensuring the continuity of relationships between children and their biological family;
- preference for largely supporting the families in difficulty before or instead taking the child away from the family.

The set of these principles expresses a fundamental and welcomed concern of the state for its own future.

III. WHEN THE CHILDREN'S RIGHTS ARE VIOLATED BY THE ACTIVITY OR INACTIVITY OF THE PUBLIC AUTHORITIES, THE PEOPLE'S LAWYER INTERVENES AND RECOMMENDS THE RESPECT OF THE RIGHTS MOST OF THE TIMES, BUT ALSO THE RETURN TO THE PREVIOUS SITUATION OR THE DAMAGE REPAIR.

The first distinct report referring to the Convention developed by the People's Lawyer was a part of the necessary steps towards incorporating the Convention. The chapter of this document regarding the access of children to the People's Lawyer (1997-2000) describes that "most of the complaints which refer to the children's rights are addressed

by parents or close relatives. **There have been registered only three complaints signed by children aged under 14 so far:** a 13 year old girl considers that her rights are violated as a result of her parents' divorce, another 8 year old boy asks for support because his father left him, his mother has no incomes, and the diligences to the authorities had no result. The third petition is signed by six brothers (the youngest is 7) who feel threatened by a possible decision to send them to residential institutions, formulated by the Commission for Children's Rights protection Gorj[1]".

At that time, the People's Lawyer addressed to several public authorities for respecting the children's rights and the goals were: to ask for information referring to social investigations, evaluations, copies of some administrative documents, points of view regarding some real situations; to inform the special commissions of the Chamber of Deputies and of the Senate, the chairmen of some county councils; but also to formulate several recommendations regarding the use of the right – protection measures, the right to be provided for, to social benefit, to social house, to reassess the situation, to clarify the legal status, to clarify the civil status, the right to academic education, to child benefit from the state, to free medication, to social scholarships, to a childcare leave up to 2 years, etc.

"Some recommendations addressed to the authorities of central public administration referred to taking measures for eliminating some abusive practices in the beginning of the procedures for legally declaring the abandon or for the preparation of the administrative documents necessary to the admission of international adoption, proposals for ratification of some normative acts, etc.[2]"

Law no. 272/2004 regarding the protection and promotion of children's rights designed a new legal framework for respecting, promoting and securing the children's rights. The implementation of these laws empowered a new European modern system of protection of children's rights matching with the international treaties in which Romania participates, with the republished Convention in November 20, 1989 regarding the children's rights and the Convention for Defending

[1] *Special Report regarding the children's rights protection* (October 1998-August 2000), 8, www.avpoporului.ro
[2] Idem[3], 9

the Human Rights and the Fundamental Liberties. In this context, the institution of People's Lawyer had the objective of securing the children's right to have his personality and individuality respected, to benefit from the best health condition he can reach, to get an education that allows his abilities and personality to be developed in a nondiscriminatory context, to be protected against any form of violence, abuse, bad treatment or careless, to be protected against any form of exploitation.

In 2007, when our country became a member of the EU, the Report of activity of People's Lawyer contains a special chapter dedicated to children, youngsters and family where it is pointed out that the institution of People's Lawyer respected the Decision no.779/2007/CE of the European Parliament and the decision of the Council in June 20, 2007 that establish a special program of prevention and control of violence against children, youngsters and women, as well as of protection of the victims and groups at risk (Daphne III program), as a part of the "Fundamental Rights and Justice" general Program, during 2007-2013". Important international personalities manifested interest in the strategy that the institution promoted for defending the children's, youngsters' and family's rights in Romania. Thus, during the visit to the People's Lawyer, the European Commissary for human rights, Thomas Hammarberg, appreciated the systemic approach of the issues regarding the children, youngsters and family within the frame of a unique specialized department in the institution, considering it to be effective and original in the institutional system in Europe. Paulo Sergio Pinheiro, the independent expert of the General Secretary of the United Nations for studying the violence against children, also documented regarding the form of organizing this department within the institution, as well as regarding the procedures of solving the petitions addressed by children and youngsters and the relations of collaboration with the state authorities, during his visit to the institution of People's Lawyer.

17 years after publishing the first special report regarding the children's rights in Romania (2000), the People's Lawyer still continues to be addressed to referring to various registered disturbances regarding the violation of children's, youngsters' and family's rights by the state institutions.

"Certain parents addressed to the institution of People's Lawyer regarding the assessment of the situation of a child who is entrusted to

the other parent by a legal decision. The discontented parent complained about the superficial way that the General Directorate for Social Assistance and Child Protection had analyzed the situation of the child, without taking into account the superior interest of the child. As a result of the actions developed by the institution of People's Lawyer, the General Directorates for Social Assistance and Child Protection that have been addressed to undertook new evaluations of the children's situations, deciding either a permanent monitoring of the academic situation, or drawing the attention of the parent whom the child is entrusted to towards the negative aspects observed in minor's growing up and education (...) There have also been registered situations when parents complained that their children with serious health problems are not provided with free medication which they should benefit, according to the law, or their children are not given powdered milk, according to the Law no.321/2001 regarding freely providing powdered milk for children aged 0 to 12 month old. The registered aspects have been analyzed in the context of an alleged violation of the right regarding protection of children and youngsters and the right of health protection. As a result of the actions taken by the institution of People's Lawyer, the petitioners got the medication or the required products for free, according to the medical prescriptions. There have also been registered violations of the children's right to education. For example, in some Special Education Centers the expulsions have been too easily applied, without observing the stipulations in the Regulations for Organization and functioning of the pre-university education institutions and without analyzing the possible negative effects of these expulsions on the institutionalized youngsters in the Services of Social and Professional Integration of the Young People over 18 within the General Directorates of Social Assistance and Child Protection (D.G.A.S.P.C). As a result of the actions taken by the institution of People's Lawyer, some young people got the right to be enrolled again in the education institutions and preserved their rights to benefit from the social protection measures stipulated in the Law no. 272/2004. Another kind of problems referred to not paying the survivor pension to some children after one of their parents died, although they were still students. The intervention of the People's Lawyer to the Local Pensions Agencies triggered the issuing of decisions of granting the legal rights for survivor pensions. The People's Lawyer also faced situations when certain town halls inexcusably refused to grant the rights stipulated

by the Emergency Ordinance of the Government no.148/2005 regarding support for family to raising children. As a result of the actions taken by the institution of People's Lawyer, the institutions of local public administration that were addressed to solved the petitions and granted the financial support for raising children[1]".

"The debates regarding the necessity of establishing some specialized courts to judge the trials involving minors still continued in 2007. Although specialized sections have been established at the level of the Courts of Appeal, at the level of inferior courts there are no specialized judges to judge the trials involving minors. The necessity for information exchange between the courts, of achieving a unitary judicial practice and a partnership of the institutions was highlighted during the debates. The proposals to set up specialized courts are still blocked by the financial problems and the Court for Minors and Family in Brasov remains the only court in the country that is specialized for the trials involving minors[2]".

In 2008, on the occasion of the actions taken, the People's Lawyer identified a series of aspects regarding, for example, the financial problems which many Romanian families with children face, so this fact leads to parents' impossibility of raising their children, for example, and, under these circumstances, to abandoning children. The financial shortages and poverty still exist in the Romanian society in 2017 and, under these circumstances, the opinions submitted by the People's Lawyer almost ten years ago are still valid, i.e. "we should identify a solution that would make the stipulations of the article 5 in the Law no. 272/2004 regarding the protection and promotion of children's rights be more effective, and according to them the responsibility for raising a child and ensuring the child's development belongs mainly to parents who have the obligation to exert their rights and to respect their obligations to the child, taking into account firstly his superior interest. Secondly, the responsibility belongs to the local community that the child and his family belong to. The authorities of local public administration have the duty to support parents or, in case, another child's legal representative in fulfilling the obligations they have related to the child,

[1] *2007 Report regarding the activity of the People's Lawyer*, 25-26, www.avpoporului.ro
[2] Idem, 27

for this purpose developing and providing diversified, accessible and quality facilities, according to the child's needs. The intervention of the state is complementary. The state provides children's protection and ensures the observance of all their rights by the specific activity undertaken by the state institutions and the public authorities with attributions in this domain. We could take into account the stipulations of the article 119 in the Law no. 272/2004 in identifying a solution, and according to this law, each child who is subjected to the placement is given a monthly benefit for placement of 90 lei, which is modified by a Government Decision. The child who has a legal tutor is also provided this benefit[1]. The benefit is paid to the person or to the family representative who fostered the child or to the tutor. The placement benefit is supported by the state budget through the Ministry of Labor, Social Solidarity and Family. In this context, a normal question which the competent authorities could answer may be asked, i.e. **why providing a benefit is possible only if the child is subjected to placement and it is not possible in the situation when a child is raised in his biological family?** The answer, that is going to be formulated, could contain also the solution to the problem in such a way that the stipulations in the article 5 in the Law no. 272/2004 regarding the protection and promotion of children's rights are highlighted"[2].

For ten years, since Romania became an EU member, the difficult situations which affect the childhood of some Romanian children have continued and have become more and more complex. For example, in the 2011 Report of activity, the People's Lawyer drew attention to the issue of the children without identity, expressing the concern for the percent of the unregistered births which affected especially the Romany children, homeless children, newborns abandoned in hospitals and babies born at

[1] In th republished text of the Law no. 272/2004 the stipulation is regulated in the art.128 paragraphs (1) and (2) as it follows : (1) Each child who is subjected to the placement to a family, person, foster carer, in a residential type service of a private accredited organization or a child who has a legal tutor is provided a monthly placement benefit, according to the law, related to the social indicator of reference, which represent 1.20 ISR; (2)The benefit stipulated at the paragraph (1) is paid to the person, foster carer, representative of the family ,or of the private accredited organization that foster the child in placement or to the tutor and is meant to ensure the rights stipulated at the art. 129 paragraph (1).

[2] *2008 Report regarding the activity of the People's Lawyer*, 45-46, www. avpoporului.ro

home or in other backgrounds. As it was observed that the number of children without identity acts has increased lately, the People's Lawyer still manifests concern especially for the fact that, although the laws stipulate the children should be registered in maximum 30 days since their abandon was observed, a very huge number of abandoned children leave hospitals without a birth certificate. The People's Lawyer shows concern also for the extremely long procedure of late registration of birth, especially with the children born at home or when parents themselves do not have a birth certificate[1]". The republished Law no. 272/2004 did not present modifications in this respect, and the republished Law no. 119/1996 regarding the civil status acts does not have specific regulations for these situations.

IV. WE CAN ASK THE QUESTION WHETHER, AFTER A 10 YEAR PERIOD SINCE ROMANIA BECAME A EU MEMBER AND AFTER THE 27 YEAR PERIOD SINCE THE CONVENTION REGARDING CHILDREN'S RIGHT WAS IMPLEMENTED IN ROMANIA, THE ROMANIAN LAWS MATCH THE STIPULATIONS OF THE CONVENTION AND THE COMMUNITY AQUIS IN THE CHILDREN'S RIGHTS DOMAIN. HAS THE SITUATION OF CHILDREN AND YOUNGSTERS BECOME A PRIORITY IN POLITICS? WHICH ARE THE OLD AND NEW PROBLEMS? IS THE ROMANIAN CHILDREN'S LIFE BETTER?

Unemployment, the increasing differences between people, the economic regression, the inflation, the housing issue, criminality, drug abuse, poverty, difficulties in the social integration and professional insertion of young people, the constant decrease of the financial support for the families with many children contribute to the constant deterioration of the standard of living, especially for the families with more than two children, but also to the serious decrease of birth rate.

The violation of children's privacy, especially with the children who trespass the law; the access of children to adequate information; the fact that not all the children have equal access to information and to mass media, especially the children who live in poverty and the marginalized

[1] *2011 Report regarding the activity of the People's Lawyer*, 40, www. avpoporului.ro

children; the fact that the internet, radio and television via satellite providers operates according to some minimal rules of children protection against information or materials inappropriate to them; torture and other cruel, inhuman or degrading punishments have been and still represent a set of issues related to the children's right to protection.

The difficulties which continue to challenge the local authorities because of a lack of information and real devices for monitoring in the domain of preventing child abandon cannot be ignored. There are frequent situations in the recent years which involve Romanian children without an adult or separated from the families who drew attention of authorities in other countries, some of them being abused and neglected even when they are with their parents or with their relatives, as well as the increasing number of children who are left home by one or both parents who go to work abroad. To the children who are deprived of a family background there is not a set of coherent standards which should provide the basis for a decision to place a child out of his family and for the monitoring and evaluating that decision, and there is not a unitary protocol that should guide the process of planning and monitoring the intervention, including the evaluation of children's individual needs.

The children's right to be listened to is one of the fundaments of the Convention, in spite of the fact that the possibilities of influencing the decisions of the local administration for children and youngsters have been and still are very limited. The stakeholders' interest in young people's participation has increased, however the structures designed for this purpose are still reduced. The formal procedures for the participation of children aged under 15 are almost absent. The most usual measure is the establishing of different forms of councils of young people. *A list of children's issues based on the Convention requests does not exist, not even formally, neither do some measures which should oblige the local councils and authorities to prepare analysis upon the impact of the political decisions on children, before they adopt those decisions. The list of children's issues would serve as a support when the issues subjected to debates in the local council are prepared.*

However, the two international acts – UN Convention or the European Convention – regarding the protection and promotion of children's rights do not offer methods or solutions for solving the various problems of children and young people in Romania. For example, what used to be an engagement that Romania undertook during the process of

pre-accession to European Union, i.e. establishing the National Authority for Children's Rights Protection, did not mean anything when the Law no. 329/2009 was adopted, as the article 68 paragraph o) dissolved this entity. Five years later it was set up again by the Government Decision no. 299/2014 regarding the organization and functioning of the National Authority for Children's Rights Protection and Adoption.

Children represent not only a preoccupation for the individual families, but also a responsibility for the society, in general, and for the community, in particular. The community's responsibility means to systematically and consciously incorporate the perspective of child in every process of decision and in every activity that has to do, some way or another, to children and young people. A kind attitude towards children is not sufficient, neither is the false belief that adults would know better what the welfare of children means. The whole bunch of laws must contain unconditional stipulations which have to be accomplished by any person who, one way or another, is responsible for children and young people.

The 2014 Strategy for the protection and promotion of children's rights 2014-2020, approved by the Government Decision no. 1113/2014 should be seen this way. Although we could have expected that the **child become a national priority** when implementing concrete politics and programs, and this status which encodes a high and effective recognition of the position and importance of the children within the problems of the Romanian society, should provide priority to children on the agenda of all the state institutions, we can notice that the document still assumes the role of facilitator for implementing the principles of the UN Convention regarding the children's rights.

In the context of this paper it is necessary for us point out that the content of the Strategy highlights that "although the laws regarding the protection and promotion of children's rights is according to the European and international requests in the domain, there are still no adequate resources offered, which should ensure its unitary implementation. The analysis of the situations of all General Directorates of Social Assistance and Child Protection (DGASPC) and of the Public Services of Social Assistance (SPAS), based on the evaluation of implementing the legal stipulations in the domain, identified a huge heterogeneity of the organizational structures in the country and of the work procedures used within them. Most of the functional difficulties

identified during the evaluation are based on the lack of human resources and of administrative capacity necessary for an integral implementation of the existing laws. Compared to 2007, there is a 27% decrease in the number of the employees in the system of child protection, and the largest decrease is for those who work in the services of day care/other services (36%), while the smallest is for those who work in the placement centers and foster carers (18%, respectively 19% less at the middle of 2013 compared to the end of 2007). The analysis of the qualifications of the specialists who work within the system shows a pretty reduced percent of those with a university degree in the domain. Another critical point that has been identified by many researches and confirmed by the practitioners in the system of children's rights protection refers to the deficient collaboration between sectors or authorities while implementing the existing laws. The processes of family disorder, correlated with poverty, generated an increase in the number and the occurrence of the problems which certain categories of children face, i. e. parents' leaving their children, juvenile delinquency, drug abuse, abuse/neglecting/exploitation, including labor exploitation or other forms, illegal traffic, homeless living, etc[1]".

We can notice that the Government Decision no. 113/2014 regarding the approval of the National Strategy for the protection and promotion of children's rights include an operational plan of implementing the Strategy, but it is very likely to be again overtaken by the objective reality, as it has happened with the previous Strategy developed for the period 2008-2013. Now, for example, I consider the project and the impact analyses announced by the Ministry of Regional Development, Public Administration and European Funds for the process of decentralizing in the health, culture and education domains. Under these circumstances, a direction that could be taken into account is that the major decisions of the Government and the local public administration referring to the social protection or which affect children immediately should be accompanied by preliminary analyses regarding the impact which they have upon children, including the child's own perspective among the reference terms to a reasonable degree. The need to design and develop complete statistic data bases applicable to children;

[1] *The 2014 National Strategy for the protection and promotion of children's rights 2014-2020*, published in Monitorul Oficial no. 33 bis/January 15, 2015

the influence and children's and young people's participation in the activity of the local communities; county councils' establishing some standard systems for monitoring the achieving of the children's best interest in the activity of the local public administration; the plans for social assistance of children; the budget resources for children and the analyses referring to the impact of the various decisions upon children could become tools to be used in this type of monitoring. A deeper involvement of the local communities in assuming some precise and diversified responsibilities in the child protection domain and in supporting the programs of the NGOs and spreading the best practices models are necessary.

We have to mention that, during the process of consulting upon and developing the Strategy for 2014-2020, which aimed to ensure the institutional and juridical coherence and coordination, there were mentioned a variety of public, governmental and nongovernmental entities with attributions in the domain of children's rights protection and promotion, but, unfortunately, the institution of People's Lawyer has not been consulted and none of its Reports of activity or special reports with an explicit content in the children's rights domain have not been harnessed in this framework act.

It is relevant that, even in the present, the knowledge of the UN Convention, as well as the EU European Chart of the fundamental rights is reduced and inadequate both with the local authorities and the children and young people. In this direction, constant efforts should be done, and this work should begin in schools, especially at the secondary school level and at the college level, so that the two international acts become an obligatory element of the educational process, in many and various ways. It is not the juridical education that should come up in the schools, but the civic education regarding the fundamental rights and liberties, the principles which the real democracy is based on and functions with, and the interactive dissemination of the various problems that affect children.

In the governmental sector, the child's own perspective should be systematically highlighted as a part of the decision making process. In the situation of each major decision, an analysis of the impact the adopted decisions have upon children or of the decisions that affect them immediately should be developed. Such an analysis could be applied to the budget decisions, to the specific laws in health and education domain, as well as to the measures that affect the environment, and the People's

Lawyer plays an important role in activating and supporting the central or local authorities, the county councils to implement and respect the children's rights in society, to raise awareness of the children's issues in the national and local policies, to make the children's voice be heard in public debates, as it represents the national factor of connecting all the efforts related to respecting the children's rights.

We have still a lot of work to do until we reach the situation when children is really in the center of the decision that refer to him, and children's superior interest benefits of a significant percent of the decisions that refer to him.

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REFLECTION REGARDING THE FEATURES OF A FEW PRIVATE LAW INSTITUTIONS WITH TRANSDISCIPLINARY APPLICABILITY

Ilioara GENOIU[1]

Abstract:

The current Romanian Civil Code in force[2] *contains several institutions (some with a pure novelty attribute for the Romanian legal system, while others with a long established Romanian legal tradition, which have been only partially reformed), having an applicability which goes beyond the borders and the boundaries of the education subjects from which they originate and within which are taught; they have incidence and implications also in regard to other subjects. The current work shall discuss only a few institutions which are typical to the family law (for instance marriage, adoption and kinship), but which nonetheless stretch their branches and applicability also in the field of succession law, which is a constant topic of our interests.*

Key words*:* *inheritance, surviving spouse, marriage, kinship, adoption, inheritance rights.*

INTRODUCTION

The Romanian Civil Code presently in force, which was adopted in an unjustified rush in our opinion, was the one to recognize the monistic theory, therefore providing a single and unitary regulation to all private law relations, unlike its predecessor[3], which was enforcing the dualistic theory. As a consequence, it now appears quite difficult answering to a legitimate question: can we still speak today about branches of the private law, and particularly about the family, commercial and private international law[4]? Our aim is not to answer to

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[2] That is Law No. 287/2009, republished in the Official Gazette No. 505 from 15th July 2011).

[3] Meaning the 1864 Civil Code, currently abrogated

[4] See also Ion Craiovan, „Exigenţele demersului ştiinţific – repere majore pentru configurarea ramurilor dreptului", *Dreptul* magazine 3 (2017): 12-31.

this question here, while we have nevertheless discussed it within other previous works[1], but we will only say that, in our view, we can still continue to speak at least of educational subjects (the family, commercial and international law), as subjects which study several specific legal institutions.

Some of the institutions from which these subjects emerged generate legal consequences also in other fields (related to private law, naturally), reason for which we can call them boundaries subjects. For instance, if referring to people, it is the case of the presumption regarding the legal time of conception, the legal acknowledgement of one's death, the disappearance of a natural person, the extraction of organs, tissues and human cells out of dead persons' body, for medical or scientific purposes, the residence, the civil status documents, the capacity of a legal person and so on. All these matter also for the succession law, as they interfere with its legal institutions. Moreover, some institutions having origins in the family law also have incidence upon the succession one. We are referring for instance to: the marriage in general and the marriage between relatives in particular; bigamy; the preciput clause; matrimonial conventions and regimes; filiation; medically assisted human reproduction involving a third donor; adoption; end, nullity and dissolution of marriage; kinship and so on. The same qualification can also be equally assigned to subjects which are traditionally taught within the discipline "Real rights" but which have applications also in the succession field, such as: the general ways of acquiring real rights, the partitions of the private property law, the assets and patrimony of a natural person, the common property and the partition or the management of someone else's assets.

Among all the subjects above, we will attempt to subsequently point out only the influence exerted by marriage, adoption and kinship – which are institution typical to family law – upon the field of inheritances[2].

[1] Bogdan Pătraşcu and Ilioara Genoiu "The accession of Romania to the European Union – a factor for improving the legislative renewal process, with a special look on the Romanian private law", in *After 10 years since the accession of Romania to the European Union. The impact upon the evolution of the Romanian law* (Bucharest: Universul Juridic Publ. House, 2017), 31-39.

[2] We have discussed other boundary legal institutions (like the usage capacity and, implicitly, the legal time of conception, as well as the medically assisted human reproduction involving a third donor) in Pătraşcu and Genoiu "The accession ...", 31-39.

MARRIAGE – A LEGAL GROUND FOR THE SURVIVING SPOUSE TO OBTAIN THE INHERITANCE PARTIALLY OR TOTALLY

Marriage is the first legal institution regulated by the Civil Code, at Book II – "On the family", articles 266-404; therefore, its origins stem from the family law. Out of the several aspects which a marriage involves, we are nonetheless interested in the present work in pointing out the way in which it influences the succession law. The incidence of marriage upon the inheritance field is significant without a doubt, as the Civil Code in force (which can be rather called the Private Law Code), as well as the Law No. 319/1944[1], entitle the surviving spouse to the inheritance, in competition with any of the other heir classes, by providing him – if he meets the conditions required for the purpose – with a share from the inheritance, a right to inhabit the shared home and a special right upon the furniture and the household assets[2]. The surviving spouse shall enjoy these rights if at the moment when the inheritance is opened (marked by the death of the person leaving it) he still has the quality of spouse. As a result, it is also important for the succession law to know the meaning of the end, dissolution and termination of marriage[3], as some of these set apart from the inheritance the person claiming the succession rights.

We will subsequently discuss only a few aspects involved by marriage, but which have consequences in the succession law field and which also generate controversies (some of them). Thus:

[1] We are referring to the Decree-Law No. 319/1944 on the right to inherit of the surviving spouse, currently abrogated.

[2] For the complete debate of these rights from the exclusive perspective of the succession law, see for example: Bogdan Pătraşcu and Ilioara Genoiu, "Drepturile succesorale ale soţului supravieţuitor", in *Noul Cod civil. Studii şi comentarii*, vol. II, ed. Marilena Uliescu (Bucharest: Universul Juridic Publ. House, 2013), 643-666; Dan Chirică, *Tratat de drept civil. Succesiunile şi liberalităţile* (Bucharest: C.H. Beck Publ. House, 2014), 63-74; Codrin Macovei and Mirela Carmen Dobrilă, "Cartea a IV-a Despre moştenire şi liberalităţi", in *Noul Cod civil. Comentariu pe articole*, ed. Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (Bucharest: C.H. Beck Publ. House, 2012), 1021-1025, etc.

[3] See for this purpose, Cristian Mareş, *Dreptul familiei* (Bucharest: C.H. Beck Publ. House, 2015), 131-229.

a) It has no relevance when it comes to obtaining a part of an inheritance or all of it, the fact that the spouses lived together or *were separated without legal formalities*[1] when the inheritance was opened. This is due to the fact that the separation without legal formalities of the spouses does not trigger the dissolution of their marriage; therefore, the condition of the marriage existence is met in what they are concerned and, therefore, the surviving spouse can inherit the one who died.

b) The legal situations of the *concubines* has remained unchanged also after the entry in force of the new Civil Code, so that they cannot make use of the legal provisions regarding the inheritance rights of the surviving spouse not even at the present moment, no matter how lasting might have been their relation. The death of one of the concubines does not entitle the other one to claim a right upon his legal inheritance. Of course, if the deceased concubine left a legacy on behalf of the other, the latter can claim a right to the testamentary inheritance, within the available share, if the deceased had force heirship heirs.

c) As a rule, the surviving spouse inherits the deceased one if at the moment when the inheritance is opened there is no *final divorce sentence or no divorce certificate has been issued*. Consequently, if when the inheritance is opened, the divorce legal procedures are still undergoing or the divorce has been ruled, but the divorce sentence has not been declared final yet, the surviving spouse can make use of his quality of heir of the deceased. The same goes when the divorce procedure by administrative or notarial channel has not been yet concluded by issuing the divorce certificate, although it was started. In all these cases, marriage *is not dissolved* by divorce, but *ends* together with the death of one of the spouses.

On this occasion, it should also be pointed out the exception provided by the Civil Code, at article 373 letter b) – *"A divorce can take place: (...) b) when out of solid reasons the relations between the spouses are seriously injured and the continuation of marriage is no longer possible* (…)"[2].We are therefore talking about the dissolution of marriage

[1] See: Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România* (Bucharest: Academiei Publ. House, 1966), 131; Francisc Deak, *Tratat de drept succesoral* (Bucharest: Universul Juridic Publ. House, 2002), 112.

[2] Also pointed out in Ilioara Genoiu, *Dreptul la moştenire în Codul civil* (Bucharest: C.H. Beck Publ. House, 2013), 62; Floriniţa Ciorăscu and Andreea Drăghici and Lavinia Olah, *Dreptul familiei şi acte de stare civilă* (Piteşti: Paralela 45 Publ. House, 2005), 126-127.

out of the exclusive guilt of the spouse defendant. In this situation, if the spouse plaintiff dies during the divorce procedures and the legal action is continued by his heirs, and the court acknowledges on the basis of the evidence presented that the spouse defendant is exclusively guilty for seriously damaging the relation between the spouses, then the marriage shall not end through the death of the spouse plaintiff, but will be dissolved at the date when he or she dies. Consequently, the spouse defendant will not be entitled to the inheritance of the spouse plaintiff deceased, even if at the date when he died the divorce sentence was not final (in fact, it hadn't even come up, since the court had not ruled yet on the matter). This in fact an exception from the rule according to which marriage ends through the death of one of the spouses[1]. But if the heirs of the spouse plaintiff do not wish to continue the action filed for divorce, then the court shall recognize the end of the marriage through the death of the spouse plaintiff. As a consequence, since the spouse defendant meets the special condition of married person, he can still enjoy the right to claim his share from the inheritance and he inherits the deceased spouse.

d) The quality of spouse is also lost as a consequence of the (retroactive) *dissolution* of marriage, when the court acknowledges that the marriage is completely void (for the cases provided by art. 293-295 of the Civil Code) or relatively void (for the cases provided by art. 297-300 of the Civil Code), even if the death of one of the spouses takes place before the sentence acknowledging or ruling on the nullity of marriage is final. In this case, we cannot speak in principle of some inheritance rights enjoyed by the surviving spouse out of the marriage declared void or annulled.

Nonetheless, by exception, according to the provisions of art. 304 par. (1) of the Civil Code: "*The spouse in good faith at the conclusion of a void or annulled marriage continues to enjoy the quality of a spouse from a valid marriage, until the sentence remains valid"*. In this case we can speak of *putative marriage*. Hence, if the death of one of the spouses takes place before the decision declaring or ruling the nullity of marriage is final, the surviving spouse will be entitled to inherit the deceased only

[1] Francisc Deak and Romeo Popescu, *Tratat de drept succesoral*, Vol. I (Bucharest: Universul Juridic Publ. House, 2013), 240-241; Veronica Stoica and Laurenţiu Dragu, *Moştenirea legală în noul Cod civil* (Bucharest: Universul Juridic Publ. House, 2012), 125.

if he was in good faith when the marriage was concluded, not knowing the cause for which the marriage becomes void. The spouse in good faith from the putative marriage maintains his spouse quality until the sentence ruling the dissolution of marriage is final. On the contrary, if the death of one of the spouses takes place after the sentence ruling the dissolution of marriage is final, the surviving spouse will not be entitled to the inheritance of the deceased, irrespective of him being in good or ill faith, as he loses his quality of spouse retroactively, as an effect of the marriage being declared void.

e) A situation which receives a peculiar solution, but only apparently, is the one in which *the remarried (good faith) spouse of the other spouse legally declared death* (but who reappears generating the annulment of the death statement, and then dies) cannot inherit the latter. In this case, the first marriage is considered dissolved when the second one is concluded, while the spouse of the person legally declared death and then reappearing (but dying afterwards) can only inherit the second spouse [art. 293 par. (2) of the Civil Code]. On the contrary, if the spouse of the one legally declared death has been in ill faith, by knowing that his spouse was still alive, commits bigamy by remarrying[1]. Therefore, the second marriage concluded will be declared void, while the first one will be maintained, including the mutual right to inheritance of the ill faith spouse and of the one declared death and then reappearing [art. 273 corroborated with art. 293 par. (1) of the Civil Code].

f) The inheritance of the deceased can be claimed from the quality of surviving spouse by *one, two or several persons*. This can take place if the surviving spouses prove their quality of spouse when the inheritance is opened. It is obvious that this hypothesis cannot be conceived out of bigamy. Nonetheless, the persons claiming to be the surviving spouses shall equally share the divided quota from the inheritance, provided by article 972 par. (1) of the Civil Code if they can prove their good faith – meaning that they did not know of the previous marriage(s) of the deceased – hence meeting the legal condition of the surviving spouse. In fact, the solution above is recognized by article 972 par. (3) of the Civil Code, according to which "*If after the putative marriage two or more persons are in the situation of a surviving spouse,*

[1] According to the provisions of art. 273 of the Civil Code, called "Bigamy": "*It is forbidden the conclusion of a new marriage by a person who is already married*".

then the share established by articles (1) and (2) shall be equally divided between them".

g) The surviving spouse can be in some exceptional cases a *relative of the deceased*. This is due to the fact that article 274 par. (2) of the Civil Code allows "*the marriage between the collateral relatives of 4th degree out of solid reasons (...)*". Consequently, cousins-german can get married if there is a special medical proof requested by the law for this purpose and the authorization of the competent tutelage authority. In this case, depending on his personal interests, the surviving spouse can choose between his quality of surviving spouse and that of relative of the deceased or can cumulate them. It is highly unlikely, in our view, that someone may claim an inheritance as a 4th degree collateral relative (hence as part of the last heirs class, that of ordinary collaterals), by abandoning his quality of surviving spouse, which entitles him to the inheritance just like any of the heirs classes and which, in certain conditions, entitles him also to living rights in the shared home, as well as to a special right to the furniture and household assets.

There can also be asked the question if the surviving spouse who is also a relative of the deceased can cumulate the two qualities. For instance, the deceased has only a surviving spouse (who is also his cousin-german) and relatives of IV class 4th degree; therefore only relatives from the same class and degree as the surviving spouse, regarded from the perspective of relative. If the surviving spouse is entitled to the inheritance on the ground of the marriage with the deceased, then he will receive ¾ from the inheritance, in competition with the IV class of legal heirs, and the other two categories of the rights mentioned above, if there are met the conditions provided by law. But if the surviving spouse decides to claim his share from the inheritance as a relative of the deceased, then the inheritance will be equally divided between the 4th degree collateral relatives. Thus, the surviving spouse will receive a share of at most ½ from the inheritance, therefore smaller than the one he would have received on the ground of marriage.

As for the possibility of the surviving spouse who is a relative of the deceased to cumulate the two shares, that is both the ¾ one established on his behalf as a surviving spouse – in competition with the IV class of relatives – and the share to which he is entitled as a relative of the deceased – of ¼ – calculated according to the number of ordinary collateral relatives that he competes with – we consider that this

possibility could be accepted. The reason is that article 1102 par. (1) of the Civil Code, named "The multiple entitlement to an inheritance" states that "*The heir who is entitled in several ways to an inheritance according to the law or the will has for each of these a different right to refuse them or not*". Therefore, a person can cumulate several entitlements *only* on the ground of the legal inheritance, *only* on the ground of the testamentary inheritance or on the ground of the legal *and* testamentary inheritance. Consequently, in the case discussed, the person in question can cumulate the two qualities, obtaining both the share provided for by the law for the surviving spouse and that to which he is entitled as cousin-german of the deceased.

In our opinion, the same solution should be applied also in the case in which a person is both the son and grandson of the deceased (as son of the deceased's daughter) as his father is at the same time the father of his mother. Several discussions can be raised by this case, some related to morals, others to criminal law, but from the perspective of the succession law, the person under scrutiny has a double entitlement to the inheritance, either as a 1st degree relative – in competition with his mother (who is also a 1st degree relative of the deceased, as his daughter) – or as a 2nd degree relative, as grandson of the deceased, case in which he shall be removed from the inheritance by his mother, by enforcing the principle regarding the proximity of the relatives degree within the same class of heirs[1].

BLOOD KINSHIP – THE LEGAL GROUND TO OBTAIN AN INHERITANCE BY THE CLASSES OF HEIRS

According to the principles of succession law, the four classes of heirs[2] include the relatives of the deceased – bot the natural ones (blood kin) and the civil ones, resulted from adoption. According to the provisions of article 405 par. (1) of the Civil Code, found too at Book II – "On the family", Title III – "Kinship" (hence within the family law):

[1] We are aiming to come back to this example and to provide more details about it in a future work

[2] For more details, see for instance: Liviu Stănciulescu, *Curs de drept civil. Succesiuni* (Bucharest: Universul Juridic Publ. House, 2015), 77-88; Dumitru Văduva, *Succesiuni. Devoluţiunea succesorală* (Bucharest: Universul Juridic Publ. House, 2012), 55-63; Mircea Dan Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil* (Bucharest: Universul Juridic Publ. House, 2012), 51-55.

"*Natural kinship is the relation based on the origin of a person from another person or on the fact that several persons have a common ancestor*". In order to determine the componence of the classes of heirs, it is therefore necessary to know the meaning of kinship, by resorting to the provisions of the family law.

By resorting to the provisions of art. 406 par. (1) of the Civil Code, it can be pointed out that kinship can be:

a) on a straight line (ascendant and descendant), resulting from the origin of a person from another person;

b) on a collateral line, resulting from the fact that several persons have a common ascendant;

According to provisions of art. 406 par. (3) of the Civil Code, kinship on a *straight* line can be:

- ascendant, as in the case of parents, grandparents, great-grandparents, without limit of degree;

- descendant, as in the case of children, grandchildren and great-grandchildren, without limit of degree;

According to the provisions of article 406 par. (3) point b) of the Civil Code, are considered relatives on a *collateral* line the following:

- siblings (2nd degree relatives, there not being relatives of 1st degree);

- nephews and nieces, uncles and aunts of the deceased (3rd degree relatives);

- grandnephews and grandnieces, cousins-german and the siblings of the deceased's grandparents (4th degree relatives).

The new civil legislation should be praised at this point for bringing together to the inheritance the straight line relatives – until infinite – and the collateral line relatives – only until the 4th degree included. We are underlining this as the Civil Code from 1864, through the provisions of article 676, was stating that relatives succeed the deceased until the 12th degree included. It is nonetheless true that this legal text has been abrogated by the provisions of the Law on progressive tax on inheritances from 28th July 1921[1], which was stating at article 4 that the entitlement to the inheritance is enjoyed only by collateral relatives until the 4th degree included. In fact this principle was also taken over by Law No. 319/1944.

[1] Currently aborgated.

KNOWING THE LEGAL REGIME OF ADOPTION – A PREMISE FOR THE JUST ENFORCEMENT OF THE SUCCESSION LAW PROVISIONS

The Civil Code in force (art. 405), just as the Civil Code from 1864 assimilates civil kinship to natural kinship. In the light of the provisions of art. 405 par. (2) of the Civil Code, civil kinship represents the relation resulting from the adoption performed according to the legal conditions. De *lege lata*, adoption contributes to establishing kinship relations between the adopted and the adopter, as well as between the adopted and the adopter's relatives, while the kinship relations between the adopted and his natural family cease to exist[1]. As a result, by moving the discussion in the field of succession law, the child adopted under the regime of the Civil Code in force can inherit both his adoptive parents and all the relatives within the adopting family, while he can also be inherited by both his adoptive parents and all the relatives within the adopting family. *On the contrary*, this child shall not inherit his relatives from his natural family, nor he will be inherited by them.

In our opinion, another mention should be made regarding adoption, namely that related to the adoptions approved before the entry in force of G.E.O. No. 25/1997 regarding adoptions, currently abrogated, which has established the unitary system within the field subject to discussion, by giving up to the distinction between the adoption with full effects and that with limited ones. In our view, even after the entry in force of the current Civil Code, this distinction has a practical use, as according to the principle regarding the lack of retroactive character of the new civil law [acknowledged by art. 6 par. (1) of the Civil Code] the adoptions approved with limited effects have not become adoption with full ones. As a result, the provisions of the Government Ordinance mentioned before have an ultra-active character, so that the adopted with full effects can inherit his adoptive parents and relatives, while he can also be inherited by his adoptive parents and relatives. The right to inherit of the adopted with full effects shall not regard the relatives within his

[1] According to art. 451 of the Civil Code, "*Adoption is the legal operation creating a filiation relation between the adopter and the adopted, as well as kinship relations between the adopted and the adopter's relatives*". For more details, see Andreea Drăghici, *Protecţia juridică a drepturilor copilului* (Bucharest: Universul Juridic Publ. House, 2013), 247 – 249.

natural family with which he is no longer connected, nor they will be entitled to claim any right to the inheritance of the child adopted with full effects. On the contrary, when it comes to the child adopted with restricted effects, to his inheritance will be entitled both his adoptive and natural parents, as well as the relatives within his natural family. This is due to the fact that the adopted with restricted effects establishes kinship relations only with his adoptive parents, and not also with their relatives, by maintaining at the same time kinship relation with his natural parents and family. By correspondence, the child adopted with limited effects shall inherit his adoptive parents, but not also their relatives, and also his natural parents and family.

CONCLUSIONS

We believe to have proven in the present work the multiple roles and vocations of some private law institutions. We are talking about marriage, natural kinship and civil kinship resulted from adoption, whose primary applicability are found in the family law field, but which generate significant implications also in other fields of the private law, particularly the succession one. As a consequence, their missing or insufficient knowledge affects the just enforcement of the principles and rules typical to the inheritances field.

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CRITERIA FOR ASSESSING THE SUPERIOR INTEREST OF THE CHILD

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Abstract:

The application of any principle listed in Article 6 of Law no.272/2004 is governed by the affirmation of the superior interest of the child who, in any event, must prevail. In fact, this is the message of all national and international regulations. However, the problems of interpretation of this principle are numerous, being determined by the elusive way in which the legislator regulated it. Internally, Law no. 257/2013 brings changes to this effect, covering some of the legislative loopholes, in that it establishes a number of criteria of assessing, absent in the initial regulation.

Key words: *Child, principle, superior interest, criteria of assessing*

1. PRO AND CONTRA OF REGULATION CRITERIA FOR ASSESING THE SUPERIOR INTERESTS OF THE CHILD BY LAW NO. 272 / 2004[3]

Regularly labeled, internationally and nationally[4], but widely used as a legal criterion in solving situations related to the child, the principle

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[3] Published in the Official Journal no. 607 of September 30, 2013
[4] The principle is also found in the Declaration of the Rights of the Child from 1959 adopted by the United Nations General Assembly which states that: "the child shall enjoy special protection and shall be offered facilities by law and other means intended to provide him a normal physical, mental, spiritual and social development, in the conditions of freedom and dignity. In adopting the laws necessary to achieve this aim, the superior interests of the child will be taken into account. The principle is also reiterated by the International Convention from 1989 in Article 3, thus becoming the means of reporting on the approaches of the organisms and authorities entitled to make

of the superior interests of the child, although shown as a guideline in whole specific principles of the child protection, has not been sufficiently developed normative, thus leaving the place of subjective interpretations with the consequence of altering, in some cases, the "superiority" of the child's interest to other interests.

As the notion of "superior interest of the child" is the message enshrined in Law no.272/2004 and all normative acts relevant to the field of child protection have to be interpreted in correlation with this principle (art.6 lit.l), the Romanian legislator brought in supports of interpretation and Correctly applying it a number of assessing criteria, so that the distance between the subjective and the objective to be reduced as much as possible.

Although, this late initiative of the legislator puts an order in a conceptualized elusive matter, having the role, ultimately to ensure the most optimal choice of competent organism, by drawing boundaries or indicating criteria around which the decision of these organisms must revolve, not long ago in the doctrine stated that the lack of these criteria is justified, without the need for legal regulation to indicate them directly, even at the guidance level. The argument takes into consideration the complexity and diversity of the situations in which each child is found and the different circumstances that generate these situations. As diversity determines, by itself, different decisions, objective determined by specific circumstances, establishing criteria of appreciation it would reduce the possibility for administrative organisms and courts to take into account the particularity and specificity of the child's situation.

It is a point of view argued, justified by the difference of any kind that exists between similar situations arising from different circumstances, specific, which must not be neglected by the technical application of an equation. Such omission of specific circumstances and peculiarities of any nature would mean uniformity in the decisions of organisms with competence in the field of child protection, which would not necessarily be for the benefit and respect of that superior interest of the child. It is precisely the term "superior" that requires individualized attention to the child's situation, taking into account these particularities, to the smallest detail, beyond the boundaries imposed by the legislator.

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decisions about the child. Obviously, as it was natural, the principle of the best interests of the child is reiterated in Law no. 272/2004 regarding the protection and promotion of children's rights.

Thus, it was argued that the non-regulation, in the initial form of the law, of these criteria of assessment is not a legislative loopholes, but a deliberate omission of the legislator who, failing to have regard to the complexity and variety of situations in which each child can be found, leaves this to account of the competent organisms (courts, administrative bodies) who, through the assessment of the specific circumstances, must precisely determine the superior interests of the child.

Therefore, the supporters of this first point of view are of the opinion that, in the case of the child's superior interests, we discuss a legal concept with a variable content, the task of establishing it lies to the competent authorities, ie those organisms indicated by the normative acts.

A long time, until the amendment of Law 272/2004 in September 2013, Law 257/2013, the appreciation of the child's superior interest, has gathered a rich judicial practice, making a number of criteria relating both to the child (age, personality, gender, degree of maturity, institutionalized education, religion, growing continuity and care), as well as the person or persons with whom he / she maintains personal relationships and who have a bearing on his / her education, growth or professional training (criteria of morality, criminal history, material criteria, civil status, state of health, religion, etc.)[1].

In fact, it should be remarked that this judicial practice created in the absence of assessing criteria imposed by the legislator, was largely a source of inspiration for the additions to this effect of Law no.257/2013. Moreover, in an extremely sensitive matter, where the judge bears the harsh responsibility of the destiny of cruel, fragil and vulnerable beings, we consider that the legal indication of a few assessing criteria could lead to his being relieved of such pressure, being a welcome helpful in making an objective decision that ultimately reflects the natural purpose of respecting the child's superior interest. This, from our point of view, does not exclude a thorough and detailed analysis of the child's situation, depending on the particularities and the specificity of the situation.

[1] A. Draghici and A. Tabacu and A. Singh. "The relation of the minor with the parents and extended family. Assessing the best interest of the child. Criteria of Assessment", *EIRP Proceedings, vol. 5* (2010)*:* 86-87

It is no less true that, although it has been stated that "the minor's interest must be appreciated within the limits of the law"[1], it should not be neglected that in certain circumstances the law may contain certain omissions or inconsistencies which by their nature can jeopardize the child's interest. It is therefore the task of the legislator that through his intervention he succeeds in maintaining the superiority of this interest, so that those who have the task of applying the law should not prejudice to this interest.

Opposite views that the regulation criteria for assessing the superior interests of the child would impede making the best decision, it is the contrary opinion that it is imperative for greater attention in their regulation at the level of national legislation. Thus, critical reviews on the principle of the superior interests of the child is identified in the literature, but without denying its importance, it is stated that "this principle puts more problems than it solves, becoming even counterproductive in some aspects"[2]. The arguments of this critique are based, as we have previously said, on the subjective of the decision organisms in evaluating the options available to make a decision that respects the child's superior interest.

We also consider that, in the absence of such criteria, which are also limited to the law, the possibility of a delay in making a decision in this matter should normally be subject to celerity in most cases from the point of view of the subject , could be unreasonably delayed, as a result of the tendency of the decision-maker to stay as much as possible on all the issues in question, without being able to set a priority order. Therefore, in some situations, delay in making a decision could have dramatic effects on the child's life, integrity or destiny. These guiding criteria may, from this perspective, have the essential role of ordering the judgment, setting priorities, clearly not excluding in any circumstances the specificity of the child's situation.

That is why we said that[3] "given that in the last century there has been a substantial expansion of the human rights sphere and thus child,

[1] I.P. Filipescu, „Noțiunea de interes al minorului şi importanţa determinării lui", *Revista română de drept* 2 (1988): 25

[2] Doina Balahur, *Protecţia drepturilor copilului ca principiu al asistenţei sociale,* (Bucharest: All Beck, 2001), 87

[3] Andreea Draghici, *Protecția juridică a drepturilor copilului* Bucharest: Universul Juridic, 2013): 31

we consider that it is necessary to conceptualize the most important principle that governs the protection of the child. We do not assert that the legal establishment of a matrix would be solved the problem legal content of this principle. This would be impossible in terms of the circumstances in which a child can be found at a certain moment, but also by the problem to be solved from the point of view of this principle. However, priority may be given to prioritizing the criteria for assessing the superior interests of the child, depending on the subject matter in question, namely: the exercise of the child's rights, the application of an alternative protection measure, the execution of a educational measures, custody of the child in the event of divorce, exercise of parental authority, dissolution or nullity of adoption, conclusion of an individual employment contract[1], etc. ".

2. ON THE CRITERIA FOR ASSESSING THE SUPERIOR INTERESTS OF THE CHILD LISTED IN ARTICLE 2 PARAGRAPH 6 OF LAW NO.272/2004

Beyond the arguments expressed in doctrine, for and against the regulation of the criteria of appreciation of the superior interest of the child, the legislator found it appropriate to regulate them even through the normative act that enshrines the principle of the superior interest of the child and promotes his rights and freedoms. Thus, Article 2 paragraph 6 provides for a number of criteria that enable decision-makers[2] to orient themselves in decision-making according to: the needs of physical, psychological development, education and health, security and stability, and membership in a family; the child's opinion, depending on age and maturity; the child's history, in particular with regard to abuse, neglect, exploitation or any other form of violence[3] against the child, as well as the potential risk situations that may occur in the future; the capacity of

[1] For detailing the special conditions of concluding an individual employment contract if the employee is a minor, see Carmen Nenu, *Dreptul muncii* (Pitesti: University of Pitesti Publishing House, 2010): 13.

[2] Art. 263 par. (1) Civil Code, who expressly consecrate this principle, uses, when it comes to measures concerning the child, the phrase "irrespective of the author of the measure", which means that any decision-maker, physical person, public or private institution, is subject to the same rigor of appreciation of the child's interest.

[3] This collocasion of abuse, neglect, exploitation or any other form of violence, replaces the terms of abuse and negligence.

parents and carers to grow and care for the child to meet its specific needs; to maintain personal relationships with people to whom the child has developed attachment relationships.

Given that, in the wording of the legal text, the legislature uses the term "at least the following" (when referring to those criteria of assessment), it follows that their list is limitative, since the competent authorities may also consider other criteria when they come to weigh the superiority of the child's interest. Therefore, the legislator does not limit the authorities' ability to analyze and decide, but leaves them the possibility, depending on certain particularities, to add to their own decision and other criteria of appreciation that support the superior interests of the child. We may submit that by making a legal enumeration of these, the legislator does not apply an exact matrix to a particular situation, so as to leave some essential aspects ultimately resulting from the substance of the factual situation, but establishes some non-defining guidelines which leads and directs, through all the details analyzed, to the most optimal decision.

In a lapidary reading of these criteria, it is noted that the legislator concerned criteria relating to the child's personality and his specific situation, in particular, conditions relating to his health and physical and mental development, as well as criteria to keep him as far as possible in the proximity of people to whom it has developed attachment relationships. All five of these criteria are complemented by the recognition of the child as an autonomous being with the ability to participate in social life, which is natural, as long as Law no.272/2004 recognizes all the rights and freedoms recognized to the adult. As a result, one of these criteria refers to listening to the child's opinion, taking into account its margin of subjectivity due to age or lack of maturity. Besides, article 264 of the Civil Code establishes the mandatory character of listening the child who has reached the age of 10 years in administrative and judicial proceedings concerning him, thus becoming a co-participant in making a decision in which to prevail over his interest. Moreover, the law permits in the same sense, even the hearing of the child who has not reached the age of 10 if the competent authority considers that this is relevant to the objective settlement of the case.

Through regulating listening to the child's opinion both as a criterion of assessing and as a principle of the protection of the rights of the child, the

latter becomes a participant in making the decisions that concern him, obviously depending on his age and degree of maturity.

It is also worth noting that the five legal criteria for assessing the child's superior interest can be easily assimilated to some of the principles specific to child protection, principles set forth in article 6 of Law no.272/2004. Thus, the criteria are supported by the principle of providing individualized and personalized care for each child; the principle of respecting the dignity of the child; listening to and viewing the child's mind, taking into account age and maturity; to ensure stability and continuity in the care, growth and education of the child, taking into account its ethnic, religious, cultural and linguistic origin, in the event of taking a protective measure as well as providing protection against child abuse and exploitation.

It follows that the legislator considered when regulating these criteria both the principles governing the respecting and guaranteeing the rights of the child and the rich judicial practice of the courts prior to Law no.257/2013, but so useful in respecting and appreciating the superior interest of the child .

Although the legislator states that these criteria are listed only in a limitative way, his intention in this respect resulting from the way in which he formulated the legal text, we consider that the order in which these criteria were formulated, the legislator's intention was not to grant their priority in the order in which they were listed. Therefore, the needs of physical, psychological, education and health, security and stability, and family affiliation, the first criterion can not have an increased importance to the criterion of maintaining personal relationships with persons to whom the child has developed relationships attachment, last in this order.

However, we consider that these criteria should have been regulated or at least recalled upon the consacration of each legal institution or means of protection in part, since each measure or legal institution has its own specificity.

CONCLUSION

The principle of promoting the superior interests of the child remains the most important principle of child protection, around him by gravitating the other principles. By listing the criteria for assessing the

superior interests of the child, the legislator gives the consistency of this principle, thus facilitating the laborious interpretation and analysis of a given situation.

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CONTENTS OF THE INDIVIDUAL EMPLOYMENT CONTRACT

Carmen Constantina NENU[1]

Abstract:

The content of the individual employment contract includes general rights and obligations of the parties. Thus, on one hand the employer is bound to ensure the provision of the agreed activities and also provide the employee with the means to perform it, on the other hand the employee must perform work personally, being in a subordinate position. The main rights and obligations of the employees are mentioned in art. 39 (p. 1 and p. 2) of the Labor Code. The Labor Code also establishes in art. 40 p.2 the main obligations of the employer and lists the basic rights of the employer under their contractual relationship with the employee. Besides the general clauses of the individual employment contract, the contents of the parties may include specific clauses, some of them being covered by the Labor Code, other by special laws.

Key words: *Labor Code, employer, employee, rights, obligations, specific clauses*

The content of the individual employment contract includes general rights and obligations of the parties. Thus, the employer is bound to ensure the provision of the agreed activities and also provide the employee with the means to perform it. He is obliged to pay the agreed salary ensure that the employee receives all the social benefits provided by law and by collective bargaining. He must also respect the professional qualifications agreed with the employee and not assign tasks that do not meet these qualifications. The employer must respect the dignity and privacy of the employee[2].

In turn, the employee must perform work personally, he cannot be substituted by a third party in order to carry out the work in a conscientious and loyal manner, and he must be loyal to the employer. Being in a subordinate position, the employee shall obey orders and instructions of the employer, he shall comply with internal regulations,

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[2] Carmen Nenu, *Contractul individual de muncă* (Bucharest: CH Beck, 2014), 168.

refrain from any act of competition, directly or indirectly, to the employer.

The main rights of the employees, mentioned in art. 39 p. 1 of the Labor Code are: entitlement to remuneration for their work, the right to benefit from daily and weekly rest, the right to have an annual leave, entitlement to equal treatment, the right to have dignity at work, the right to health and safety, access to training, information and consultation rights, the right to take part in the determination and improvement of working conditions and the working environment, the right of protection in case of dismissal, the right to collective and individual bargaining, the right to participate in collective actions, the right to form or join a union. Most of these rights have constitutional protection as well.

The main obligations of employees are listed in art. 39 p. 2 of the Labor Code. These obligations are as follows: the obligation to respect the time required to perform the job or, if necessary, to fulfill the tasks assigned by the job description, the obligation to respect work discipline, the obligation to observe the provisions of the applicable collective agreement, as well as of the employment contract, the obligation of loyalty towards the employer in the performance of duties, the obligation to comply with health and safety measures in the work unit, and the obligation to observe secrecy.

The Labor Code also lists the basic rights of the employer under their contractual relationship with the employee namely: to establish the organization and operation of the firm, to establish suitable tasks for each employee, to give legal instructions to the employee, to exercise control over the performance of the employee's duties, to assess the disciplinary offenses and apply appropriate sanctions under the law, under the applicable collective agreement and under the internal regulations, to establish performance targets for employees and also their achievement benchmarks[1].

The Labor Code also establishes in art. 40 p. 2 the main obligations of the employer, namely: to inform employees of the conditions of work and on issues related to employment relationships, to ensure the ongoing technical and organizational conditions considered in the development of appropriate labor standards and working conditions, to respect all employee rights under the law, under the applicable collective agreement and under the individual employment contracts, to

[1] Nenu, *Contractul individual de muncă*, 169.

regularly communicate the economic and financial situation of the unit to the employees, to consult with the union or, where appropriate, with representatives of employees on decisions likely to affect substantially the employee rights and interests, to pay all their contributions and taxes, and to withhold and remit employee contributions and taxes due under the law, to establish the electronic register of employees and operate electronic records provided by law, to release upon request, all documents evidencing that the applicant is an employee, to ensure the confidentiality of employees 'personal data.

SHORT CONSIDERATIONS ABOUT THE BASIC RIGHTS OF THE EMPLOYEE AND EMPLOYER

The employee performs work under the authority of the employer, who has the power to give orders and directives to the employee, to control fulfillment of duties and penalize deviations from the work discipline. It is what is called legal subordination[1].

By concluding the individual employment contract, the employee is subordinated to the employers economically as well, as a consequence of the employee's main purpose, which is to obtain an income that would ensure his family and his own existence.

THE EMPLOYER'S RIGHT TO ORGANIZE THE WORK OF THE FIRM

This right stems from the freedom to conduct a business recognized by art. 16 of the Charter of Fundamental Rights of the European Union. Thus, the employer invests capital and therefore he decides which is the activity of the firm, its purpose and resources necessary for this purpose, in which human resources have an important role.

It is undeniable therefore that the employer's authority involves organization of the firm, including employee labor organization by setting individual tasks in the job description attached to the employment contract, but this power is not absolute. The employer must exercise his rights in good faith, in the interests of the entity that he controls. The

[1] Alexandru Athanasiu and Ana-Maria Vlăsceanu, *Dreptul muncii. Note de curs* (Bucharest: CH Beck, 2017), 59.

employer's decisions are sometimes conditioned, according to law, by a certain preliminary procedure and they are always likely to be subject to judicial review, both from the perspective of their legality and of their solidity. Therefore, legislature has determined that, on some important decisions regarding the activity organization, such as those relating to labor standards, to the training of employees, to collective redundancies, the employer must consult in advance with trade unions or representatives of employees. The organizational prerogative of the employer cannot be exercised in an exclusively subjective manner. Therefore, the employer must, according to art. 40 p. 2 of the Labor Code, regularly communicate the economic and financial situation of the unit to workers.

Moreover, employer's decisions on the organization of work activities, that have an impact on employees' rights, can be subject to judicial review, the court having jurisdiction to determine whether the employer has improperly exercised authority in this regard.

THE RIGHT OF THE EMPLOYER TO ISSUE DIRECTIVES REGARDING THE EMPLOYEE ACTIVITY

The authority of the employer must be known by the employee, the latter having the right to be made aware which are the job duties and the rules governing the individual employment relationship, in the context of developing it within a group. As a result, the power of the employer to issue directives, part of his authority to the employee, is reflected in the employer's right to determine the tasks of each employee and to establish rules of labor discipline, performing a regulatory action on the legal work relationship.

The attribute of the employer to issue directives on the work of the employees must be exercised only by respecting the principle of dignity at work of the employees, the principle of non-discrimination of employees and that of keeping them informed. The employer is obliged to respect the equal treatment of all employees, he shall not discriminate employees directly or indirectly on the grounds of sex, sexual orientation, genetic characteristics, age, nationality, race, color, ethnicity, religion, political views, social origin, disability, family status or responsibilities, trade union activity or affiliation.

The power of the employer to issue directives is manifested both in relation to the entire team of the firm and in relation to each employee. Thus, the employer is obliged to draw up internal rules containing normative provisions on individual and collective labor relations, arrangements to be made known to employees in order to become mandatory.

The employer must also prepare each employee's job description, establishing duties and responsibilities as well as functional and hierarchical relationships within the institutional organization.

The employer has the right to give written and oral instructions about the development of work activity of the employee, subject to their legality, the employee not having the right to refuse to fulfill them, even if considered to be inappropriate.

THE EMPLOYER'S RIGHT TO CONTROL THE EMPLOYEE'S WORK, TO FIND AND PUNISH MISBEHAVIOR

The employer has the right to control, inspect and monitor how employees comply with his activity organization provisions. However, in the case of the rights of the employer, it is important to relate to the nature of the subordinate employee benefits.

According to paragraph 40. 1 letter d) of the Labor Code, the employer's right to control is exercised over the employee during the execution of the individual employment contract, but it is not unlimited.

The employee is required to comply with both obligations expressly provided by law, by the applicable collective agreement, by the individual employment contract and also by orders given by the employer exercising his right to direct and organize the activity. By having the power to control, the employer verifies how the employee meets all these requirements. If, after exercising control, the employer establishes that the employee has violated labor discipline, he is entitled to apply, where appropriate, disciplinary actions.

THE EMPLOYEE'S RIGHT TO RECEIVE WAGES

The most important right of the employee is to receive wages. Wages represent the consideration for the employee's work under the individual employment contract, being an essential element of the

employment contract, the principal purpose for which the employee accepts to conclude the contract and to perform the required work.

The wages include the following elements: the base salary, allowances, bonuses and other benefits.

Wage determination, whether it is the result of individual or collective negotiation, or it is regulated by law, is governed by a set of principles, of which the following will be highlighted:

a. The principle of equal treatment;

b. The principle of establishing wages and of payment of wages in cash;

c. The principle of salary confidentiality;

d. The principle of establishing wages by negotiation;

e. The principle of guaranteeing the payment of the national minimum gross wages.

SPECIFIC CLAUSES COVERED BY LABOR LAW

The Labor Code illustrates in art. 20 in four specific clauses that can be negotiated by the parties and stipulated in the individual employment contract, namely: the clause on training, the non-compete clause, the mobility clause and the confidentiality clause[1].

1. *The non-compete clause* can be either negotiated on concluding the individual employment contract or during its execution. It consists, on the one hand, in the obligation of the employee, after the termination of the individual employment contract, not to provide, for themselves or for a third party, an activity that is in competition with that performed for their employer and. On the other hand, it refers to the employer's obligation to pay the employee for the entire period of prohibition a sum of money as compensation to limit the right to work[2].

2. *The mobility clause* is the clause in which the parties to the employment contract provide that, in consideration of the specific work, service obligations execution by the employee is not done in a stable workplace. From the wording of the text it is considered that the mobility

[1] Athanasiu and Vlăsceanu, *Dreptul muncii*, 61-62.

[2] Carmina Popescu, "Individual employment contract - Concept and Importance", in *Guide for Romanian and German Labour Law*, ed. Carmen Nenu, Carmina Popescu and Ilona Zenker (Norderstedt. Germany: BoD, 2014), 28.

provided by the Romanian legislator is a geographical and not a professional one.

The mobility clause is different from the delegation, as a change of work place. In the case of delegation, changing the workplace is exceptionally imposed unilaterally by the employer, while in the case of the mobility clause; the rule is the mobility itself.

3. *The confidentiality clause* provided in art. 26 of the Labor Code is the clause whereby the parties agree that on the duration of the contract and after its termination they shall not transmit data or information which they acquired during the execution of the individual employment contract, within the conditions set out in the internal regulations, collective agreements or individual employment contracts. Data confidentiality must be ensured by both the employer and the employee. The employer has by law (article 40 p. 2 of the Labor Code) the obligation to ensure the confidentiality of personal data of employees. The confidentiality clause has no legal time limit to be imposed after the individual employment contract termination.

4. *The clause on training* may be negotiated between the parties of the individual employment contract by detailing how to train the employee, beyond what is required by law. When such a clause is not negotiable, training of employees shall fall within those clauses specified in the Labor Code, in the applicable collective agreement or in internal rules[1].

By this specific clause the parties clearly determine the training method and the rights and obligations related to this clause, which are subject to the addenda of the individual employment contract.

OTHER SPECIFIC CLAUSES

Throughout the individual employment contract other specific clauses can be provided, that will materialize the agreement of the parties, respecting the mandatory rules of the law, some of which being under special laws, others being highlighted by doctrine or judicial or administrative practice. Among these the following are to be mentioned: the performance clause, the clause on intellectual property rights, the stability clause, the extension clause, the objective or result clause, the

[1] Athanasiu and Vlăsceanu, *Dreptul muncii*, 61.

conscience clause, the risk clause, the delegation of powers clause, whose brief presentation is in the following[1].

1. *The performance clause.* The performance contract is the at-will agreement concluded between the trader (autonomous, corporations and national companies and the companies in which the state or a political subdivision is a major shareholder), through a representative, appointed by the general meeting of shareholders, in the case of companies or, where appropriate, the Board, for autonomous administrations, and the head entity, which is to achieve the objectives and performance criteria approved by the income and expenditure account, in exchange for the wages set by the employment contract. The performance contract is an Annex to the individual employment contract and it is subject to annual review.

2. *The clause on intellectual property rights*. Intellectual property rights include copyrights on literary, musical, artistic work, software, photographic work and industrial property rights, on invention, innovation, brand, know-how, industrial designs etc. Rights arising in connection with human creativity fall into moral rights and economic rights. Moral rights always belong to the author of the creation, whether it is an employee or not. When the property rights are in question, the employee status of the author raises negotiation of terms related to his rights in relation to his employer's rights.

3. *The target clause*. There is no statutory provision prohibiting parties to the employment contract to set a result of the employee's work, although the principal obligation which he assumes is to do so. The objective clause means that the employee is required to obtain, at a time, quantifiable results of his work.

4. *The stability clause* is the clause that obliges the employer, on the one hand, to keep the position to which the employee is assigned for a certain period of time, and, on the other hand, not to dismiss him for reasons not related to the employee - in the same period. If the employer fails to fulfill an obligation, the employee is entitled to claim compensation. The clause can be established both in the typical employment contracts and by atypical contracts.

5. *The extension clause*. It can be included only in the contracts of employment of limited duration. Such a contract can also be extended

[1] Ion Traian Stefănescu, *Tratat teoretic și practic de dreptul muncii* (Bucharest: Universul Juridic, 2014), 286-287.

beyond the initial term, under this clause, but only by addendum, not exceeding the period of 24 months and not being extended for more than two times within the maximum period.

6. *The risk clause*. One can set it in some individual employment contracts in which the type or place of work involve a high degree of risk to the employee (e.g. utility climbers, mountain rescuers, war rapporteurs, investigative journalists). The employee will receive under the terms of this clause a number of advantages in relation to other employees of the employer, consisting of various salary increases, reduced working hours, protective equipment and / or diversified work.

7. *The conscience clause* allows the employee to not perform a legal duty order, if it were contrary to his conscience[1]. Reasons of failure of the employee to respect the employer's provision may be moral, religious or political. Under this clause the employee shall not be liable to disciplinary action. Such a clause is negotiated mainly by employees in the media, in the cultural, scientific, legal and medical sectors. No employee may invoke the conscience clause to not enforce a legal obligation service, even verbally imposed by the employer. For example, under the conscience clause no employee may be absent on a day when employees work legally, citing the argument that, according to his convictions, that day is holiday.

8. *The delegation of powers clause*. The employer or an employee responsible for the management may delegate some of his duties to a subordinate employee, unless there is an express statutory prohibition. Such a clause can be negotiated at the individual employment contract conclusion or during its execution.

The legal effects that delegation of tasks produces are complex, thus failure to fulfill the task attracting the liability of the person who delegated and the person to whom powers were delegated.

9. *The penal clause* is an ancillary convention to the agreement by which the parties determine in advance the amount of loss suffered by the creditor as a result of the failure to perform, of the delay or improper performance of the obligation by his debtor. Inserting a penal clause in the individual employment contract is inadmissible.

[1] Stefănescu, *Tratat teoretic și practic de dreptul muncii*, 288-289.

CONCLUSIONS

It is important to highlight that although the legislator gives power to the employer, his powers may not, however, be exercised in an arbitrary manner, being limited by the content of the individual work contract, as well as by the mandatory rules of labor law. In order to ensure the good working of the relationship between employer and employee, the content of the individual employment contract is in accordance with the regulations in matters and includes general rights and obligations of the parties, but also may include specific clauses, some of them being covered by the Labor Code, other by special laws.

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NATIONAL COUNCIL OF THE JUDICIARY AS THE GUARDIAN OF THE INDEPENDENCE OF JUDGES AND COURTS IN POLAND IN THE LIGHT OF RECENT LEGISLATIVE AMENDMENTS

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Piotr UZIĘBŁO [2]

Abstract:

National Council of the Judiciary of Poland is a constitutional state organ responsible for safeguarding the independence of courts and judges. It is composed of the judges as well as the members chosen by the Sejm and the Senat from amongst deputies and senators. The Authors present the circumstances of its introduction to the Polish constitutional system as well as they present the constitutional and statutory regulations, pointing out the latest proposals to reform the Council that are being planned by the Polish government.

Key words: *(4-7 words)*

1. The introduction of the National Council of Judiciary to the Polish constitutional system was strictly connected with the period of the fall of the communism in Eastern and Central Europe and the beginning of democratic transformation in the second half of the 1980s. The establishment of the National Council of Judiciary was perceived as an institutional prelude to the transformation from the totalitarian into a democratic state[3]. One of the most important issues in the discussion on the democratization of Poland concerned the need to provide effective legal guarantees of a particular position of judiciary in a democratic state based on the rule of law. The appointment of the state organ responsible for these issues was one of demands postulated by the opposition during the "round table" negotiations held in Poland between 6 February and 5

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[3] P. Tuleja, „Konstytucyjny status Krajowej Rady Sądownictwa", in *Krajowa Rada Sądownictwa. XX-lecie działalności* (Warszawa, 2010), 62.

April 1989 between the representatives of the Polish People's Republic (communist regime), the democratic opposition and the Church. As a result of the works of the subcommittee on legal and judicial reform, subsequently approved by the plenary, a political agreement was adopted to establish the National Council of the Judiciary. The Council was to become a constitutional body whose primary task would be to co-decide on the personal matters of judges, including considering candidates for judicial positions in all types of courts operating in Poland, co-deciding on nominations, promotion and transfer of judges, as well as other issues concerning judiciary and the rule of law. The National Council of the Judiciary became a constitutional organ by means of the amendment of art. 60 of the Constitution of the Polish People's Republic adopted on 7 April 1989[1]. On 20 December 1989 Parliament passed the first law on the National Council of the Judiciary[2]. On this basis, the first composition of the National Council of the Judiciary was set up and the first meeting of the Council was held on 23 February 1990. The constitutional character of the National Council of the Judiciary was also maintained in the subsequent constitutional acts in Poland - the so-called Small Constitution of 1992[3] and the current Constitution of 1997[4] which has strengthened the position of the National Court Register in the Polish constitutional system.

It should be pointed out that state organs analogous to the Polish National Council of the Judiciary are also known to other European countries, including France and Italy (which served as models for the solutions implemented in Poland) as well as in Portugal, Bulgaria, Croatia, Slovenia, Slovakia, Hungary and Ukraine. However, in Europe there are also other methods used to guarantee the independence of courts and the independence of judges. In countries such as Austria, Germany, Finland, Luxembourg, the Czech Republic or Latvia there are no organs similar to the National Council of the Judiciary and the competence to

[1] The Act of 7 April 1989 on amending the Constitution of the Polish People's Republic, Official Journal of Laws "Dziennik Ustaw" 1989, No 19, item 101.
[2] Act of 20 December 1989 on the National Council of the Judiciary, Official Journal of Laws "Dziennik Ustaw" 1989, No 73, item 435.
[3] Constitutional Act of 17 October 1992 on the Mutual Relations Between the Legislative and Executive Powers and the Territorial Self-government, Official Journal of Laws "Dziennik Ustaw" 1992, No 67, item 336.
[4] Constitution of the Republic of Poland adopted on 2 April 1997, Official Journal of Laws "Dziennik Ustaw" 1997, No 78, item 483.

appoint judges is usually entrusted to the Ministry of Justice or different kinds of collegial bodies which are involved in the procedure of the recruitment of candidates for judges[1].

2. According to art. 186 para. 1 of the Polish Constitution of 1997, the National Council of the Judiciary is a collegial constitutional body which shall safeguard the independence of courts and judges. The Constitution formulates this main task of the National Council of the Judiciary, however (apart from the possibility of initiating proceedings before the Constitutional Tribunal) does not specify the means and procedures for its implementation. Accordingly, the obligation to provide the Council with specific instruments enabling it to perform its constitutional obligation to protect the independence of courts and judges in an effective manner was imposed on the legislator[2]. The Act on the National Council of Judiciary[3] specifies that the constitutional task of the National Council of Judiciary is performed, inter alia, by examining candidatures for the office of a judge and presenting the applications for the appointment of judges to the President of the Republic, adopting the rules of professional ethics of judges and supervising their implementation, as well as expressing opinions on matters concerning the judiciary and judges. In a broader context, the functions, tasks and competences of the National Council of the Judiciary directly resulting from art. 186 para. 1 of the Constitution of the Republic of Poland should be also perceived as the concretization of constitutional principles expressed in art. 2 ("The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice"), art. 7 ("The organs of public authority shall function on the bases of, and within the limits of, the law"), art. 173 ("The courts and tribunals shall constitute a separate power and shall be independent of other branches of power") and art. 178 para. 1 ("Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes") of the Polish Constitution[4].

[1] P. Mikuli, „Rady sądownictw w Europie", in *Krajowa Rada Sądownictwa. XX-lecie działalności*, *P. Tuleja (ed.) (*Warszawa: Toruń, 2010), 110.
[2] The decision of the Constitutional Tribunal of 18 February 2004, K 12/03.
[3] Act of 12 May 2011 on the National Council of the Judiciary, Official Journal of Laws "Dziennik Ustaw" 11, No 126, item 203, with later amendments.
[4] K. Kozłowski and P. Tuleja, „Ewolucja ustrojowej pozycji sądów a konstytucyjne zadania Krajowej Rady Sądownictwa", 1 (26) Krajowa Rada Sądownictwa (2015): 10.

The National Council of the Judiciary plays a fundamental role from the point of view of the constitutional principles. On one hand, it guarantees the proper enforcement of the principle of the division of powers expressed in art. 10 of the Constitution, especially when it comes to relations of other state authorities to the judiciary. On the other hand, by safeguarding the independence of courts and judges it ensures one of the most important rights granted to each person by art. 45 of the Polish Constitution - the right to court[1]. Safeguarding the independence of courts and the independence of judges within the meaning of art. 186 para. 1 of the Constitution of the Republic of Poland has extensive normative content. It creates the directive of effective protection of the constitutional position of courts and judges as well as indicates constitutionally justified limitations of both principles.

It should be noted that in the Polish doctrine of constitutional law for a very long time there has been a dispute over the constitutional nature of the National Council of the Judiciary and thus its assignment to one of the powers specified within the principle of division of power. The subject of the discussion and the controversies it provokes concern both the composition of the Council and the nature of powers entrusted to it. On one hand, the provisions of the Constitution referring to the National Council of the Judiciary have been placed in Chapter VIII "Courts and Tribunals" which is devoted to the judiciary. The representatives of the doctrine thus indicate that this fact proves that the constitution makes clearly wanted to place the Council among independent, non-judicial bodies of the judiciary[2]. A similar opinion was expressed by the Constitutional Tribunal[3]. However, there are also other ways to perceive the constitutional nature of the Council. According to L. Garlicki, the National Council of the Judiciary is a special state organ located between the authorities of different powers, both because of the mixed

[1] K. Szczucki, „Uwagi do art. 186", in *Konstytucja RP. Komentarz, t. II, M. Safjan, L. Bosek (ed.)* Warszawa (2016): 1114.

[2] B. Banaszak, *Prawo konstytucyjne* (Warszawa, 2008), 682; A. Bałaban, „Krajowa Rada Sądownictwa – regulacja konstytucyjna i rola w systemie władzy sądowniczej", in *Sądy i trybunały w konstytucji i praktyce*, W. Skrzydło (ed.) (Warszawa, 2005), 79; N. Leśniak, J. Michalska, „Krajowa Rada Sądownictwa jako pozajudykacyjny organ władzy sądowniczej", in *Konstytucyjny model władzy sądowniczej w Polsce – wybrane problemy, M. Jabłoński, S. Jarosz – Żukowska (ed.),* Wrocław (2013): 64;

[3] See: The decision of 15 December 1999 of the Constitutional Tribunal, P 6/99, OTK 1999, Nr 7, poz. 164.

composition of the Council, whose members are appointed by the legislative, executive and judicial branches and the scope of its functions[1].

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3. The only competence directly granted to the National Council of the Judiciary by the Constitution is the right to make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges (art. 186 para. 2). The legitimacy of the Council to initiate proceedings before the Tribunal is of a special nature as it is subject to a limited scope. The concepts of the independence of courts and the independence of judges should, however, be interpreted in a dynamic manner, covering not only matters relating directly to the independence of courts and judges, but also those legal institutions which, from the point of view of the violation of these two principles, may raise doubts in the sphere of effective exercise of the right to court[2].

For example, the National Council of the Judiciary submitted an application to the Constitutional Tribunal on 16 July 2008 in relation to the compliance with the Constitution of the provisions of the law on the system of common courts[3] and the corresponding regulation of the President of the Republic[4] to the extent they constitute the legal basis for the remuneration mechanism of judges which leads to a systematic reduction of these remunerations. Another example can be the application introduced to the Constitutional Tribunal by the National Court Register on 24 November 2015 with respect to the law on the amendment of the Act on the Constitutional Tribunal of November 2015.

4. The Polish Constitution directly defines the composition of the National Council of the Judiciary which, in line with the assumptions

[1] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Warszawa, 2015), 334.
[2] Kozłowski and Tuleja, „Ewolucja ustrojowej pozycji sądów a konstytucyjne zadania Krajowej Rady Sądownictwa", 20.
[3] Act of 27 July 2001 – the Law on the Organization of Common Courts, Official Journal of Laws "Dziennik Ustaw" 2001, No 98, item 1070, with later amendments.
[4] Regulation of the President of the Republic of Poland of 6 May 2003 on basic rates of salaries of the judges of common courts, assessors and practitioners and the rates of the functional supplement for judges, Official Journal of Laws "Dziennik Ustaw" 2003, No 83, item 761.

accompanying the introduction of the Council to the Polish constitutional law, includes representatives of all three branches of power - the judiciary, the legislature and the executive. The term of office of the elected members of the National Council of the Judiciary is four years. What is more, the statute provides that one person cannot be a member of the National Council of the Judiciary more than twice. The National Council of the Judiciary shall elect its chairman and two deputy chairpersons from among its members.

According to art. 187 para. 1, the National Council of the Judiciary is composed of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, an individual appointed by the President of the Republic, fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts, four members chosen by the Sejm from amongst its deputies and two members chosen by the Senate from amongst its senators. Therefore, the National Council of the Judiciary consists of twenty-five members, which can be divided into three groups according to the selection criteria: members who are in the Council *ex officio*, elected judges and members elected by political bodies. Regardless of the way of appointment to the National Council of the Judiciary, all members of the Council have the same status with the same rights and entitlements. Any category of members benefits from special privileges.

The First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice are members of the National Council of the Judiciary during their term of office.

Judges are elected for the term of office of the Nation Council of the Judiciary by the respective general assemblies: two judges of the Supreme Court are elected by the General Assembly of the Judges of the Supreme Court, two judges of administrative courts are elected by the General Assembly of Judges of the Supreme Administrative Court together with representatives of the general assemblies of provincial administrative courts, two judges of the courts of appeals are elected by the representatives of the general assemblies of the judges of the courts of appeals, eight judges of district courts are elected by the representatives of the general assemblies of the judges of district courts and one judge of the military court is elected by the Assembly of Judges of the Military Courts.

The Sejm and the Senate elect the members of the National Council of the Judiciary for a term of four years, but their mandate in the Council expires no later than three months after the end of the term of office of the Sejm and the Senate or at the moment they lose their parliamentary mandate. The Sejm and the Senate elect members to the Council by an absolute majority of votes. It should be noted that the inclusion of deputies and senators in the National Council of the Judiciary constitutes an exception to the constitutional principle of incompatibility as the Constitutional presupposes the need to combine the parliamentary mandate of six deputies and senators with the membership in the National Council of the Judiciary[1].

The specific situation concerns a person appointed by the President of the Republic who holds office in the National Council of the Judiciary without a specified term of office and may be dismissed at any time by the President. In case of the end of the President's term of office, the membership of such person in the Council shall expire not later than within three months.

Due to the fact that the dominance of representatives of the judiciary (17 persons) over representatives of legislative (6 persons) and executive (2 persons) powers is significant, the National Council of the Judiciary is regarded as the highest representation of the judicial environment, acting primarily on issues of the judiciary. For example, the Council can issue binding opinions on the appointment of presidents and vice-presidents of appellate and district courts. As the Constitutional Tribunal has pointed out, entrusting the Council with this competence does not violate the constitutional principle of the autonomy and independence of the judicial power (provided by art. 178 of the Constitution), since it has been detained within judicial power[2]. The mixed structure of the National Council of the Judiciary allows to express opinions in the name of the whole judicial community, but also to perform other functions, including quasi-control powers, allowing to include strictly political authorities of executive and legislature in

[1] K. Grajewski, *Przedmiotowy zakres ochrony działalności wchodzącej w zakres sprawowania mandatu parlamentarnego (art. 105 ust. 1 konstytucji)* Nr 1 (132) Przegląd Sejmowy (2016): 32.
[2] The decision of the Constitutional Tribunal of 18 February 2004, K 12/03.

activities aimed to consolidate and safeguard the independence of the third judicial power[1].

5. Having in mind the constitutional position of National Council of the Judiciary is it well worth considering whether the proposed by the government direction of change regarding the manner of creation as well as in the procedure regarding the line[2] of decisions is in fact constitutional[3]. Opinions regarding this are actually contradictory. According to the Minister of Justice the project will result in democratization of the election of judges for the of National Council of the Judiciary which will enhance its prestige. The rules governing the appointment for the Councils are changing, the unclear and complicated model of appointing for the Council will be modified. The candidate for the judges will be verified in a more transparent way which will result in improving the effectiveness of courts and rebuilding citizens trust towards the system of justice[4].

A different point of view is presented by the judges themselves. The National Council of the Judiciary has stated that "in the project presented for commenting the Minister of Justice has failed to met the rudimental objections of the Councils regarding the unconstitutionality and irrationality of the proposed regulations. Yet another version of the project varying significantly from the propositions put forward within the last 10 months proves that there is no coherent conception of the Minister of Justice. Moreover the current version of the bill is even more unconstitutional than its previous counterparts. The haste of the legislative proceeding regulation functioning of a constitutional organ of the state as the Justice Council is yet another reason to be frowned upon. The proposed pace of legislative proceedings results negatively on the quality of the opinioned bill, which also results in the superficiality f its

[1] P. Mikuli, *Krajowa Rada Sądownictwa – zakres regulacji konstytucyjnej i ustawowej a potencjał kompetencyjny organu*, 11; http://www.academia.edu (21.03. 2017).

[2] See. Project regarding change of bill on National Council of the Judiciarys and other bills
http://legislacja.rcl.gov.pl/docs//2/12284955/12350850/12350851/dokument277955.pdf [10.03.2017].

[3] It is not the place of this publications to evaluate the manner in which the bill has been prepared, although it does raise serious questions due to a very short period for presenting the opinion of the parties it concerns

[4] See https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/projekt-ustawy-o-zmianie-ustawy-o-krajowej-radzie-sadownictwa-oraz.html [10.03.2017].

justification[1]. In a similar down note may we find the stand of the Association of Polish Judges "Iustitia" which, apart from opinions similar to the one of the National Council of the Judiciary has raised that the final version of the proposed bill has actually never been presented, which is in violation of the rules of social dialogue and proper, responsible legislation. Additionally it is a symptom of disregard towards the people by the executive as "Iustitia" represents the biggest association of Judges in Poland[2].

The changes proposed by the council of ministers might be regarded as really far going. The first of the changes regards the manner in which the members of National Council of the Judiciary are appointed. As it has been mentioned its panel – apart from those members that are included ex officio such as the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court – is composed out of the representative of the President of Poland, fifteen members appointed from the judges of the Supreme Court, ordinary courts, administrative courts as well as court martial and four members appointed by the Sejm amongst its members and two members of the Senate also chosen amongst its members. The current regulation assumes that the abovementioned fifteen members are chosen by the judges in a dispersed manner. This state of affairs is regulated by art. 11 National Council of the Judiciary of the Act. According to it two members are chosen by a general assembly of the Supreme Court Judges amongst its members, another two are chosen by a general assembly of the Supreme Administrative Court Judges together with a general assembly of the Voyvodeship Administrative Courts judges, two members are chosen by representatives of courts of appeal and eight are chosen by representatives of ordinary courts. The last member is chosen by courts martial amongst its members.

[1] The opinion of National Council of the Judiciary form March 7, 2017 on Government project of the Bill on National Council of the Judiciary http://wsww.krs.gov.pl/pl/aktualnosci/d,2017,3/4663,opinia-krajowej-rady-sadownictwa-z-7-marca-2017-r-dotyczaca-rzadowego-projektu-ustawy-o-krajowej-radzie-sadownictwa [10.03.2017].

[2] The opinion of Polish Judge Association Iustitia on the project of 22.02.2017 on the Project regarding change of bill on National Council of the Judiciarys and other bills http://legislacja.rcl.gov.pl/docs//2/12284955/12350850/12350851/dokument277955.pdf [10.03.2017].

The act also defines the manner in which the representatives are to be chosen. According to article 12" the general assemblies of Voyvodeship Administrative Courts elects two representatives each and the election should take place no later than one month prior to the end of office of the members of the Council elected amongst the Administrative Judges. In the case of general court judges "the assembly of Courts of Appeal Judges elects its representatives amongst its members in the amount equal to one fifth of the given administrative court" whereas " the general assembly of judges of a given county elects its representatives amongst its members in the amount equal to one fiftieth of the given county[1]. In this case as well the one month term for the election is in effect. One might conclude that the appointment of National Council of the Judiciary members takes place in two-tier election.

The proposed project of the amendments changes those rules significantly. Eventually it has not been proposed that the members of the Councils should be elected by judges themselves. The proposed rules will result in depriving the judges of any influence on the appointment of the members of this organ. The election will be made by the Lower House of Parliament, which will mean that an organ with a political character will decide about the appointing of members of the Council. Moreover, the candidates for the council may only be appointed by the Presidium of the Sejm or a group of at least 50 members of parliament. Judge associations in the light of the project may only recommend candidates to the Marshal of the Sejm, which will not be amounting to their appointing for candidates. What is more the Marshal of the Sejm will not be bound in any form by such an appointment. As a result the appointment may be seen as only illusory. If the Sejm was to make an appointment, an opportunity to minimize the risk of making such a process political might be a rule that the candidates may be appointed exclusively by the judge associations. It is also well worth adding that the Lower House of Parliament is not mentioned as the competent authority in the constitution. It is a valid case in point as both the Lower and the Higher

[1] In reality this results in strengthening of the voice of Administrative court judges, which in turn results in mineralizing of possible problems connected with the voting. See P. Mikuli, *Konstytucyjność trybu wyboru sędziów powszechnych do KRS : opinia w przedmiocie zgodności art. 11 ust. 3 i 4 oraz art. 13 ust. 1, 2 i 3 ustawy z 12.05.2011 r. o Krajowej Radzie Sądownictwa z art. 187 ust. 1 pkt 2 Konstytucji RP*, „Krajowa Rada Sądownictwa"4 (2014): 11.

House of Parliament were appointed as the organs amongst which members are respectively chosen 4 and 2 of the members of the Council. It should be interpreted as the competency to elect the representatives only by the judges themselves[1]. This view seems to be supported not only by the argument of a reasonable legislator but also by the fact that the Council is an organ of judicial self-government.

Moreover, the project does not precisely define the criteria of the election, nor does it ensure the every type of courts will be represented, which might be perceived as a valid infringement of a constitutional norm resulting from art. 187 par. 1 point. 2^2 of the constitution. We may also form an arguments that such an approach in unconstitutional as depriving the judges of an influence on the composition of the Council is an infringement of court independence rule, that need to be only supervised by the remaining authorities, not controlled. If we are to reform the judiciary it is well worth to take a slightly different approach, one that leads to making it independent from the remaining, political authority. Appointing the judges by the members of parliament, being political in its very nature, is greatly affecting the constitutionally guaranteed apolitical of the judiciary.

Yet another disturbing solution, which may be found in the project is dividing the Council into two separate assemblies. In the current situation the Council is an homogenous organ in which every member has the same duties as well as rights. According to article 20 of the NCJ act for the validity of its resolution at least 50% of its members need to cast a vote. For a resolution like this to be effective at least half of the members must be present. As a rule such a resolution is taken by at least half of the votes in an open voting yet any of the member may demand an open voting, which may be important in the terms of personal voting. Such a form of regulation guarantees that without the consent of the judges representatives the Council will not be able to reach any

[1] The prior version of the project suggested that the election for the National Council of the Judiciary were to be in camera. The judges were to be obliged to participate in such an election and the candidate were to be appointed by judges varying in number from the type of court. see A. Łukaszewicz, *Będzie nowa Krajowa Rada Sądownictwa*, „Rzeczpospolita" of 6 May 2016, http://www.rp.pl/Sedziowie-i- and sady/305069984-Bedzie-nowa-Krajowa-Rada-Sadownictwa.html [12.03.2017].

[2] See L. Garlicki, „Uwagi do art. 187", in *Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. IV*, L. Garlicki (ed.) Warszawa (2005): 5

resolution. This is another guarantee of the independence of the third authority in Polish legal system.

As it has been mentioned before the project aims at neglecting such a solution, assuming that the Council will be divided into two assemblies. The first one will consist mainly of politicians; four members of the Lower house of parliament, two members of the upper house of parliament, the Minister of Justice, a representative of the president as well as the First President of the Supreme Court and the President of the Administrative Supreme Court. The second assembly will consist of the remaining Council members. The power of each assemblies vote is to be equal, which means that each resolution will require an unanimous stand of both assemblies. Even though a way of overcoming the objection of one assembly has been predicted, but it requires unanimity of all the Council judges, both those that have been appointed by the Sejm as well as well as the First President of the Supreme Court as well as the President of the Supreme Administrative Court. In reality, especially if take into consideration the way in which the Council members are assigned arising of such a situation seems highly unlikely. In reality such a division will result only in strengthening the political voice in the Council with a simultaneous weakening of the power of the Council, but also may result in the paralysis of the Councils decisiveness which may result in troubles for instance in nominating new judges. One may not disagree with the opinion of NCJ that the analyzed proposition will result in impeding the equality of the Council's members by giving the vote of the members of the first association more power than the vote of the members of the second one[1]. This will lead to an obvious differentiation of competence of the members of this Organ, which, in the light of constitution has been commissioned as homogenous, not one that operates within two different configurations[2]. There can be no doubt, that the proposition is in contradiction to the art. 187 par. 1 of the constitution and thus should be perceived as unacceptable.

The third controversial matter that is being regulated by the government is the nomination of the vice president of the Justice Council. Current regulations presented in art. 16 par 1 of the National Council of Justice act specifies: The Councils shall elect from among its members a President, two vice-presidents and three members of the

[1] Opinion of the National Council of Justice form march 7th 2017
[2] Opinion of the National Council of Justice form march 7th 2017

Council's Council. The government's revision project leaves the principles of the choice of the President and the members of the Council's Council, however modifying the choice of vice-presidents. Each of them is to be elected by the assemblies separately, with his competence being governing the assembly if the president does not come from the assembly itself. In the justification no practical argument for supporting such an idea has been presented, except for stating that it is an adjusting mechanism in nature. The authors of this article support the view of the Council according to which form art. 187 par. 2 of the constitution one may infer that the choice of the vice president is the sole competence of the National Council of the Judiciary presiding en banc and not other organs even if members of the Council are in its ranks[1]. Therefore a need to provide a normative guarantee for the vice-president to represent each of the assemblies does not seem to be a valid case in point.

The proposed revision has however abandoned another, often mentioned, that would undoubtedly have to be considered as opposing the court independence rule. The idea being that the Council would be obliged to present two candidates for each proposed judge nomination among which the President would choose the one to be nominated. In theory this would not change the way in which new persons would be admitted to the profession. However presenting two candidates might result in acting in a way that would not be contradictory to the interests of the President. Therefore in the context of a refusal to appoint a judge the head of state may pass negative judgment on those judges that would be able to Pass judgments that would be adverse to the ones exercising authority. Therefore, especially in the case of the so called promotional nominations the necessity to present two candidate might reflect negatively on the judges independence when it comes to judicial decisions as it might result in political speculations while passing sentences.

Finally, the greatest infringement of the constitutional order is connected with temporary solutions. The project assumes that within 30 days of implementing the act, the mandates of the members of the Council shall expire. This means that the cadency of current members of the Council shall be terminated, despite the fact that according to article 187 par. 3 it is supposed to last four years. Due to the fact that the

[1] L. Garlicki, „Uwagi do art. 187", 2-3.

Council is a constitutional organ it would be proper to wait before implementing such a solution until all the mandates of current members expire. This proposition unequivocally infringes the rule of a democratic state under the law, especially the rule of proper legislation and connected rule of citizens trust towards the country, especially that it changes a mandate resulting from the constitution. Moreover, such a solution will reflect negatively on the continuity of the works of NCJ. The expiration will not take place after new members have been elected, as they are to be elected within 30 days from the moment of the current members mandate's expiration.

CONCLUSIONS

To conclude, it is absolutely necessary to clearly state that the National Council of the Judiciary is an organ meant to protect the courts independence. The changes proposed are in contradiction to the rules stated in constitution and, therefore, neglect the basis of the separation of powers. As a result the judiciary is controlled by other authorities, especially the regulating authority on the level of judge nomination. Therefore the dismantling of the current Council is hard to be described as aiming democratizing the judiciary. It is necessary to point out that the changes in the sphere of the judiciary operating are in fact necessary, but their aim should be to increase the independence of the independence of the third authority. It is also worth considering whether not to take the path set by Uruguay and delegate to the Supreme Court not only supervision over court rulings, but also supervision over the administrative courts. Such an analysis, however, is beyond the scope of this research and would require much further studies.

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INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL LAW INSTITUTION

Florin-Anton BOȚA[1]

Abstract

The paper aims to make a succinct presentation on the necessity of appearance need for this international intergovernmental organization, as an international institution of financial law with a role of monetary cooperation and international financing, but also highlighting the highlighting the decisive role of this institution in generating the International Monetary System, through the regulations and norms it has issued, applicable to the international financial-currency relations.

Key-words : *International Monetary Fund, monetary cooperation, international financing*

INTRODUCTION

Before the first two decades of the 20th century, the bilateral feature of the foreign exchange-financial relations has had as foundation the mechanisms of the market, as well as the norms and regulations referring to the national monetary systems specific to all partner states. Therefore, at that time, one cannot talk about the existence of an International Monetary System[2]. At that time, the national monetary systems were based on the gold standard, hence the name Gold Specie Standard.

The gold standard is characterized mainly by the following:

a) the gold value of a monetary unit, namely its parity, was established by the law;

b) the monetary parity was established as relation between the parities of the concerned monetary units;

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[2] Ion Ignat and Spiridin Pralea, *Economia Mondială* (Iaşi: Symposion, 1994): 76

c) was practiced the hammered coinage from gold, the citizens having the right to bring a certain amount of gold to the state treasury, receiving in exchange the corresponding number of gold coins;

d) the equivalence between the nominal value of the bank-notes and the value of the corresponding gold coins, was insured by the direct, free and unlimited exchange of the bank-notes with gold coins;

e) the gold enjoyed a free movement, both inside and outside the country.

The national monetary units were related only to this metal (gold) only by using it the exchanges were possible. Each sovereign state established the content in gold of the national currency, these being exchanged between them, using a fixed exchange rate, which was established depending on the monetary parity. The monetary parity was a metallic parity which was determined as relation concerning the gold content of two coins. The gold has the quality of universal currency and fulfilled the position as means of payment and reserve, both nationally and foreign, measure of the value of traded goods, but also being a price benchmark. In this way it was insured the capacity to intervene upon the automatism of the spontaneous self-regulation on the balance of external payments. Gold currency represented the connection between the different monetary systems of states, the mechanism of the gold etalon spontaneously regulating the amount of money placed in circulation with the economic needs, by simultaneously achieving the balance for the current payments: when it became surplus, gold came into the country, incrementing also the amount of money in circulation and generating higher prices. This also resulted into a diminution of exports, the consequence being the reduction of the inputs of precious metal and in reverse, until the self-regulation of the balance of current payments, and of the money in circulation.

The gold etalon has been adopted in 1716 by England, after that being adopted by the other European states, for in 1787 to be adopted by the United States of America. In 1867, Romania adopted this etalon, during a period in which the bimetallism was functional (gold and silver acting as single general equivalents, between them being established a fixed rate of exchange). Starting with 1890 the bimetallism was waived, the gold remaining the single base of the etalon.

For the mechanism based on the gold etalon to efficiently function, the reserve of the states should have important amounts of gold.

Over time, as effect of the unequal economic, financial and currency development of the states, the world faces a phenomenon of mass concentration of gold in the developed countries and another phenomenon of the absence of gold in the underdeveloped states. Moreover it is ascertained the acute trend of banks and citizens for gold hoarding, generating significant and almost permanent fluctuations for the international gold reserves, all these generating the need to replace the national monetary systems based on the Gold Specie Standard.

After the above mentioned disorders, manifested at the level of the gold etalon, after the second decade of the 20th century, certain states[1] have shifted towards the adoption of a new monetary system, namely the gold-bullion standard[2]. By this new system, it is effectively waived the use of the gold coins, which remain deposited in the existing banks, having the role of covering the issued monetary marks in circulation, which were manufactured either of paper or different alloys, without containing the gold. Theoretically, the convertibility in gold of the monetary signs was permissible, but in practice, it becomes restrictive for the signs representing the equivalent of gold bullion, this fact limiting the entire process, because the state did not enjoyed a sufficient quantity of gold to cover for it.

In other countries[3], in order to insure the real capacity of payment generated by the inflexibility of the gold standard, has been inserted a new standard for the monetary system, namely the gold exchange standard. The introduction of this new standard took place after the International Monetary Conference, held in Geneva in 1922. On this opportunity, are included in the national monetary systems, together with gold, new means of international payment and reserve, such as the US dollar, the British pound, the French franc etc, namely the national currencies of the most influent states of the world – economically and politically. Subsequent, they shall receive among them the different economic and public effects which were expressed by these currencies. This situation emerged – first of all – because of the fact that the United States and Great Britain had as reserves large amounts of gold, being at that time the most industrialized and economically developed states, but also the most influent ones, from the perspective of the international

[1] In fact, we are referring to England and France.
[2] Gold Bullion Standard
[3] First of all, we are referring to the United States and subsequently, to England.

policy. Between 1939-1933, the European economy has suffered a deep crisis, from which the British pound and the French franc are seriously weakened, their role suffering a considerable diminution, and generating on the other hand the role of the US dollar, which enjoyed a period of economic blossoming. Thus, after the crisis, in 1934, it is agreed to the establishment of a fixed value of the ounce of gold, with a content of pure gold (31.1 grams) set for 35 US dollars. In this way, it is performed a consolidation of the role of the American currency within this standard.

The gold exchange standard system has the following mainly features:

a) the national monetary units are defined by a certain amount of gold or in relation to a currency of a developed state, convertible in gold;

b) the gold is excluded from the domestic circulation, in which shall be used only marks of its value[1];

c) regarding the foreign convertibility in gold or in the so-called "currency-gold", it is laid at the bank's disposal[2];

d) the reserves of international means of payment held by the states were represented of gold, other actives and convertible currencies;

e) the funds held were free-transferable or transferable under certain circumstances, with certain limitations.

This gold exchange system replaces the old one[3], involving the direct action, legislated, of the banks and the monetary authorities, to secure the necessary money for circulation.

In time, within this system emerged different phenomena generated by the financial-monetary imbalance between the states, especially during the economic crisis, reason for which specific practices and strategies have been adopted, being created different international financial-monetary organisms that shall unfold specific actions in order to insure a legal and institutional framework that shall regulate the international currency policy concerning both the states and the economic agents. By negotiations and common regulations it was aimed the creation of an International Monetary System, its role being to insure a plus of order and discipline in the international financial-monetary relations. We do not want to insist too much over the need for the

[1] Bank-notes, coins, divisional, scriptural money

[2] Currency-gold = coins (means of payment) for certain states in which the currency was convertible legally and practically, to an official exchange rate.

[3] The system "gold exchange standard" was practically a gold standard.

creation of the International Monetary System – and over the creation of the international institutions for its support – but this aspect is directly and strongly related to the evolution of the relations between world states, to the international investments and trades, to the need for the existence of international general valid legal regulations established for the insurance of the conduct and coordination of transactions (or of certain transactions) between the states, to the implementation of a strict rigor, necessary to be respected by all participants, thus the financial imbalances, the social tensions and discontents shall be avoided.

In the general context above mentioned, during 1-22 July 1944, the representatives of 45 states, including the Soviet Union, hold a meeting in Bretton Woods[1], North-America, to decide upon the creation of the first International Monetary System, aiming to revive the gold standard, by drafting new principles – the gold standard being strictly based on the dollar – and also establishing the creation of two international intergovernmental institutions, having the nature of the international financial institutions – the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD)[2], known as the World Bank, the purpose of these institutions being to support the reconstruction of the world economy and of the international monetary system[3].

The debates from the Bretton Woods were based on two projects, drafted by two of the most famous economists of that time, namely the British John Maynard Keynes and the American Harry Dexter White, a high representative of the U.S Department of the Treasury. These two economists have begun since the early years of the 4th decade of the 20th century, thus in full World War II, to separately work and launch proposals for the establishment of new monetary system, that shall revive the free trade and insure the stability of the exchange rates. In the same time, it was aimed that, instead of spontaneous meetings, of irregular conferences between the states, to create a permanent international

[1] United States of America, state of New Hampshire

[2] Established as a World Bank, after the Conference from Bretton Woods (1944), the IBRD enhances its structure in the following years, by creating the Group of the World Bank, together with the IBRD, also including: the International Finance Corporation (IFC) – 1956, the International Development Association (IDA) – 1959, the Multilateral Investment Guarantee Agency (MIGA) – 1988 and the International Centre for Settlement of Investments Disputes (ICSID) – 1996.

[3] Florin Bonciu, *Economie Mondială* (Bucharest: Lumina Lex, 2004): 153-158

institution which shall coordinate this entire system, granting financial assistance for the states having difficulties in achieving the balance of payments, by receiving a financial support allowing them to set order to their business. Starting from these specific elements, Keynes and White have had different opinions regarding the means of granting financial assistance. Thus, the project drafted by J.M Keynes considered, first of all, the need for the development of the commercial trades between the states and the restoration of the balance of payment, using the solidarity between creditors and debtors. In this meaning he proposed the establishment of an International Clearing Union and of an international monetary unit, defined in gold and having a bank code. The international institution – in the eyes of Keynes, was aimed to be a central world bank, with wide authority, including with the power to create its own currency, thus having the possibility to offer financial support for the states in difficulty. The project initiated by the American H. White considered a wider role for the gold in the system, representing a major interest for the U.S Department of Treasury, given the fact that at the moment of the negotiations (1944) the U.S held almost 2/3 of the official reserves of gold of the developed world and intended to further maintain an essential role in the system, aiming to place the U.S dollar in the centre of the system, as international currency. Moreover, H. White supported as source of the financial assistance the creation of a Financial Stability Facility, powered by the contribution of the member states, thus considering that the international institution[1] proposed by him shall have an active role in the cooperation and shall held a rigorous control over the policy of the credited states. The two plans have been subjected to long debates, the American version being predominant due to the position as leader held by the U.S. Nevertheless, we may state that the financial agreement adopted can be seen as a hybrid, a combination between the two initial proposals. Thus, the IMF when granting loans to different member states uses the official reserves of the other member states, and the money loaned from the states having reserves, in case of need shall be refunded. Like this, the creation of monetary mass, from the Keynes's proposal, is combined with the need for cooperation from the White's proposal, thus being created the funds of a financial institution able to

[1] Harry White supported the establishment of the Bank for Reconstruction and Development for the purpose of financing the reconstruction of the states affected by war, but also for the purpose of supporting the states economically left behind.

offer temporary support for its members, to restore the balance of payments by creating international liquidities[1].

The agreement for the creation of the IMF and the IBRD (World Bank), signed after the conclusion of the negotiations, has brought as absolute novelty "the transfer of the power on the exchange rate of each nation towards this entity". Therefore, after 1944, their modifications could only be operated after receiving the prior agreement of the IMF. The decision confirmed the fact that the world states acknowledged that the policy in the area of the exchange rate and international trade affects both the interests of all states and it is necessary to insure a specific regime and a predictable evolution[2]. Mainly it has reconfigured the monetary system based on the gold exchange system, strengthening the position of the U.S dollar, after the Conference the definition and conversion of the national currencies and the establishment of financial liquid reserves shall be made only by gold and U.S dollars, not by gold and multiple currencies, as it was before. This was a reflection of the dominant economic, political and financial position of the United States.

The IMF headquarters is at Washington D.C and has started the activity in May 1946, having 39 member states.

Also, during the Conference at Bretton Woods, given the American wish for a faster liberalization of trade, it is adopted a resolution recommending the creation of an international institution (World Trade Organization), which shall favour the development of the commercial agreements. Having as base this resolution, for the adoption of the statute of this new organism, in 1947 in Havana, Cuba, holds place a conference, but it is not until the 1950s when an agreement is reached, by the adoption of the GATT (General Agreement on Tariffs and Trade), having a secretariat providing the legal framework for solving trade conflicts and for the periodic destabilization of the protective measures. Unlike the IMF and the World Bank, which are international intergovernmental organizations, the GATT does not enjoy this quality, because it does not have means for regulations or financing. The GATT's mission is mainly to promote the world commercial trades, by combating all forms of restrictions (tariff or non-tariff) converging a little bit with the IMF's mission, which is the one to promote the world trades by

[1] A.F.P Bakker, *Instituţii financiare internaţionale* (Oradea: Antet, 1997): 24-25
[2] Florin Georgescu, *Introduction to F.M.I-ul*, by Patrick Lenain (Bucharest: Coresi, 2000): 8

removing the restrictions for the international payments and the consolidation of the convertibility of the currencies[1].

The purposes of the IMF are defined by Art 1 of the Agreement for creating the IMF, namely its statute, which has a total number of 31 articles, which define the objectives and rules for functioning. In the main, the IMF has the role to offer short-term credits for the reestablishment in the balance of payments, by performing ordinary withdrawals from its own resources, providing for its members, upon request, based on compliance with certain conditions, the currency of other members, in exchange for the gold or for their own currency. The state requesting the assistance, purchases "on sight" from the Fund foreign currencies, by paying for them with its own currency, while "at due date" commits itself to redeem an amount equivalent from its national currency, by paying in gold or in convertible currencies.

According to Art 1 of the IMF Statute, the purposes of the institution are the following:

a) to promote the international monetary cooperation through a permanent institution offering the appropriate framework for consultancy and cooperation in the area of the international monetary issues;

b) to ease the expansion and growth of the international trade, by contributing to the establishment and maintenance of high levels of employment of the labour force and of the real incomes, as well as to the development of the productive resources of all member states, as main objective of the economic policy;

c) to promote the stability of the foreign exchange rates, maintaining the discipline through rules established by the Fund regarding the trade agreements between its members (foreign currency exchanges) and avoiding the competitive depreciations (the depreciation of the competitive foreign exchange rate);

d) to ease the establishment of a multilateral system of payments for current payments between the members and the elimination of the restrictions for the foreign exchange rate (international exchanges), which hamper the development of the world trade;

e) to provide assistance for its members, by temporary placing at their disposal payments (the Fund's general resources), with the appropriate guarantees, offering them the possibility to correct the

[1] Patrick Lenain, *F.M.I-ul* (Bucharest: Coresi, 2000): 43

imbalance of payments without using measures that will prejudice their prosperity;

f) in accordance with the previous paragraphs, it shall be taken into consideration the diminution of the duration, extent and intensity of the international imbalances of payments (of its members).

As a conclusion, the role of the International Monetary Fund in the monetary area is to hamper the repetition of the economic catastrophes of the 1930s, by an organized liberalism and to support the states found in difficulty, between these two objectives existing the need for a strong and permanent cooperation[1].

Up next, we need to mention from the Statute the fact that Art 4 refers to the "Regime of fixed trades and their stability", Art 5 taking into consideration "the means for credit granted by the Fund", and Art 8 refers to the convertibility of the currency, while Art 14 emphasizes the clause for protection for the states having a poor balance of payments. We have referred to all these articles of the Statute because they seem to be the most important ones in the context of approaching our subject, which is punctual and limited. The author feels it is necessary to mention that, as an effect of the modifications occurred at the level of the world economy and in the international financial system, the IMF's Statute has suffered three modifications after the Conference at Bretton Woods.

The first modification is inserted on 28 July 1969 and allows for the Special drawing rights (SDR) to be used as an instrument for the management of the liquidities of the international monetary system (IMS). The new Art 18, modified by Para 1 (a) if the Statute, states that "in all its decisions concerning the allocations and cancelations of SDRs, the Fund shall insure the long-term needs, when and to the extent to which it is necessary to supplement the existing reserves in order to ease the achievement of the objectives, in a personal mean, by avoiding the economic stagnation and deflation, as well as the excessive requests and the world inflation". Also, this amendment has decided upon the increment of the SDR, to 50% of the shares of the organisation.

The second modification to the IMF's Statute is the most important one by its amplitude, occurs in 1976, with the occasion of the agreements in Jamaica. This modification becomes operational in 1978,

[1] P.M Defarges, *Organizaţii internationale contemporane* (Iași: European Institute Press, 2003): 42

when it is approved by the member states. Thus, it is adopted a new system based on the freedom of the exchange systems, a demonetization of the gold, the establishment of a special fund for states under development and the increment of the shares. The new statute consents to the disappearance of the fixed exchange system established at Bretton Woods, stating the fact that the member states must avoid the excessive fluctuations of their currencies, as well as the excessive rigidity of the exchange rates which hamper the proper functioning of the international adjustments. The new Art 4 of the Statute emphasizes in its Para 1 that the member states must promote a fixed exchange rate system. Art 4 Para 4 states that the IMF shall determine with a majority of 85%, the international propitious conditions for the reestablishment of a fixed exchange rate system.

The third amendment is adopted in 1992 and inserts new rules for functioning and a mechanism for a graduate suspension of the rights of the states having delays in payments to the Fund. Practically, this third amendment establishes sanctions against the states who have registered delays in the payment of their dues because of the refunding of the credits to the Fund and which refuse to cooperate for finding a solution to this problem. This amendment expands the role of the IMF in over-watching the bank systems and allows the suspension of the right to vote for the member states that ignore to comply with their obligations to the Fund[1].

On the occasion of the last financial-monetary crisis, it has been emphasized the qualitative evolution of the economic relation "real economy – financial fluctuations", expressing differences between the national economies. This is why, in order to combat the world economic crisis, numerous specialists have chosen for the use of the SDR, as mechanism for reserve created in 1969 by the Fund. The controversial American businessman George Soroş, a fine connoisseur of the financial-monetary area and a fine speculator in this area, has stated that this mechanism could be useful for the peripheral states, with the condition that the rich states offer loans or donate for the poor states their share of special drawing rights, thus stimulating the world economy and unlocking the exports. According to him, the future of the IMF (and of the World Bank) depends on the form in which these two shall succeed in solving this issue. If they prove to be incapable of supporting the poor

[1] Lenain, *F.M.I-ul*, 25-27

states then these two international financial institutions shall lose their influence[1]. Not least, we ascertain the fact that in the past few years, along with the financial crisis and the excessive indebtedness of the poor states, without the notable effects for their economies, the efficiency of the Fund's functioning is more and more criticised, but also analyzed. These aspects shall represent the object of another paper.

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THE EU LAW IN THE POLISH LEGAL SYSTEM

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Abstract:

EU law plays a specific role in the legal system of the EU Member States. Its creation and enforcement is the result of many compromises achieved at translation level. Owing to the fact that the Constitution of the Republic of Poland stipulates the possibility of delegating some of the competences to the international body, EU law may be applicable in Poland. The European Court of Justice and its case law has a great impact on the way of implementation, enforcement and interpretation of the EU law. In Poland, the Polish Constitutional Court has a similar impact, however, the said court is in favor of the principle of supremacy of the Constitution.

Key words: *EU law, the legal system of the UE Member States, The Constitutional Tribunal, enforcement of the EU law.*

INTRODUCTION

According to N. MacCormick, a theoretician of law and an expert on EU law, there is legal order where there is a set of institutional rules that are treated as a unity indicating the behavior of a certain human community. The legal order thus adopted becomes an autonomous one through the practical functioning of its institutions, as well as of those individuals who apply to them, requesting them to give them the rules and the ways of appropriate conduct. Over time, it may happen that the rules in force will take on an entirely internal character. We are dealing with such a situation when it discussion of EU law. Consequently, it must be stated that the EU legal order has become autonomous[2].

Undoubtedly, the legal order of the European Union stands out among the legal orders of traditional international organizations. *Its specific character is expressed by the legally binding nature of the law established by the EU institutions or by the effect it exerts, ie direct effect*

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[2] N. MacCormick, *Nowa konstytucja europejska w ujęciu filozoficzno prawnym*, (Warszawa, 2003), 15.

on internal relations. This points to the recognition of the EU legal order as sui generis[1].

By entering into force on 1 December 2009, the Treaty of Lisbon has changed three basic treaties, the Treaty on European Union, the Treaty establishing the European Community (henceforth called the Treaty on the Functioning of the European Union), and the Treaty establishing the European Atomic Community. The European Community has been replaced by a European Union with legal personality. The Treaty of Lisbon abolished the pillar structure and the Union was covered by a unified legal regime.

The source of European Union law consists of the primary sources, ie the law establishing the Union, the Member States' secondary sources (derivation), which are created by the Union institutions on the basis of the powers entrusted to them and by sources which consist of elements of law not provided for in the Treaties. It is mainly about the jurisprudence of the Court of Justice, international law and general principles of law. You can also meet with a division on the subject of regulation, where institutional and material rights are distinguished. Institutional law regulates the organization, competence and functioning of the European institutions, while substantive law refers to the substantive scope of the EU competences[2].

1. RULES OF APPLICATION OF THE EUROPEAN UNION LAW IN THE LEGAL ORDERS OF MEMBER STATES

Poland's accession to the EU structures caused a significant change in relations between the Polish Constitution and Polish law and EU law. EU law pursuant to Art. 90 and Art. 91 of the Constitution of the Republic of Poland and under the accession treaty became part of the Polish legal order - in addition to the Polish law established by the Polish national authorities and the ratified international agreements.

Community order developed along with the judicial decisions of the European Court of Justice concerning the interpretation of the founding treaties. The ECJ assumed that European integration should

[1] R. Kwiecień, *Suwerenność państwa w Unii Europejskiej: aspekty prawno międzynarodowe*, (PiP, 2003), 29.
[2] J. Barcik, *Prawo Unii Europejskiej*, J. Barcik, A. Wentkowska, (Warszawa, 2014), 202.

result in the expulsion of EU law from international law[1]. The particular position of EU law is influenced by its specific characteristics. First and foremost, the principle of priority over national law and the principle of direct effectiveness of norms of EU law should be mentioned above. Both these principles have been shaped by the process of becoming independent of EU law from the law of the Member States.

Fundamental to the principle of primacy of Community law is the ECJ judgment in Costa v. ENEL. One can also come across the term "superiority" or even "supremacy" of EU law, but how should you adhere to S. Biernat's statement, which states that "it seems better to talk about" priority "for at least two reasons. Firstly, such a term is found in Art. 9 sec. 2 and 3 of the Constitution of the Republic of Poland as well as Art. I-6 of the Constitutional Treaty. Secondly, the term better reflects the essence of the phenomenon in question and is associated with it by other meaningful institutions than in the case of «superiority»"[2]. As S. Biernat points out, the notion of "superiority" is primarily associated with hierarchical dependence in the organizational structure[3]. He also underlines the essence of the way EU law is created, which affects its position in the legal order and how it is used[4].

Regardless of which method of introducing international law into national law has been adopted by a Member State, EU law is part of national law, ie it is directly applicable[5]. Immediate application of EU

[1]A. Wyrozumska, „Prawo międzynarodowe w systemie prawa wspólnotowego", in *Prawo międzynarodowe publiczne a prawo europejskie. Konferencja Katedr Prawa Międzynarodowego, Karpacz, 15 – 18 maja 2002*, ed. J. Kolasa, A. Kozłowski, (Wrocław, 2003), 48.

[2] S. Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie – kilka refleksji*, (PIP, 2004), 11-20.

[3] Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie – kilka refleksji*, 11-20.

[4] „On the other hand, in the case of relations between Member States and the Union, a better point of view is the image of Member States which have the common will to establish an organization (Community, Union). States become part of this organization. EU law is not a law superior to the rights of individual states or the law external (foreign). Just consider who and how the law of the European Union is created", Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie – kilka refleksji*, 20– 21.

[5] This was pointed out by the ECJ in the aforementioned judgment in case 6/64 Costa v. ENEL while simultaneously adopting the monistic structure of the Community legal order.

law implies its direct application in the national law of the Member States. With this dependence it is closely related to the need to establish priority rules in the event of a conflict of laws. The principle of the primacy of Community law at that time was formulated by the ECJ in the Costa v. ENEL judgment mentioned above. The Court pointed out that in the event of a conflict between a national standard and a Community law, Community law must prevail not to deprive that right of Community character and not to undermine the legal basis of the community itself[1]. The Court stated in the aforementioned judgment that "the incorporation of the provisions of Community law into the legal systems of the individual Member States and, in general, the letter and spirit of the Treaty, render them unilaterally unable to take measures against their reciprocal legal order(…). Given the specific nature of the Treaty's law and coming from an independent source, no domestic law can prevail over it, so as not to deprive it of the Community character and not weigh the legal basis of the Community itself"[2].

The principle of precedence applies to all norms of EU law, both the Treaty standards (founding treaties, revision and accession treaties), Union acts of binding force (European regulations), and international agreements concluded by the European Union[3]. The jurisprudence over prior and subsequent national law prevails[4]. Significant in this respect was the ruling in Simmmenthal, where the Court stated that "in accordance with the principle of primacy of Community law, the provisions of the Treaties and the directly applicable acts of the Communities' bodies exercise in the internal legal order not only the effect that, by their entry into force, they disable the application of any provision of domestic law contradictory to them, but also - that the entry into force of a new norm of domestic law is impossible to the extent that it would be contrary to Community standards. (…) The referring court, which is in its power to apply Community law, is obliged to ensure the full effectiveness of these standards, which also manifests itself in the necessity not to apply any subsequent domestic law provision without the need for inference or waiting for the abrogation of the norm in the

[1] A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, J. Barcz, M. Górka, A. Wyrozumska, (Warszawa, 2015), 287.
[2] 6/64 *Costa v. ENEL.*
[3] Z. Brodecki, *Prawo integracji z europejskiej perspektywy*, (Warszawa, 2004), 104.
[4] Z. Brodecki, *Prawo integracji w Europie*, (Warszawa, 2009), 102.

legislative or in any other proceedings provided for by constitutional law"[1]. It is important that although the Court recognized the primacy of EU law, national law contrary to it, is not unimportant, but it is not obliged to apply the national norm.

The expression of the principle of priority of the law of the Union with regard to national law in Art. I-6 Treaty establishing a Constitution for Europe aroused many controversies[2]. As a consequence, a Declaration No 17 was added to the Treaty, stating that the provisions of this article "reflect the existing case law of the Court of Justice and the Court of First Instance." Ultimately article I-6 was abandoned in the Lisbon Treaty. A declaration of the conference No. 17 was added, in which the Conference, ie the Member States, points out that "The Conference recalls that, according to settled case law of the Court of Justice of the European Union, treaties and laws adopted by the Union under the Treaties take precedence over the law of the Member States under the conditions laid down by mentioned case law"[3].

In addition, the Conference decided that the Final Act of the Conference would be accompanied by the opinion of the Council Legal Service on priority stating that: "The case law of the Court of Justice shows that the primacy of Community law is a fundamental principle of this law. According to the Court, this principle is inextricably linked to the special nature of the European Community. When the first judgment was issued in the now settled case law (in Case 6/64, Costa v ENEL), there was no mention in the Treaty of the principle of precedence. This situation has not changed today. The fact that the principle of priority is not incorporated in the future Treaty does not in any way affect the principle or the case law of the Court of Justice[4]".

On the other hand, the principle of direct effect indicates that the majority of EU legal norms as of the date of entry into force automatically become part of the legal order of the Member States, without the need for their incorporation (direct validity). It is related to the fact that they can be an independent source of rights and obligations

[1] 106/77 *Simnnenthal* (nr 2).
[2] It read: "Constitution and law adopted by the Union's institutions in exercising competences conferred on it shall take precedence over the law of Member States".
[3] http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14434&Itemid=431#17, [accessed: 14.03.2017; 19:01].
[4] http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14434&Itemid=431#17, [accessed: 30.09.2016; 20:24].

of the individual (direct effect). This principle refers not only to the norms in force in the legal order of the Member States without the need for their incorporation, but also to the norms whose application in a given Member State requires prior implementation[1].

It should be emphasized that the direct validity of EU law is not a feature defined by the treaties. Literature of the subject can be seen in the understanding of this principle as the application of EU norms precisely by becoming part of national legal orders from their entry into force without the need for their incorporation. To say that EU law applies as if "next to" national law, some authors understand in a way that EU law does not become national law only retains its distinctiveness[2].

For the first time, the principle of direct effect has been formulated by the Court of Justice in 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos, which stated: "according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as having a direct effect and creating individual rights which the national courts are required to protect"[3]. The Court in this judgment explicitly stresses the link between the direct effect of a provision of EU law and the fact that individual rights are granted to that individual, ie it adopts a subjective approach. However, one can also point to a second aspect in this judgment: "A procedural act that expresses the fact that an individual who derives certain rights under EU law may pursue claims directly based on an effective provision of EU law before the national courts"[4]. Firstly, EU law can be a source of rights for citizens of the Member States (the subjective element); secondly, the recognition of claims based on EU law is a matter for the courts of the Member States (the objective element)[5].

As explicitly stated in art. 288(2) of the Treaty on the Functioning of the European Union, and previously the Treaty establishing the European Community, the regulations must be directly applicable. Only here in the treaties there is mentioned the direct application of the act of

[1]Z. Brodecki, *Prawo integracji w Europie*, Warszawa 2009, p. 98.
[2] Por. S. Biernat, *Prawo Unii Europejskiej a Konstytucja RP i prawo polskie – kilka refleksji*, (PiP, 2004), 11, 20 and on.
[3] A. Wróbel, „Uwagi do art. 288", in *Traktat o funkcjonowaniu Unii Europejskiej*, (Warszawa, 2012, t. III), 635.
[4] Wróbel, „Uwagi do art. 288", 635.
[5] Wróbel, „Uwagi do art. 288", 635.

European Union law. Article 288(2) states that "the regulation is of general scope. It is binding in its entirety and is directly applicable in all Member States." The Court of Justice clarifies that the Regulation produces direct effects because of its special nature and place in the system of sources of EU law. The special role of the Regulation was given by the Court of Justice in the judgment in Case 34/73 Fratelli Variola v. Amministrazione Italiana delle Finanze, pointing out that "by its special nature and place in the system of sources of Community law, the decree immediately and consequently gives individuals rights, which national courts have a duty to protect. The direct effect of the Regulation means that its entry into force and application in favor of or against those who are subject to it shall be independent of any remedy provided for in national law. The provision of national law reproducing the content of a directly effective provision of Community law can not in any way affect the direct effect or jurisdiction of the Court under the Treaty "[1].

The direct effect is produced by those provisions of EU law, which, firstly, are clear and precise, secondly, are unconditional, thirdly, unless they are not exercised by the Member States or EU institutions and fourthly do not grant the parties the power to act based on the recognition or discretionary power[2].

Due to the fact that the norms are directly applicable Union law, they are directly applied and exert a direct effect "Field of these concepts and their interaction is a very controversial doctrine, especially given the fact"[3] that ECJ does not use them consistently.

Practical implementation of direct effect is expressed in direct application of EU law. "Direct application of EU law falls within the scope of judicial practice of the authorities of the Member States"[4]. It should be referred to "the manner and scope of application of Community law [Now EU-ed. Author] by the authorities of the Member

[1] Za: A. Wyrozumska, in *Instytucje i prawo Unii Europejskiej*, J. Barcz, M. Górka, A. Wyrozumska, (Warszawa, 2015), 290.
[2]Wróbel, „Uwagi do art. 288", 636.
[3]W. Postulski, „Sądy państw członkowskich jako sądy wspólnotowe", in *Stosowanie prawa Unii Europejskiej przez sądy,* ed. A. Wróbel, (Warszawa, 2005), 472.
[4] P. Kapusta, „Sąd Krajowy jako sąd unijny", in *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, ed. M. Jabłoński, S. Jarosz- Żukowska, (Wrocław, 2015), 233.

States"[1]. On the other hand, A. Wróbel recognizes that direct application is related to the manner and scope of the application of EU law by the authorities of the Member States, but it is about the application of the law sensu stricto as a process of determining in a single and specific act, that is, in the form of a judicial or Administrative decision, the legal consequences of the facts considered proven. Then the basis for the resolution will be the norm of EU law[2]. It is noted in the literature that the possibility of direct application, in particular the provisions of the regulations, is "to attribute this feature exclusively to this category of acts constitutes an expression of a narrow understanding of the concept of direct application." "An example of an act that can also be used directly, are directives which, in accordance with Article 288 ECJ bind each Member State to which they are directed, with regard to the result to be achieved, but leaves the national authorities free to choose the form and the means. It follows from the above that, in principle, in contrast to the provisions of primary law and regulations, the directives do not intrude in law on their own"[3]. But we must remember that their applicability in the internal legal systems of the Member States involves the transposition of the provisions within the deadline indicated by the competent authorities of the Member[4].

2. POLISH CONSTITUTION IN CONSIDERATION OF LAW OF EUROPEAN UNION

The Constitutional Committee of the National Assembly, during the work on the draft Constitution of the Republic of Poland, took into account the fact that Poland is preparing to join the European Union and the European Union, which will be obliged to adopt to the full of the acquis communautaire. Thus, it was found that the Constitution should provide a suitable ground enabling the Polish Republic to take without obstacles and significant changes to the content of the Constitution the decision on accession to the EU structures, followed by the introduction

[1] W. Postulski, „Sądy państw członkowskich jako sądy wspólnotowe", in *Stosowanie prawa Unii Europejskiej przez sądy,* ed. A. Wróbel, (Warszawa, 2005), 414.
[2] Zob. A. Wróbel, „Zasady ogólne (podstawowe) prawa Unii Europejskiej", in *Stosowanie prawa Unii Europejskiej przez sądy*, ed. A. Wróbel, (Warszawa, 2005), 85.
[3] D. Kornobis- Romanowska, *Sąd krajowy w prawie wspólnotowym* (Kraków, 2007), 25.
[4] See. ECJ ruling of 23.5.1985 29/84 Committee *v. Germany* [1985] ECR 1661.

of the law in force in the Republic of Poland, on which the EU is founded. The content of article 90 and 91 of the Constitution would allow it. These constitutional provisions made it possible for the Republic of Poland to ratify the Accession Treaty in 2003, together with Article 9 of the Constitution of the Republic of Poland creating the basis for recognition as the norms in force in the Republic of Poland both the original and the secondary law of the European Union[1].

The introduction of these regulations did not, however, have led to the silent voices indicating that such regulation was insufficient or not completely correct. It has even been suggested that, like the Republic of Austria or the French Republic, separate chapters in the constitutions governing the matters concerning Poland's membership of the European Union should be introduced[2].

The frequent accusation connected with Poland's accession to the European Union was the problem of binding the accession treaty and the agreements to which it referred, and thus the whole of EU law constituting the acquis communautaire, which was understood even as the loss of sovereignty by Poland. One of the submissions to the Constitutional Tribunal to examine compliance with the Constitution of the Republic of Poland, and in particular with the preamble itself, indicated that "the sovereignty of the Polish nation remains undermined if the state is bound by the law of a supranational organization whose nature is reduced to <<taking over successively and irrevocably sovereign rights of peoples>>. The preamble to the Constitution refers to the cooperation of Poland with all countries, which means equality, and not <<the absorption of one state and nation by the supranational organism>>"[3] And further, "the recognition of the supremacy of the external legal system over the Constitution, which comes from the Nation and which is the supreme law of the Republic of Poland, is in contradiction with art. 4 sec. 1 of the Constitution. The consequence of such a solution is to deprive the Nation of supreme authority and to

[1] P. Winczorek, *Konstytucja RP a prawo wspólnotowe*, (Państwoi Prawo, 2004), 11, 3.
[2] See more J. Barcz, „Członkostwo Polski w Unii Europejskiej a Konstytucja z 1997 r.", in *Czy zmieniać konstytucję? Ustrojowo- konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, ed. J. Barcz, (Warszawa, 2002), 21 and on.
[3]Judgement of the Constitutional Court of 11.5.2005, K 18/04, OTK ZU nr 5A/2005, pos. 49.

transfer the basic tool of action for the good of the citizens to the external being"[1].

In turn, the Constitutional Court, even before Poland's accession to the European Union, presented a more general position on the role of European law in the interpretation of the Constitution of the Republic of Poland, which, even after its accession, retained its validity, stating that "the interpretation of existing legislation should take into account the constitutional principle of favorability to the process of European integration and Cooperation between states. It is constitutionally valid and preferable to interpret a law that seeks to achieve the specified constitutional principle[2]". The Court has previously indicated that: "The postulate of using European law in the pre-accession period as an interpretative inspiration for the Constitutional Court means, first of all, the use of this right to reconstruct the constitutional standard in the exercise of control. It is not synonymous with <<application>> of European law, which would be neither possible nor appropriate at this time, if only on formal grounds. Thus reconstructing the pattern (norm) according to which an assessment is made of constitutionality should be used not only to the text of the Constitution, but - to the extent that the text refers to the terms, concepts and principles of the known European law - to those very meanings"[3].

Article 90 of the Constitution was criticized for failing to define the substantive boundaries of non-transferable competence[4]. Article 90 sec. 1 is detailed when it comes to the mode of granting consent to the transfer of powers of state authorities to international bodies. On the other hand, it is too vague on the substance of the case itself. It does not contain a word about sovereignty, although its content clearly shows that it is about this matter. It does not specify the competence that can be transferred. However, the subject of the transfer may be the competence of the state authorities "in some cases" a proposal should be made to prohibit the renunciation of sovereignty by the act and the inadmissibility of the

[1] Judgement of the Constitutional Court of 11.5.2005, K 18/04, OTK ZU nr 5A/2005, pos. 49.
[2] Judgement of the Constitutional Court of 27.5.2003 r., K 11/03, OTK ZU nr 5/A/2003, p. 576.
[3] Judgement of the Constitutional Court of 28.1.2003 r., K 2/02, LEX nr 74917.
[4] Zob. B. Banaszak, G. Kulka, *Prawo europejskie w polskim systemie prawnym*, in *Wybrane zagadnienia teorii i praktyki prawa* europejskiego, ed. Z. Pulka (Legnica, 2009), 14.

transfer of all powers of a body[1]. Limitation of the exercise of sovereignty, the possibility of which is provided for in Article 90, is not equivalent in any case with the restriction of sovereignty. It is also right to point out that the "constitutional norm of the transfer of an international organization or an international body of competences of the organs of state authority in certain cases is an act by which the Republic of Poland renounces the exclusive exercise of its authority within the prescribed scope, allowing in this regard, in their internal relations, the legal acts of an international organization (international body) "[2].

It should be borne in mind that even when Poland, under an international agreement, entrusts an international organization or an international body with the power to legislate, the Constitution remains the highest law in the Republic of Poland. The Constitutional Court emphasizes: "Delegation of powers <<in some cases>> must be understood as both a general ban on the transfer of competence of the authority concerned, the whole transfer of powers issues in the field, as well as the prohibition of transfer of powers on the substance of issues defining the authority of the state." It is therefore necessary to define the fields as precisely as possible, and to indicate the scope of the competence to be transferred. There is no basis for assumption, according to which to maintain this requirement would be sufficient to preserve in several cases, even for the sake of appearance, the competence of the constitutional authorities. (...) Activities that result in the transfer of competences that would undermine the meaning of the existence or functioning of any of the organs of the Republic would, in addition, be clearly in conflict with Article 8 sec. 1 Constitution of the Republic of Poland. Guaranteed by Article. 91 sec. 2 of the Constitution the priority of application of international agreements, ratified on the basis of statutory authorization, or taken under national referendum authorizing (in accordance with Article. 90 paragraph. 3), including agreements on the transfer of powers "in certain cases" - over the provisions of laws which can not be co-exerted- does not lead directly (in any area) to recognize the same priority to these agreements before the provisions of the Constitution. The Constitution thus remains - by virtue of its special

[1]B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (Warszawa, 2012), 520.
[2]K. Działocha, „Uwagi do art. 90 Konstytucji", in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, (Warszawa, 1999, t. I), 3.

power - the "highest law of the Republic of Poland" in relation to all international agreements binding on the Republic of Poland. This also applies to ratified international agreements on the transfer of competence "in certain cases". According to Article 8 sec 1, the Constitution of the Republic of Poland is granted priority of legal power in sence of validation and application"[1]. It should also be borne in mind that, as emphasized in Polish law, "this transfer does not (...) result in a loss of sovereignty over the delegated powers. It is not absolute and can be canceled. However, if such an appeal was made in violation of an international agreement, then the state would be at risk of violating international law and its own constitutional law."[2].

If, therefore, under the sovereign decision of the Polish legislator the transfer of powers is equivalent to the replacement of the Polish legislator by the EU legislator, the consequence of this is the full application of relevant EU norms. It refers not only to the situation of the norms of EU law in the narrow sense, but also to the norms outside of the system to which EU law refers. There should not be a situation, in which the Polish government finds that only Polish law and the laws of an international organization or organ, which has received concrete legislative competence is binding, and deny the norms created by another legislator, to which the Polish or EU legislator refers to[3]. As noticed by B. Banaszak „in the simplest of words: if you are in for a penny, then you are in for a pound". If we agreed to recognize the competence of lawmakers of the Union in a given sphere of social relations, then with all its consequences, including the recognition of superiority to EU law over certain norms from other systems, when such is the will of the EU legislator"[4]. At this point it can be added that referrals not just for other acts or even legal systems are not anything wrong. Such references may be justified by the principle of the rationality of legislative action, which has been fulfilled by the rule of the

[1] Judgement of the Constitutional Court of 11.5.2005 r. K 18/04, OTK ZU nr 5A/2005, pos. 49.
[2]J. Jaskiernia, *Akcesja do Unii Europejskiej a konstytucyjny system stanowienia prawa*, in *Akcesja do Unii Europejskiej a Konstytucja Rzeczypospolitej Polskiej. Materiały konferencyjne. Referaty. Dyskusja*, H. Zięba- Załucka, M. Kijowski, (Rzeszów, 2002), 10.
[3]B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz (*Warszawa, 2012), 522.
[4] Banaszak, *Konstytucja Rzeczypospolitej Polskiej*, 522.

democratic rule of law. Assuming that a case is already in good shape from the legislator's point of view (ie, corresponding to the purpose of the regulation to be issued) regulated by a legislative act, it has two options: firstly, it must either be repeated in the act itself, and secondly, it can refer to an already existing act.

CONCLUSION

For a long time, the debate on the role of national constitutions and their place in the legal order in these countries has been taking place in the field of law, especially constitutional law, of many EU Member States. It is often linked to the discussion of the contemporary essence of state sovereignty. "The opponents of European integration often refer to the need to protect the sovereignty. Also people who are worried about the deepening and intensification of the integration, argue that the state participation in the structures of the EU threatens its sovereignty"[1].

It should be noted that "multilevel nature of the Union creates great flexibility. Participation in the policies of the European Union varies according to their nature and the Member States themselves. The Schengen Agreement, the euro area and the Western European Union do not cover the same countries. Similarly, some states are neutral and others belong to NATO. [...]Rejection of one of the policies of the European Union does not mean rejection of the entire process"[2]. Thus, the constitutions of the Member States expressing their sovereignty continue to retain their importance as a fundamental determinant of state sovereignty and can not be assumed in the foreseeable future to be suppressed or superseded by any other transnational act or group of acts of comparable importance to the constitutions of the Member States.

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DETAILS OF PAYMENT, WHICH IS NOT DUE IN THE REGULATION OF THE NEW CIVIL CODE

Nora Andreea DAGHIE [1]

Abstract

The concept of "payment which is not due" includes different realities in practice. The interest in this institution has re-emerged under the circumstances in which the doctrine considers that the rules contained in the Civil code are intended to apply not only in the matter of the of private law strictosensu, but, in the absence of certain special rules, in the administrative law and in the Community law. With reference to the previous regulation, we notice that the modern lawmaker of 2009 has taken over the opinions developed in the literature. For instance, endorsing the interpretation according to which the error is a necessary condition for being in the presence of the payment which is not due only in the cases of relative non-existence of the debt intended to be paid, the texts of the New Civil Code do not contain any provision which expressly orders that the solvens error is a condition the presence of which is mandatory in all assumptions of payment which is not due. Sometimes, the error alters the conviction that there would be a chargeable liability, which could justify a payment from the legal point of view.

Keywords: *payment, solvens, accipiens, error, return*

INTRODUCTION. DEFINITION, REGULATION AND SCOPE

A lawful legal fact is defined in the literature[2] as an operation compliant with the law and good manners, with was performed without the intent of producing legal effects, which legal effects occur however under the law.

A payment, which is not due (the payment of a non-debt), is the second particular form of lawful legal fact which generates obligations, which consists in the execution by a person (*solvens*) of an obligation to

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[2]Emöd Veress, *Civil Law. General Theory of Obligations* (Bucharest: C.H. Beck, 2016), 91.

another person (*accipiens*) to which it had no obligation and without the intention to execute another person's obligation[1]. The payment which is not due gives rise to a civil legal relationship between the *solvens*and *accipiens*, and it identifies the right of the person who made the payment to return of such and the correlative obligation of the person to which the payment was made. If the payment is not willingly returned by the *accipiens*, the creditor, namely *solvens*, has the right to an action which was called "condictioindebiti" in the Roman law[2].

The term "payment" is used in its largest sense, with the meaning outlined by Article 1469 (2) of the Civil Code: "the payment consists in the remittance of an amount of money or, as the case may be, in the execution of any other provision which forms the very object of the obligation". The ground for the payment may be found in Article 1470 of the Civil Code: "any payment involves a debt". *Per a contrario*, the person who makes a payment without having a debt, is entitled to return, according to the provisions of Article 1341 (1) of the Civil Code.

In respect of the scope of this institution, the doctrine[3] assesses that a payment, which is not due, may stand good both against banking institutions and against the tax authorities, in their capacities as subjects of the public law, characterized by the existence of internal regulations establishing their own policy, sometimes derogating from the common law. In this respect, the French doctrine[4] firmly expressed the thesis according to which the dispute regarding the claim in respect of a payment which is not due has major importance, involving values such as social security, as well as the relationships with the institutions mentioned above, whose bookkeeping is complicated and often disorganized.

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[1] From the standpoint of the person having the obligation to return, this source of the obligations was defined as the legal fact of receipt by a person, called *accipiens*, either personally or by attorney-in-fact, of a provision made by another person, called *solvens*, either personally or by attorney-in-fact, without having such obligation, and this fact obliges it to return the provision made, either in kind or by equivalent. See Sache Neculaescu, „Payment which is not due" in *New Civil Code. Studies and Comments*, ed. Marilena Uliescu et al. (Bucharest: Universul Juridic, 2014), 383-384.

[2] Vladimir Hanga and Mircea Dan Bob, *Course of Roman private law* (Bucharest: Universul Juridic, 2009), 248-249.

[3]Ioan Adam, *Civil Law. General Theory of Obligations* (Bucharest: C.H. Beck, 2014), 256.

[4] Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Les obligations* (Paris: LGDJ, 2013), 599.

CONDITIONS OF A PAYMENT WHICH IS NOT DUE

For a legal relationship specific to the payment which is not due to arise, the following **conditions** have to be met:

a) the executed provision should have been made as payment (with the intent of extinguishing a debt), irrespective of its object (*to give* or *to do*). The obligation to return does not arise further to the performance of a payment as liberality or within the specific mechanism of business management; in the latter cases, the obligation to return shall arise based on a different legal, contractual or extra-contractual ground.

b) the debt for whose extinguishment the payment was made should not exist from the legal standpoint in the relations between the person who made the payment and the person who received the payment, when such was made (the legal relationship legitimating the payment is missing - for instance, the debt is already extinguished on the payment date or it never existed; the person who received the payment is not the creditor of the person who paid - for instance, upon the creditor's death, the debtor makes the payment to a person it mistakenly considers as heir; the payment is made to the creditor by another person than its debtor - for instance, upon the debtor's death, the debt is paid by a person who is mistakenly considered as heir).

This condition is not met when a natural obligation is executed; according to Article 1471 of the Civil Code, "the return is not admitted in respect of the natural obligations which were executed willingly".

In the doctrine[1], the non-existence of the debt whose extinguishment was intended by the payment made was classified as absolute and relative. Thus, the non-existence of the debt is absolute and the payment which is not due is objective in the absence of any relationship of obligations between the person making the payment and the one receiving the payment. The relative non-existence of the debt and the subjective payment which is not due are present when another provision is executed than the one forming the object of an obligation existing between the parties or if the obligation whose extinguishment was intended by the payment did not exist between the *solvens* and

[1]Liviu Pop, „Payment which is not due", in *Course of Civil Law. Obligations*, ed. Liviu Pop et. al. (Bucharest: Universul Juridic, 2015), 282.

accipiens, without excluding however the actual existence of another obligation of a different kind or with another etiology[1].

c) the payment should have been made by error, the person who made the payment believing that it is the debtor of the person who received the payment. In this respect, para. (3) of Article 1341 of the Civil Code establishes the relative presumption of performance of the payment by the *solvens* intending to extinguish a debt of its own[2]. "The error may be presumed from the concrete circumstances of the fact, from the very fact of payment, which, from this standpoint, appears as effectively without any reason, without minimum motivation, inexplicable, and it is no longer necessary to prove the error as independent element and, consequently, without giving it an essential status"[3].

The source of the error is indifferent, as it is useful to see whether the error is *de jure* or *de facto*. Thus, the payment of a non-debt shall also exist if the *solvens*believes that it is a debtor under a convention, tort or under the law that it has interpreted in a completely erroneous manner[4].

If the person who made the payment was aware that it is not a debtor, the payment made in this manner may be interpreted either as liberality or as business management.

In some situations, by means of exception from the rule, for appearance of the obligation to return, the fulfilment of the condition related to the error of the person who made the payment is not required. For instance, a payment made by a debtor which executes the provision for the second time because it lost the releasing receipt and wants to avoid a potential enforcement. If it finds the receipt, the second payment is subject to return, although it was not made by error.

[1]Dimitrie Gherasim, *Enrichment without due cause to the detriment of another person* (Bucharest: Academiei Publishing House, 1993), 77-82.

[2] According to a traditional solution, which was unchallenged for a long time, being grounded on the text of Article 993 of the Civil Code of 1864, it was asserted that the error of *solvens* existing at the time when it executed the provision is a necessary condition for a payment which is undue, without making the difference between the cases in which the non-existence of the debt when the payment was made was absolute or relative. See Pop, *Payment which is not due*, 283.

[3]Bogdan Ionescu, *Case Law Gems* (Bucharest: Universul Juridic, 2011), 210.

[4]Paul Vasilescu, *Civil Law. Obligations* (Bucharest:Hamangiu, 2012), 212.

The need of the condition related to the error of *solvens* has been analysed for a long time also in the French doctrine and case law[1]. Thus, while traditionally the error was regarded as a *sine qua non* condition of any payment which is not due, a ruling issued by the French Court of Cassation on 2 April 1993, often quoted in the doctrine[2], decided that, in the case of a payment which is absolutely not due, the only condition required is that it is not due, without examining the error of the *solvens*[3].

EXCEPTIONS

By means of exception from the legal obligation to return a payment which is not due, the provision is not subject to return in the following cases:

- the return may not be ordered by the court against a person which, in good faith, benefitted from the payment and the expiry of the applicable limitation period, gives up the writ of claim (which outlined the actual debtor), by any means (including by destruction thereof) or waives the securities of the receivable [Article 1342 (1) of the Civil Code]. However, according to Article 1342 (2) of the Civil Code, if the obligation is not barred by limitation, the *solvens*has a right to sue for compensation against the actual debtor, by effect of the legal subrogation of the rights of the paid creditor. Thus, Article 1593 of the Civil Code provides that "Any person which pays in the place of the debtor may be subrogated in the creditor's rights, but it may not acquire more rights than such" [para. (1)], and "subrogation may be legal or conventional" [para. (2)]. Consequently, Article 1342 (2) of the Civil Code contains a case of legal subrogation in the creditor's rights.

[1]Malaurie, Aynès and Stoffel-Munck, *Les obligations*, 563-564; Yvaine Buffelan-Lanore and Virginie Larribau-Terneyre, *Droit civil. Les obligations* (Paris: Dalloz, 2014), 510-511.

[2] François Terré, Philippe Simler and Yves Lequette, *Droit civil. Les obligations*, (Paris: Dalloz, 2013), 1105; Bertrand Fages, *Droit des obligations* (Paris: LGDJ, 2013), 357; Alain Bénabent, *Droit des obligations* (Paris: LGDJ, 2014), 339.

[3] "But, considering that, according to Articles 1235 and 1376 of the Civil Code, a payment which was not due is subject to return; (…) considering that, consequently, the payments at issue were not due, the company Jeumont-Schneider was entitled, without producing any other evidence, to obtain the return of such payment; for these purely *de jure* reasons, replacing those criticized by the appeal, the judgement is found justified" – URSSAF de Valenciennes c. Société Jeumont-Schneider, Plenary Session of the Court of Cassation 2 April 1993, in Henri Capitant, François Terré and Yves Lequette, *Les grands arrêts de la jurisprudence civile* (Paris: Dalloz, 2008), 545.

- if the exigibility of the payment obligation is affected by the modality of a suspensive term, and the debtor – waiving the benefit of the term – makes the payment in advance, it may request the return only if its waiver was the result of deceit or violence (Article 1343 assumption I of the Civil Code). In exchange, if the very appearance of the obligation is affected by a suspensive condition, the *solvens*shall have the right to return of the payment made before the fulfilment of the condition (Article 1343 assumption II of the Civil Code).

We notice that the two situations regulated by Article 1343 of the Civil Code are associated to the two modalities of the obligations: the term and the condition.

The payment before the expiry of the suspensive term is not a payment which is not due. The payment obligation exists, but it is not exigible before this term, before its maturity. Consequently, an anticipated payment is a valid payment, not a payment which is not due. The effect of the suspensive term is clarified by the provisions of Article 1414 of the Civil Code: "What is due within a term may not be requested before the expiry of such term, but what was willingly and knowingly executed before the expiry of the term is not subject to return". The debtor's deed of paying the debt means waiving the benefit of the term, and waiver of the term "renders the obligation immediately exigible" (Article 1418 of the Civil Code). Exceptionally, what was paid when the consent was flawed by deceit or violence, shall be returned. The payment is valid only provided that it is made knowingly.

The payment made before the fulfilment of the suspensive condition is subject to return. In accordance with the provisions of Article 1400 of the Civil Code, the fulfilment of the suspensive condition affects the efficiency of the obligation. The obligation is formed, but has not arisen, consequently the debtor does not owe anything. It is possible that the respective obligation does not exist in the future, if the condition is not fulfilled. Naturally, a debtor which makes the payment in advance is entitled to return thereof, upon request, because the payment is a payment which is not due[1].

In conclusion, the relationship between the effectiveness of the obligation (suspensive condition) and exigibility of the obligation (suspensive term) is as clear as possible, without overlapping: while, in the case of manifestation of a suspensive condition, the obligation (the

[1]Călina Jugastru, *Persons' Law. Obligations' Law* (Bucharest: Hamangiu, 2013), 271.

debtor's debt) does not exist, in the case of a suspensive term, the same obligation exists, has validly arisen, but as an effect of the modality, the maturity of such debt is postponed[1].

EFFECTS OF A PAYMENT WHICH IS NOT DUE

Finally, in respect of the modality of return and of the effects of the return on third parties, Article 1344 of the Civil Code refers to Articles 1635 to 1649 of the Civil Code. (Title VIII Return of provisions). The main obligation is incumbent upon the person which received something which was not owed to it and which shall be held to return the asset/assets which formed the object of the payment: "The return of the provisions takes place whenever someone is held, by virtue of the law, to return the assets received unduly or by mistake (...)" – Article 1635 (1) of the Civil Code. The right to return belongs to the person who made the payment or to another person entitled (attorney-in-fact of the payer) – Article 1636 of the Civil Code

There are two modalities in which the provisions may be returned, in the case of a payment which is not due: in kind (Article 1639 of the Civil Code) and by equivalent (Article 1640 *et seq*. of the Civil Code). However, it should be noticed that Article 1639 of the Civil Code establishes the principle according to which "The provisions are returned in kind, by returning the received asset". The return shall be made by monetary equivalent only if it may not be made in kind, for objective reasons or if it refers to the provision of services which have already been executed [Article 1640 (1) of the Civil Code].

Although the obligation to return to the *solvens*exists in all the cases in which the conditions of the payment which is not due are fulfilled, its extent depends upon whether, when the payment which was not due was made, the *accipiens*was of good faith or not (it was aware or not that the payment was not due; it is good faith when it received a payment that it believed was due to it; *per a contrario*, it is of bad faith when it received the payment from the *solvens*, although it was aware that it was not due). As we shall prove below, the bad faith of the

[1] In this respect, see Aurelian-Gabriel Uluitu, „Article 1400 of the Civil Code" in *New Civil Code.Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2014), 1568.

*accipiens*aggravates, from a patrimonial standpoint, the obligation to return[1].

Thus, if the *accipiens* was of good faith when it received the non-debt, the following rules shall become applicable[2]:

- if the asset fully disappeared or was disposed of, it shall return the lowest value of the asset at the date of its disappearance or at the date of its disposition, as the case may be;
- if the asset disappears without its fault, it shall be released from the debt, but it shall have to assign to the creditor the insurance indemnity or the right to such indemnity;
- it shall pay the counter value for the use of the asset, if such use was the main object of the provision or when the asset was likely to deteriorate rapidly, by its nature;
- it shall keep the benefits of the asset subject to return, but shall bear the expenses incurred for generating such benefits;
- in respect of the expenses regarding the asset, according to Article 581 of the Civil Code, it has the right either to the value of the materials and manpower, or to the increase in the value of the immovable asset by the respective expenses;
- it shall incur the expenses related to the return, both itself and the payer, proportionally with the value of the provisions which are returned.

The bad faith of the *accipiens*entails the applicability of the following rules[3]:

- if it destroyed or disposed of the asset in bad faith, it shall return the highest value of the asset at the date of its disappearance or at the date of its disposition, as the case may be;
- if the asset disappeared without its fault, it shall pay its counter value, unless it proves that the asset would have disappeared even if it was in the possession of the creditor of such return;
- shall be obliged to pay the counter value for using the asset;
- it shall return the benefits it obtained or their counter value;
- the expenses with generating the benefits shall be set off;
- in respect of the expenses regarding the asset, according to Article 582 of the Civil Code, an *accipiens*of bad faith or to which the

[1]Vasilescu, *Civil Law. Obligations*, 213.
[2] See Jugastru, *Persons' Law. Obligations' Law*, 271.
[3]Jugastru, *Persons' Law. Obligations' Law*, 272.

cause of the restitution is ascribable, has the right either to half of the value of the materials and manpower, or to the increase in the value of the immovable asset.

In accordance with the provisions of Article 1643 (1) of the Civil Code, the deterioration or reduction of value of the asset, both being the equivalent of a partial loss, shall entitle to indemnifications to the person who made the payment which was not due, unless the loss results from normal use of the asset or from a circumstance which may not be ascribable to the debtor. Consequently, the debtor shall be liable only provided that the partial loss is ascribable to it. The rule is the indemnification of the creditor of the return for the partial loss, which is added to the return in kind of the asset, as it is at the time of return or submission of the action, if the return is not made willingly.

When the creditor is the one which determined, of its fault, the return of the provisions, the asset shall be returned to it as it is at the time when the action was filed, without indemnifications, unless the condition of the asset is caused by the debtor's fault. Consequently, the text of Article 1643 of the Civil Code makes a distinction between the creditor's fault, underlying the obligation to return, with the sanction of depriving such of the right to indemnification for the partial loss suffered by the asset and the fault of the debtor of the return which is liable whenever the damage suffered by the asset is caused by its fault[1].

If the *accipiens*is a person which does not hold full legal capacity, it shall only be held to return the provisions to the extent of its enrichment, assessed as of the date of the request for return and, by means of exception, it may be obliged to return in full when, intentionally and of its serious fault, made the return impossible (Article 1647 of the Civil Code).

If the *accipiens*disposed of the asset received as payment from the *solvens*, the action for return may be also exercised against the third party which acquired it, but it shall produce full effects only provided that the third party may not invoke another legal means of acquisition than the act concluded with the *accipiens* (Article 1648 of the Civil Code)[2]. For other

[1] See Rodica Constantinovici and Anișoara Ștefănescu, „Article 1643 of the Civil Code" in *New Civil Code.Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2014), 1846.

[2] The action of the *solvens* is actually an action of claim, with its legal regime provided by Articles 563 to 566 of the Civil Code. The action may be however blocked by the

acts than the action of alienation or establishment of real rights over the asset whose return is claimed, the rule is that these acts, if concluded by the *accipiens* with a third party acting in good faith, also stand good against the *solvens*. However, if these acts are with successive execution and the publicity formalities were fulfilled, in particular by the land book, they shall continue to produce effects throughout the entire term stipulated by the parties, but no more than one year, calculated from the date of the *solvens'* request for return (Article 1649 of the Civil Code)[1].

Usually, taking into account that it is a personal action, the action for return is subject to the general statute of limitation of 3 years. According to the provisions of Article 2528 (2) of the Civil Code, the limitation period of the right to action for return of the provisions grounded on a payment which was not due starts running from the date on which the creditor of the obligation to return became aware of the fact that the payment was not due and of the identity of the debtor of the obligation to return. If the object of the payment which was not due consisted in giving a determined individual asset, the action for return has the legal features of an action of claim, and, consequently, it shall be subject to its rules also in respect of the extinctive prescription.

CONCLUSIONS

At present, there are numerous occasions in which payments which are not due may be made (subscriptions, bank transfers, invoices, etc.). Although it does not bring significant modifications to the legal profile or conditions under which the payment of a non-debt leads to the appearance of an obligation to return, the New Civil Code firmly defines its identity as independent source of obligations, without any possibility of confusion with other institutions or legal situations.

The expression "erroneous payment of something which is not due"[2] expresses in a concise manner the legal conditions for the *accipiens*to be able to be obliged to perform the return. The error psychologically sustains the intention *animus solvendi*; it is the

third party invoking the fact that it acquired the ownership right over the asset by usucapio or, as the case may be, by effect of good-faith possession over the movable assets. In this respect, Pop, *Payment which is not due*, 287.

[1]Vasilescu, *Civil Law. Obligations*, 215.

[2]Vasilescu, *Civil Law. Obligations*, 211.

consequence of a distorted representation of the legal reality: the *solvens*wrongly believes that it is held by its own obligation and that it makes thus a (valid) payment[1].

Consequently, the essential assumption of this source of obligations is the legal relative assumption that the payment was made with the intention of extinguishing its own debt.

In agreement with the relevant French doctrine[2], we are of the opinion that the obligation to return is actually grounded on the less moral nature which would be involved by keeping such transfer without cause. Taking into account that it is a mechanism based on ethics, its application should be flexible in order to adapt to the circumstances which are specific to each factual situation. This explains that, despite the seniority of the substance of these legal texts, the matter is still fluctuating in certain aspects, both in the doctrine and in the case law.

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ESTABLISHING THE CHILD'S DWELLING. ASSESSEMENT OF THE CHILD'S BEST INTEREST

Andreea DRĂGHICI[1]

Abstract:

The Civil Code establishes the basic rule according to which the child's dwelling is at his parents'residence. Nevertheless, in special situations, when the parents do not live together, due to various reasons, the civil legislator identifies criteria that the family courts must consider when establishing the child's dwelling. In addition to civil provisions, the Law no. 272/2004 regarding the protection and promotion of child's rights introduces specific criteria for the assessement of the child's best interest with a view to establishing his/her dwelling. At the same time, the legislation in force covers aspects regarding the change of dwelling, an issue subject to the child's best interest principle.

Key words: *child, dwelling, best interest, assessement criteria*

INTRODUCTION
ABOUT FAMILY RELATIONSHIPS AND PERSONAL AND PATRIMONIAL OBLIGATIONS OF THE SPOUSES

The specificity of social relationships derived from marriage involves naturally a common way of living among the members of the family, which reflects on each and every personal and patrimonial implications. The common way of living we are referring to has its core focus on the dwelling of the family, without which this cannot be taken into consideration. In other words, the obligation of cohabitation of the spouses, enshrined in art.309 par.2 in the Civil Code is fundamental for accomplishing the family functions[2]. The nowadays legislator's view about the family is, as a rule, based on marriage, which implies a

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[2] Regarding the family functions one may refer to Florinița Ciorăscu, Andreea Drăghici and Lavinia Olah, *Dreptul familiei şi acte de stare civilă* (Piteşti: Paralela 45, 2005), 10-11.

common dwelling of the spouses and implicitly the raise and education of children together by them, according to the principles enshrined in the Law 272/2004. According to this, in the Civil Code, art. 261, the parents are those who have the duty, in the first place, to upbring and educate minor children, regardless their legal status at the child's birth. This responsibility gives the right to the parents to request the child from any person who holds him/her without having the legal right. Meanwhile, the legislation acknowledges the child's right to intimate, private and family life, right which presupposes the exclusion of any interference in exercising this right, the limitation of this right being achieved only is cases stipulated by the law, when the separation of the child from his/her parents is deeply justified. Such rights assigned to both parents and children justify the legal regulation of the obligation enshrined in the Civil Code, art. 309.

It becomes obvious, thus, that as long as the parents live together as an immediate effect of their marriage, the child's residence should be at his parents' dwelling, that is, their mutual living place. Thus, the art. 496, ar. 1 in the Civil Code stipulates that "the underaged child lives with his parents". If the spouses do not live together, the family dwelling is at the parent's place who has the child in care, established by spouses' mutual agreement. In such a situation, the parents can settle that the child's dwelling be at one of them or at another person's dwelling place, such as the grandparents of other members of the extended family, if this is in the child's best interest.

As a consequence, in such a case, if there is the parents' agreement, there is no need for the custody court decision, as it happens in case of divorce between spouses, when only the court may decide that the child's dwelling should be at another person's place, in an exceptional case, according to the child's best interest.

The Civil Code provides a high importance to the family dwelling which strenghtens the necessity to make the difference between the family dwelling and spouses residence. Thus, the family dwelling and equally the child's dwelling is the place that ensures the common living of the spouses under all aspects previously mentioned. This may coincide with the common residence of the spouses or may not coincide, if they have different domiciles.

At first sight, establishing the child's dwelling according to the rule in the art. 309, par. 1 in the Civil Code is a very easy task. Problems

may arise when, due to various circumstances, the parents do not live together, which affects the child's dwelling. In all these circumstances (without reference to the situation when the parents agree upon the child's dwelling) establishing the child's living place follows the principle enshrined in art. 2, par.1 in the Law 272/2004 and art. 263 in the Civil Code. In other words, the child's best interest will prevail[1].

ASSESSEMENT CRITERIA OF THE CHILD'S BEST INTEREST IN ESTABLISHING AND CHANGING THE DWELLING

As we have already mentioned, establishing the child's dwelling raises no problems when the parents live together or when, although they do not own a common residence, they agree upon this aspect. Issues arise when, due to serious reasons, the parents live separately and cannot agree upon this matter. Such situations occur when, for example, the parents are divorced or the child is is born outside a marriage bond and his/her parents do not live together, etc.

In the first of the above situations, it is obvious that exercising the parental authority undergoes substantial alterations, as long as one of the divorced parents, to whom the child's upbringigng was not entrusted, cannot live effectively and continously with his child (even if the law gives him the right of having personal relationships with his child). Considering this fact, in most cases the parents' consensus regarding the establishment of the child's dwelling is almost impossible to achieve, for which reason the family and custody court has the competence to make a decision in this respect, according tho the child's best interest.

Prior to Law 257/2013 that modifies the Law 272/2004 regarding the protection and promotion of the child's rights, the child's best interest was appreciated by the jurisprudence according to some criteria that considered both the child's peculiarities and the capacity of the person to whom the child was entrusted, to upbring and educate the child accordingly[2]. Subsequent to this moment in order to support the custody court, including the matter to be analysed, the legislator regulated,

[1] For further details refarding the child's best interest one may see: Andreea Drăghici, *Protecția juridică a drepturilor copiului* (Bucureşti: Universul Juridic, 2013), 29-37.
[2] Andreea Draghici, Andreea Tabacu and Amelia Singh, *"*The relation of the minor with the parents and extended family. Assessing the best interest of the child. Criteria of Assessment*"*, in *EIRP Proceedings, vol. 5 (2010):* 86-87.

without limiting, some general criteria for assessing the child's best interest. Considering that in formulating the legal text, the legislator uses the expression "at least the following" (when referring to assessement criteria), the conclusion is that, their enumeration is not limited, the competent authorities being in the position of admiting other criteria when assessing the child's best interest.

Therefore, the legislator does not confine the capacity of analysis and decision of authorities but leaves them the possibility that, according to some peculiarities, to add as a support to their decision other criteria of assessement, in order to preserve the child's best interest.

Thus, in art. 2, par. 6 in Law 272/2004 the following criteria are considered: the need for physical and psychological development, the need for education and health, security and stability, the need of belonging to a family; the needs of child's opinion according to the age and maturity; the child's history, considering the special situation related to abuse, neglect, exploitation or any other form of violence[1] exerted on the child, as well as the the potential risks that may arise in the future; the parents'capacity and other persons capacity to upbring and take care of the child in order to respond to effective needs of the child; maintenance of personal relationships with people involved in emotional connections and attachement with the child.

Acknowlwdging that in some situations it may be complicated to make a decision regarding the child's dwelling (when there are misunderstandings between parents), the legislator regulated, apart from these general criteria of assessement for child's best interest, the following specific criteria in the art. 21 in Law 272/2004: the availability of each parents to involve the other parent in the decison-making process regarding the child and to observe his/her parental rights; the availability of each of the parents to allow the other parent to preseve his/her personal relationships; the residential history of each parent; the history of each parent's violent behaviour against the child or other persons; the distance between each parent's dwelling and the education institution. These support art.2 in the Law 272/2004.

A swift reading of these criteria, reveals that the legislator considered the parents' behaviour and attitude in the good development of family relationships, behaviour trasposed in the level of understanding

[1] This phrase *abuse, neglect, exploitation or any other form of violence* replaces the terms *abuse and negligence*.

they prove with regard to allowing these relationships continuing in the future, even when the status of spouse is annulled by divorce. Thus, it was demonstrated that "such a collaborative behaviour is imposed by the the circumstance that the rights aforementioned are, in reality, means of fulfilling the obligations that each parent has in relation with his child and which are in force as long as each parent has not terminated his/ her parental rights"[1]. From this point of view, considering the life security and physical and mintal health of the child, it is extremely important the criterion dealing with the child's history of parents' violent behaviour against the child or other persons. At the same time, these specific criteria refer to material aspects, each parent's residential history in the past 3 years being an important factor in establishing the child's dwelling; this demonstrates, on the one hand, the parent's financial potential and on the other hand, the responsible behaviour which in some situations could demonstrate a permanent state of stability necessary for the child. This aspect is adequately completed by the last regulated criterion, that is the distance between each parent's dwelling and the education institution.

All these specific criteria of assessing the child's best interest observe the general principles of child's rights protection regulated by the Law 272/2004, art. 6.

Meanwhie, the Civil Code, art.496, par. 3 in addition to the above-mentioned critera, refers to both the psycho-social expert report and the child's right to express one's opinion about this subject starting with the age of 10. Obviously, the overregulation of these criteria is intended to facilitate an objective appraisal of the child's best interest.

The child-dwelling change is done by parents'agreement and according to the law. At the same time, for the purpose of observing the child's right to family life, the parent who was not entrusted the child has the right to preserve personal relationships with the underaged child, at his/her residence, without being confined by the court, except for the cases stipulated by the law. The law stipulates, as well, the exception of exerting this right that is, whenever it does not comply with the child's best interest. The legislator conceived the recognition of this right as a natural consequence of the fact that the termination of the spouse status does not imply the loss of parenthood. In other words, the parent who

[1] Decision no.82 of 25.02.2003, published in M.O.no.189/26.03.2003, in *Curierul Judiciar 4(2003).*

was not entrusted the the child will further exercise the parental rights acknowledged by the law (the right to supervise the child's upbringing and education, the right to guid the child under all aspects). At the same time, we should point out that there is a distinction between the parent who was not entrusted the child and the parent whose parental rights terminated by decision of the court.

Art.479 in the Civil Code also stipulates the child's dwelling change, should the parental authority or other rights be altered provided the other parent's prior approval. This solution was criticised by the doctrine in the field[1] because the prior approval is necessary in the case of the parent who does not hold a common parental authority. In such a case, it is obvious that the respective parent did not possess the moral guarantees to justify the child's best interest. Should such a situation occur it is likely that the parent in cause oppose abusively and undermine the child's best interest.

CONCLUSION

To conclude, the court is to find the balance between the parents' divergent actions and the child's best interest.

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THE PRECIPUT CLAUSE. CONTROVERSIAL DEBATES. COMPARATIVE LAW

Carmen Oana MIHĂILĂ [1]

Abstract:

Considered a matrimonial advantage for the spouses, the preciput clause represents the right of the surviving spouse to take possession, without counterparty, of one or several common goods prior to the division of inheritance. This regulation was inspired from the French legislation but it can also be found in the Belgian Law. Irrespective of the matrimonial regime the present clause must be introduced in the matrimonial convention and shall come into force only upon death of either spouse. This shall not affect the forced heirship whatsoever, and therefore, it is subject to reduction; also, the assets which are the object of the clause are not frozen and can be pursued by the creditors. Yet, the juridical nature of the clause remains controversial among the specialists. As there is a lot of unclearness in the way the preciput is regulated by the Civil Code, this clause definitely needs improvement.

Key words*: preciput clause, beneficiary spouse, matrimonial advantage, common goods*

The preciput clause, new with the Romanian legislation, has generated a lot of controversy since its introduction in the Art.333 and 367 letter D of the New Civil Code. Yet, the notion has a long tradition. Although the term was borrowed from the French Civil Code[2], the institution was somehow regulated by the Civil Code of 1864 which

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[2] The term „*préciput"* used by the French Law was replaced with „*hors part successorale*", by a Law of 2006, on http://www.dictionnaire-juridique.com/definition/hors-part-successorale.php, accessed on 11.02.2017.

referred to it as "donations made under the marriage contract, the contractual appointment[1] of a universal successor", in Art.932-935[2].

"The matrimonial convention entitles the surviving spouse to freely take possession, prior to the division of inheritance, of one or several commonly held goods, in joint or co-property. The preciput clause can be appealed to for the benefit of both spouses, or only one of them" (Art.333 paragraph 1 of Civil Code).[3]

"The preciput can be defined as the acknowledged capacity of the spouses to confer the surviving spouse the right to take possession, without counterparty, of one or several commonly held goods prior to the division of inheritance".[4]

The Explanatory Dictionary of the Romanian Language[5] defines the preciput as *"the right granted to a person to take possession of a portion of the estate prior to the division of inheritance"*.

The Roman Law mentions the preciput under the name of *praecipuum*, while in ancient Greece the prevailing law was the Law of the Firstborn which conferred the firstborn advantages in relation to his siblings, similar to the feudal system. The preciput clause was stipulated in the marriage contract and granted the surviving wife the right to benefit from lifetime usufruct or naked ownership of a portion of inheritance. The surviving wife could even enjoy cumulative testamentary benefits.[6] In France, the preciput clause also confers an advantage to the firstborn, thus supporting unequal bequests within noble families.[7] *Le droit d'aînesse*, as this benefit was named, was abolished in

[1] „The notion of contractual appointment grants a right similar to the hereditary reserve", in *Matei B. Cantacuzino, The Elements of Civil Law* (Bucureşti: All Beck, 1998), 381.

[2] Ioan Popa, *„The Preciput Clause"*, on http://www.universuljuridic.ro/clauza-de-preciput-i/, accessed on 11.02.2016.

[3] Title II, Book II, *„Marriage"*, Chapter VI, *„The Patrimonial Rights and Obligations of the Spouses"*, Section 1, „Common provisions", Sub-section 4, „Selecting the Matrimonial Regime".

[4] In the absence of the clause, the deceased spouse` share of the joint assets and of the goods he was entitled to by legacy would have been divided between the surviving spouse and the other heirs, in Emese Florian, *Matrimonial Regimes*, 68.

[5] *Romanian Illustrated Universal Dictionary* (Litera, 2011), 282.

[6] Adrian Alexandru Banciu, *Patrimonial Relationships between Spouses* (Bucureşti: Hamangiu, 2011), 137.

[7] Bianca Albu and Daniel Chelaru, *„Spouses` Preciput – a protective juridical „Arhanee"?",* on

1792, partially reinstated in 1826 and eventually abolished for good in 1849. In Spain, it remained into force until 1820 and in Japan until 1948.

This institution is meant to provide a certain guarantee and degree of comfort to the surviving spouse who has contributed to the acquisition of the joint assets that are subject to the clause.

The notion of preciput is mentioned by both Family and Inheritance Law as it regulates the patrimonial family relations by its introduction in a matrimonial convention which enables the derogation from the legal matrimonial regime, but it becomes effective only upon death of either spouse and it is subject to reduction.

The preciput clause can be resorted to only in case of a conventional community of property regime.[1] However, the experts in the field hold that the preciput clause can also be introduced in a convention of separation of property. The fact that the joint assets, held in common or co-ownership are subject to the clause comes to support this idea.

Moreover, other authors believe that the clause is also compatible with the legal community regime, considering that the spouses can modify or change the matrimonial regime one year after the conclusion of marriage.[2]

In conclusion, the preciput clause is the exclusive concern of a matrimonial convention. Thus, the spouses or spouses to be will be able to stipulate the preciput clause in their matrimonial convention, irrespective of the selected matrimonial regime.[3]

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http://www.centrulrobertianum.ro/scoala-dreptului-organic/res/prelectiuni/17.Bianca_Albu__Daniel_Chelariu_-_Preciputul_sotilor.pdf, accessed on 02.02.17.

[1] In the French Law the object of the preciput clause is represented only by the assets held by the spouses in common property by individual or universal title, in G. Cornu, *Les régimes matrimoniaux*, 9 ed. (Paris: PUF, 1997), 581-583.

[2] Adrian Alexandru Banciu, *Patrimonial relationships between spouses* (București: Hamangiu, 2011), 146. For a contrary opinion *see* Cristina Nicolescu, *The Conventional Matrimonial Regimes in the new Romanian Civil Code* System (București: Universul Juridic, 2012), 209.

[3] Cristiana M. Crăciunescu in Marilena Uliescu (coord.), *The New Civil Code. Studies and commentaries, vol. I, Book I and Book II* (București: Universul Juridic 2012), 747.

There is no provision to stipulate the validity of the preciput clause (it becomes effective even if either spouse deceases shortly after the conclusion of the matrimonial convention which stipulates it).

The parties to the preciput clause can be the spouses to be or the spouses (in case at least one year after the conclusion of marriage they change the matrimonial regime or sign a matrimonial convention whose exclusive object is the preciput clause itself[1]).

Considering the provisions of Art.333 paragraph 4 of Civil Code *(the preciput clause shall become null and void if the community of property terminates during the spouses` life, if the beneficiary spouse has deceased before the other spouse or they both deceased at the same time, or if the assets that were subject to the clause have been sold upon request of the common creditors),* the specialty literature[2] (before the amendment of Law no.71/2011) has questioned whether the clause can be adopted only mutually or unilaterally. An examination of paragraph 1, which provides that the preciput clause "can be stipulated for the benefit of both spouses or only in favor of either of them", reveals a natural solution to the question.[3]

The object of the preciput clause is represented by the asset or assets held by the spouses in common or in co-ownership. The goods must be assessed individually or generically or at least be assessable, and must be held by the spouses in common or in co-ownership.[4] It is about movable and immovable assets, tangible and intangible assets, fungible and nonfungible assets, etc. This clause shall only include assets regarded *ut singuli* and not *ut universi*, and therefore, it is absolutely necessary to

[1] The preciput clause can be introduced in a separate deed from the matrimonial convention, as for amending the matrimonial convention the law does not provides the incumbency to conclude a new convention, in Nadia C. Aniței, *The Matrimonial Convention according to the new Civil Code* (Bucureşti: Hamangiu, 2012), 65.

[2] Dan Lupaşcu and Cristiana M. Crăciunescu, „Regulation of the Preciput Clause by the New Romanian Civil Code", *Romanian Pandects* 1 (2010): 21.

[3] Cristina M. Nicolescu, "The Preciput Clause as regulated by the New Civil Code. Comparative Approach (II)", on http://www.universuljuridic.ro/clauza-de-preciput-in-reglementarea-noului-cod-civil-abordare-comparativa-ii/, accessed on 11.02.2017.

[4] An interesting feature would be the future assets and the way they could become object of the clause; in this respect, these assets should be individualized, assessable and must not belong to third parties but only to the spouse who grants them, after having been commonly acquired with the surviving spouse. Basically, apart from the suspensive condition of the disposing spouse` death, there are no other preciput-related conditions.

individualize these assets or to provide general criteria to identify them within the matrimonial convention.[1]

Private assets cannot become the object of the clause.

As to the question whether the usufruct right may become the object of the clause, the answer is positive as long as it is not detrimental to the forced heirship.[2]

The object of the clause is usually the matrimonial home, but it can also be the spouses` common bank account, household appliances, books, jewelry, valuables or objects with sentimental value. If the object is the furniture of the matrimonial home or various household appliances, the surviving spouse shall take possession of them only upon consent of the heirs of the second-fourth degree.[3]

FORM OF THE PRECIPUT

Although the preciput clause is part of the matrimonial convention signed by the spouses, in case of amendment of this convention, the clause may be stipulated in a separate document. Either way, the preciput must be authentic and notarial, with all consequences arising out of the registration and opposability obligations.

JURIDICAL NATURE OF THE PRECIPUT CLAUSE

The juridical nature of this matrimonial advantage remains questionable. It has been stated that the preciput is halfway between donation and will[4], as also referred to by the French doctrine.[5] Art.1516 of the French Civil Code defines the preciput as *"a convention between spouses or partners"(…comme une convention de mariage et entre associés).* The same trend is also followed by the Belgian Civil Code

[1] Cristina Nicolescu in F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *The New Civil Code. Commentaries to the articles* (București: C.H. Beck, 2012), 354.
[2] anciu, *Patrimonial Relationships between Spouses*, 143.
[3] Florian, *Matrimonial Regimes*, 69.
[4] Ioan Popa, „The Preciput Clause", on http://www.universuljuridic.ro/clauza-de-preciput-i/, accessed on 20.02.2016.
[5] Philippe Malaurie and Laurent Aynès, *Les régimes matrimoniaux*, 3e éd. (Defrénois, 2010), 367.

which emphasizes that the preciput is a matrimonial convention and not a donation.[1]

The authors who bring it close to *liberality*, more exactly to donation, argue that it generates an accumulation of property for the surviving spouse without any contribution of the latter. Furthermore, similar to the donation or legacy, the document which stipulates this clause shall be concluded *intuitu personae* and signed by living individuals; as it is an act of disposition it requires full capacity of exercise. Also, the authentic form required to conclude the document is common.[2] Both the donation and the preciput clause are subject to excessive liberality reduction, in case they are detrimental to the forced heirs.

Similar to the donation, the object of the preciput is represented by current and future assets. Both institutions shall become null and void unless the marriage is concluded (in case the donation is made with the very purpose of marriage).

However, there are clear differences between the two institutions, beginning with the fact that the donation is expressly regulated while the preciput is an accessory clause to the matrimonial convention. Although there are some similarities in terms of the object of these institutions, the donation focuses on private assets whereas the preciput clause stipulates only common goods. Also, unlike the preciput, the donation becomes effective upon conclusion of the contract.[3] There is also the revocation clause that may be invoked for donations, but the preciput cannot be revoked unilaterally; in other words, it involves a reduction of the inheritance in case of preciput and a reduction of the donor`s property for donations. At the same time, the movable assets that are the object of a donation must be evaluated and written in an official act preferably under private signature and under sanction of absolute nullity.

Like the preciput, the legacy comes into force upon death of the legator, usually the husband. As the preciput is an act that becomes effective *mortis causa*, it may be easily mistaken for the legacy. But

[1] Diana G. Ionaș, „Juridical Nature of the Preciput Clause – Subject of Doctrinal Controversies, Studia Universitatis", *Series Iurisprudentia* 3 (2014): 49.
[2] As authentic deeds they must be registered in the national notary public registers as follows: the donation in the National Notarial Register for the Evidence of Liberalities (R.N.N.E.L.) and the preciput clause, as part of the matrimonial convention, only in the National Notarial Register of Matrimonial Regimes (RNNRM).
[3] Banciu, *Patrimonial relationships between Spouses*, 152.

while the legacy is stipulated in the will, the preciput is included in the matrimonial convention.

Both acts are official but unlike the preciput, the legacy must not be concluded only in authentic form (the two concepts are completely distinct). Also, they are both subject to reduction.

The legacy is a unilateral act whose beneficiary is not exclusively the surviving spouse but any designated person. The preciput clause has a bilateral character while the mutual will is null.[1]

The legacy becomes null and void in case the beneficiary deceases before the conclusion of the act.[2] Also, the preciput clause cannot be revoked tacitly like the legacy.

No beneficiary of any legacy or preciput clause can be granted ownership of the assets during the testator`s (husband`s) lifetime.

Although there are voices stating that the preciput "is a liberality which borrows the features of the legacy and not of the donation"[3], Art.984 paragraph 2 of Civil Code sheds some light in the matter stipulating that *"liberalities can only be made by donation or by legacy included in a will"*.

The right of the surviving spouse is not testamentary but it arises out of the convention signed by the spouses. Thus, the transfer of property can be enforced upon opening the will, but not as a testamentary right, but *ex contractu*.[4] In other words, the surviving spouse will take possession of the assets that are the object of the preciput clause not necessarily as an heir but as a beneficiary of the clause; also he may even refuse the inheritance in order to take possession of the preciput goods.[5]

The preciput clause can be stipulated only by matrimonial convention and not by will signed by either spouse.

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[1] There is also a form of legacy stipulated by agreement, namely the legacy of the amounts and valuables deposited in banks or other specialized institutions, under Art. 1049 Civil Code, Diana-Geanina Ionaș, „Is the Preciput Clause a Liberality?" (București: Universul Juridic, 2016), on http://www.universuljuridic.ro/este-clauza-de-preciput-o-liberalitate/3/, accessed on 20.02.2017.

[2] Ionaș, „Juridical Nature of the Preciput Clause - Subject of Doctrinal Controversies", 53.

[3] Alexandru Bacaci, Viorica C. Dumitrache and Cristina C. Hageanu, *Family Law as Regulated by the New Civil Code*, 7th edition (București: C.H. Beck, 2012), 84.

[4] Ionaș, „Juridical Nature of the Preciput Clause", 54.

[5] Cristina Nicolescu, *The Conventional Matrimonial Regimes in the new Romanian Civil Code System* (București: Universul Juridic, 2012), 214.

The juridical nature of the preciput clause has been debated in terms of its similarities with the *clause of the unequal division of family property (*or the *convention of division of property)* which is a way to dissolve a conventional community.

The main similarity consists in the fact that, just like the convention of division of property, the preciput enables the surviving spouse to take possession of a portion of the common undivided assets (assets that will be added to the inherited share) right before the division of inheritance. Thus, the state of indivision is avoided. The object of both clauses is the spouses` common assets. The similarities between the two institutions can be explained by the translative property ownership.

The enforcement of the two clauses shall be performed at completely different moments. While the preciput clause shall be enforced upon death of the spouse, the clause of unequal division can be invoked whenever the spouses wish to divide their common property, be it during their marriage, or upon dissolution or termination of marriage.[1] Also, the preciput shall not have any effects on liabilities.[2] It has also been stated that the preciput is basically such a convention which is subject to a suspensive condition, bearing *mortis causa* effects.[3]

In case the preciput is mutual, no particular beneficiary is designated clearly, and thus, there is a lot of randomness occurring in this matter. On the contrary, the clause of the unequal division clearly designates the beneficiary spouse; this clause shall be enforced irrespective of the reason that generated the dissolution of the matrimonial regime.[4]

The preciput clause has been associated with a *matrimonial advantage* that must be introduced in the matrimonial convention.[5] The matrimonial advantage was defined as "the advantage that either spouse can obtain from the clauses of a conventional community, or from the confusion of movables or debts" (Art.1527 paragraph 1 of French Civil

[1] Lupaşcu and Crăciunescu, *Regulation of the Preciput Clause by the New Romanian Civil Code*, 41.
[2] Diana Ionaş, „The Preciput Clause. Legacy within Matrimonial Convention?", Bucureşti: Universul Juridic, 2016, article on http://www.universuljuridic.ro/daca-nu-este-liberalitate-atunci-ce-este-clauza-de-preciput/, accessed on 20.02.2017.
[3] Ioan Popa, *Civil Law. Inheritance and Liberalities* (Bucureşti: Universul Juridic, 2013), 243.
[4] Florian, *Matrimonial Regimes*, 77.
[5] Lupaşcu and Crăciunescu, *Family Law* (Bucureşti: Universul Juridic, 2011), 148.

Code). This advantage was considered by the French doctrine as a profit resulting from the implementation of the matrimonial regime.[1]

The same French doctrine[2] regards the preciput as a matrimonial advantage because it implies an obvious imbalance (although sometimes it could be used precisely to compensate an overspending habit of either spouse: *compenser un apport excessif de la part d'un époux*). Although considered a matrimonial advantage, the preciput has a legal origin. Unlike other agreements which give rise to other benefits between the spouses (*e.g.* donations between spouses), the matrimonial advantage can be stipulated by marriage contract or by a convention that amends this contract or the selected matrimonial regime.

The challenge lies, in fact, in the lack of Romanian legislation to regulate the institution of the matrimonial advantage, as compared with the French Law (even the French doctrine draws attention to potential difficulties in making a comparison between the preciput as matrimonial advantage and the donation of future goods, or the donation as a general concept).

The juridical nature of the clause has been considered relative to a *sui generis* act of the spouses which brings the surviving spouse advantages in terms of common assets.[3]

Other opinions state that the juridical nature of the preciput clause is a *donation of future goods – contractual designation*, a form of inheritance by contract, "an act by which the designator decides to grant after his death a part or all his assets to the other spouse who accepts them".[4] Therefore, the preciput becomes a contract which bears legacy effects.

In spite of the fact that this institution was not borrowed by the New Civil Code it is stated that the contractual designation survived though (the Civil Code of 1864 named it donation of future goods but it

[1] Nicole Petroni-Maudière, *Le déclin du principe de l'immutabilité des régimes matrimoniaux* (Presses Univ. Limoges, 2004), 176.
[2] Quentin Guiguet-Schielé, „La distinction des avantages matrimoniaux et des donations entre epoux" (Ph.D. diss., l' Université de Toulouse, 2013): 149.
[3] Teodor Bodoaşcă and Aurelia Drăghici, „Debates on the Preciput Clause as Regulated by the New Romanian Civil Code", *Law* 10, (2013): 36.
[4] Dan Chirică, *Civil Law Treatise. Successions and Liberalities* (Bucureşti: C.H. Beck, 2014), 369.

was seldom put into practice[1]). In this respect, it is also stated[2] that in case of a matrimonial convention concluded before marriage, "the donation of future goods stipulated by the preciput clause shall become irrevocable, the only accepted reasons for revocation being those provided by Art.1.020 of Civil Code (ingratitude and failure to fulfill tasks)". If the matrimonial convention is signed after marriage the donation of future goods by preciput clause becomes revocable just like any other donation between spouses made during marriage.

The object of the contractual designation could be even the entire wealth of the donor, while the preciput regulated only assets regarded *ut singuli*. Another difference is the fact that once the marriage concluded, the spouses could not resort to the contractual designation anymore, whereas the preciput clause can be introduced in a convention that amends the matrimonial convention or in a matrimonial convention that changes the matrimonial regime.

Even if he remained owner of his assets until death the designator could not use his goods for free, unlike the preciput, in which case the goods are not frozen and can be pursued by creditors.

Contractual designation involves the designation of the surviving spouse as heir while in case of preciput, the beneficiary spouse is not granted heirship of these goods.[3]

The preciput is undoubtedly an advantage and benefit for the surviving spouse.[4] Just as emphasized by the specialty literature and despite all divergent opinions, the juridical nature of the preciput remains undetermined, which severely hampers its implementation.

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[1] Art. 932-935 of the Civil Code of 1864 stipulated the donation between spouses by marriage contract. Thus, the donor would designate, by conventional agreement between living persons, his spouse as a universal successor or with universal title to take possession of his goods, being an exception from the interdiction of agreements on unopened succession, Matei Cantacuzino, *Civil Law Elements* (All Restitutio, 1998), 380.

[2] Ioan Popa, *The Preciput Clause*, on http://www.universuljuridic.ro/clauza-de-preciput-i/, accessed on 12.02.2017.

[3]For details about similarities and differences between preciput and contractual designation, *see* Diana-Geanina Ionaș, „Is the Preciput Clause a Liberality?" (Universul Juridic, 2016), on http://www.universuljuridic.ro/este-clauza-de-preciput-o-liberalitate/3/, accessed on 13.02.2017.

[4] Adriana F. Dobre, „Matrimonial conventions and regimes *under the new civil code"*, *The Law* 3 (2010): 20

JURIDICAL CHARACTER OF THE PRECIPUT CLAUSE

The preciput is a convention *intuitu personae* which arises from the affection and desire to protect the surviving spouse.

This clause is a *mortis causa* act concluded free of charge and applicable only to the family relationships, as stipulated by Art.333 paragraph 1.

The convention is bilateral and the clause can be stipulated in favour of either spouse or both of them.

The preciput clause also depends on two important factors: the condition, which is the pre-death of either spouse, and the term, which represents the date of the expected death of either spouse, hence the randomness of the convention.

The preciput clause is an accessory convention concluded in authentic form.

The preciput is a patrimonial act which involves the transfer of property but, as highlighted by specialists in the field[1], the common property is not transferred in whole but only in portions, considering that the surviving spouse already owns a part of it.

CADUCITY OF THE PRECIPUT CLAUSE

Art. 333 paragraph 4 of Civil Code stipulates that "the preciput clause shall become null and void in case the property community terminates while spouses are still alive, the beneficiary spouse has deceased before the designator, they both deceased at the same time, or the property that is the object of the preciput has been sold upon request of the common creditors". It is also worth mentioning the nullity of the matrimonial convention which contains the preciput clause, or the caducity of the matrimonial convention in case of unconcluded marriage. Regarding the termination of the property community while the spouses are still alive, this shall not be applied to the matrimonial regime of the separation of property. Also, it is stated[2] that should the assets not

[1] Bacaci, Dumitrache and Hageanu, *Family Law as Regulated by the New Civil Code*, 148.

[2] Teodor Bodoaşcă, *Family Law. Academic Course*, 3rd edition (Bucureşti: Universul Juridic, 2015), 166.

comply with the preciput clause it is not about the caducity of the clause but most likely about its ineffectiveness.

If under the law the assets have been sold upon request of the common creditors, the latter can pursue the assets that are the object of the clause even prior to the termination of the property community. However, the fact that the enforcement of the preciput clause can be done by equivalent (if there was a portion left of the common property) could support the adverse solution of invoking caducity.[1]

ENFORCEMENT OF THE PRECIPUT CLAUSE

The preciput clause shall become effective only upon death of either spouse. Thus, the surviving spouse shall acquire exclusive ownership of the assets that are the object of the clause. As mentioned before, the surviving spouse had been joint proprietor or owner of a share of the property before; the death of the spouse brings about the definitive strengthening of the surviving beneficiary spouse`s right. Taking possession of the assets shall be accomplished before the division of property. It is in fact a way to partially terminate the matrimonial regime more than to give up the intention of liberality.[2]

The period of time to claim this benefit is not stipulated by law and therefore, specialists have compared it with a convention of division of property and concluded that the right to claim is imprescriptible.[3] Yet, there are voices[4] who claim that the applicable term is the usual one, namely, 3 years from the arisal of this right, that is, from the death of the spouse.

As the law clearly states that the object is common assets, if the clause were implemented after the division of property there would be no

[1] Cristina M. Nicolescu, „Preciput Clause as regulated by the New Civil Code. Comparative Approach (II)", *on* http://www.universuljuridic.ro/clauza-de-preciput-in-reglementarea-noului-cod-civil-abordare-comparativa-ii/2/, accessed on 12.02.2017.
[2] Marieta Avram, *Civil Law. The Family*, 2nd edition, revised and completed, (București: Hamangiu, 2016), 343.
[3] Cristina Nicolescu, *The Conventional Matrimonial Regimes in the New Romanian Civil Code System* (București: Universul Juridic, 2012), 225.
[4] Gabriela Chiran, „The Preciput Clause – A New Institution in the Civil Code", on http://www.universuljuridic.ro/clauza-de-preciput-institutie-nou-introdusa-codul-civil/2/, accessed on 13.02.2017.

common goods left to use. Thus, the preciput does not need to be executed once with the division of inheritance.

An interesting debate was generated by Art.887 paragraph 1 of Civil Code which provides that "real rights shall be acquired without registration in the Land Registry should they result from an inheritance". It has been stated[1] that the beneficiary spouse will become owner only upon opening the inheritance and not at the moment s/he expresses her/his option. Other opinions[2] assert that this legal provision is not applicable in this case, because the surviving spouse acquires ownership upon registration in the Land Registry, his right arising out of the matrimonial convention and not the inheritance.[3]

Various other voices state that the heirs of the deceased spouse are bound to move the property that is the object of preciput, according to Art. 895 of Civil Code: "all deeds based on the deceased spouse`s obligations shall be accomplished after the right has been registered on the heir`s name but only in case the heir is bound to this obligation". Thus, the right of the preciput beneficiary shall prevail against the heirs who can act only as forced heirs.[4]

The dissolution of the community shall be carried out between the surviving spouse and the deceased spouse`s heirs (Art. 355 paragraph 3 of Civil Code).

The interests of the forced heirs are though protected by the fact that the preciput is subject to reduction when it exceeds the available share of the property.[5] The reduction shall be made after the legacies (they must be reduced proportionally and simultaneously) but before the

[1] Nicolescu, *The Conventional Matrimonial Regimes in the New Romanian Civil Code System*, 226.
[2] Florian, *Matrimonial Regimes*, 73.
[3] Regarding the real estate registration, the same specialty doctrine emphasized that Art. 181 paragraph 4 of the Regulation approved by Order no.700/2014 issued by the General Manager of the National Agency for Cadastre and Land Registration concerning the registration in the Land Registry, is only partially correct because the beneficiary surviving spouse will be entitled to request registration of his exclusive ownership based not only on the certificate of inheritance but also on the death certificate of the deceased gratifying spouse, which must be presented along with the matrimonial convention that contains the preciput clause.
[4] Marieta Avram, *Civil Law. The Family* (București: Hamangiu, 2013), 332.
[5] In the French law (Art.1527 paragraph. 2 of French Civil Code), the reduction is applicable if the surviving spouse competes with the forced heirs, usually children that are not of both spouses.

previous donations (the donations made by preciput become effective *mortis causa*, and as they infringe the forced heirship they will be the last to be enforced[1]). The purpose of reduction is to protect the forced heirs against any fraudulent acts hidden by spouses using the preciput clause and the civil sanction will be imposed upon request of the involved parties. Art.332 paragraph 2 of Civil Code provides an additional argument by the interdiction of the matrimonial convention to prejudice the legal devolution of inheritance.

The violation of the interdiction shall result in the relative nullity of the clause as it is about the protection of the forced heir`s direct and personal interest; the inefficiency of the clause can be observed and established by amicable settlement of disputes or by law suit.

The petition can be filed with the competent Court of Law as an independent action, or incidentally within the proceedings of some other action, which is intended to reduce the excessive liberalities, or by the request for the division of inheritance itself. The forced heirs who demand by lawsuit the reduction of the preciput clause can mention the lawsuit in the Encumbrance Certificate of the Land Registry with the purpose of informing or even warning third parties about the litigious character of the ownership demanded by the beneficiary spouse of the clause. The forced heirs can demand the reduction only if the assets that are the object of the clause exceed the disposable portion to prevent a potential prejudice to the forced heirs.

If the heirs are not forced their portion of inheritance might be prejudiced.

The common creditors are not affected by this situation and they can freely pursue the assets that are the object of the preciput. On the other hand, the personal creditors of either spouse cannot pursue the goods that are the object of the preciput, thus avoiding either spouse`s abusive decision to guarantee with these goods.

The execution of the preciput clause (Art. 333 paragraph 5 of Civil Code) shall be done in kind and only exceptionally by equivalent, should the execution in kind be impossible. The execution by equivalent involves a pecuniary compensation of the same value as the asset(s) that are the object of the preciput clause.

[1] Ioan Popa, „The Preciput Clause", on http://www.universuljuridic.ro/clauza-de-preciput-i/, accessed on 11.02.2017.

A highly controversial issue is the loss or disappearance of the common asset(s). It has been stated that in this case, spouses can amend the preciput clause by modifying the matrimonial convention. The spouses` lack of action implies the tacit revocation of the clause. Yet, this is an unreliable opinion considering that any amendment must be made in the same form as the original deed, namely the authentic form. Experts believe[1] that the fortuitous disappearance of the asset should be the only reason to execute the preciput clause in kind.

If initially a preciput clause has for object an asset and subsequently, a separate legacy is concluded which has the same object, the preciput is considered valid in case the initiator has not revoked it by authentic deed.[2]

In practice[3], the preciput clause shall be enforced after the death of either spouse, when the goods and the gross assets of the deceased have been identified. The net assets shall be calculated by subtracting the liabilities of the inherited estate and the goods that are the object of the clause. The summation of all donations made by the deceased spouse during his lifetime, if the case may be, will make up the residuary estate which determines the hereditary reserve and the disposable portion; if applicable, the reduction shall be applied to it.

In the matter of the preciput as opposed to the habitation right of the surviving spouse (Art. 973 of Civil Code), the latter acquires with the preciput higher protection than with the habitation right which shall be extinguished upon division of inheritance but no later than 1 year from the opening of the inheritance, or even earlier than this term, should the surviving spouse remarry; at the same time, the right can be limited upon heirs` request.

The cases of lack of dignity to the deceased or the revocation of donations or legacies are not provided by law.

This clause shall not be detrimental to the inheritance share of the surviving spouse.

[1] Banciu, *Patrimonial Relationships between Spouses*, 149.
[2] Gabriela Cristina Frențiu, *Commentaries to the Civil Code. Family. Art. 258-534*, (Bucuresti: Hamagiu, 2012), 198.
[3]Gabriela Chiran, „The Preciput Clause – A New Institution in the Civil Code", on http://www.universuljuridic.ro/clauza-de-preciput-institutie-nou-introdusa-codul-civil/2/, accessed on 12.02.2017.

Regarding the *law applicable to the preciput clause* in the framework of the private international law, because the preciput is part of the matrimonial convention, in case of extraneous elements applicable shall be the law of the matrimonial regime selected by spouses. This law can be "the law of the state in whose territory either spouse has common residence at the moment of selection, the law of the state whose citizenship has been acquired by either spouse at the moment of selection, or the law of the state where the couple establishes their first residence after marriage" (Art. 2590 of Civil Code).

In France, every conclusion of marriage must be accompanied by a matrimonial contract which stipulates the preciputary right of the surviving spouse. In the French law, which in fact inspired the Romanian legislation in the field, the preciput clause is stipulated by Art.1515 of the French Civil Code (*Du preciput conventionnel*). According to this provision, the surviving spouse can take before the division of goods, possession of an amount of money, certain goods in kind or classified goods from the common property.

The legal matrimonial regime of the acquisition community (most married French adopt this matrimonial regime without signing a matrimonial contract) allows the establishment of a preciput clause.

As compared with the Romanian doctrine, the task of the French doctrine was facilitated by the law-maker which considers the preciput clause as a matrimonial advantage.

It is also perceived as an additional guarantee for the surviving spouse especially when there are arguments between children and parents.[1] Before the end of 2015, stipulating a preciput clause was a good way to dodge a provision of the Fiscal Law which stipulated that in case of a community regime, if the spouse who benefits from the life insurance deceases before the other spouse, half of its value shall return to the common property that is to be divided by will. Although in 2016 this fiscal provision was readopted, the preciput clause gets the same importance in this case, in the sense that the surviving spouse who benefits from the clause shall obtain the entire amount resulting from the life insurance.

[1]http://www.notretemps.com/argent/succession/a-quoi-sert-une-clause-de-preciput,i110017, accessed on 20.02.2017.

At the same time, the introduction of such preciput clause would reduce the inheritance assets and thus, would decrease the taxes levied to the heirs.

The French law treats the preciput as a clause to liquidate the community property.[1] Art. 1516 provides that the preciput is not a liberality (*„Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de mariage et entre associés).*[2]

The preciput is regarded as a matrimonial advantage because either spouse may acquire a real advantage and get more benefits than the other[3] (the preciput is not a donation, as emphasized before).

The French doctrine raised the issue of the preciput and matrimonial advantages in general, qualifying them as potestative or potential rights, probably owing to the resemblance with the inheritance law, but in reality they aim at existing rights (one might consider that in case of divorce, these rights are not granted anymore, thus creating a connection with the potestative condition).[4]

The preciput clause can be introduced in the matrimonial contract or can be the object of a separate deed. The form of the deed is always authentic and notarial. The object of the deed is the common assets of the spouses (one or several common assets, ownership, usufruct, bare ownership, an amount of money).

In terms of matrimonial regime the spouses can choose a universal property community or a community of acquisitions. The preciput can be restricted, if agreed upon by the spouses, by
such clauses like the lack of children or the entitlement only to the usufruct of property. The French law does not stipulate a term to invoke

[1] J. Flour, G. Champenois, *Les régimes matrimoniaux* (Paris: Armand Colin, 1999), 580.
[2] For details concerning the distinction between donation and matrimonial regime in the French law, see Guiguet-Schielé, "La distinction des avantages matrimoniaux et des donations entre epoux", 169.
[3] Fr. Terre, Y. Lequette, S. Gaudemet, *Les successions. Les liberalites*, 4e ed (Paris: Dalloz, 2014), 262.
[4] Guiguet-Schielé, "La distinction des avantages matrimoniaux et des donations entre epoux", 175.

the clause either, providing just a proposition of the doctrine that the heirs should notify the beneficiary surviving spouse to invoke his right.[1]

Studies reveal that in the past, the preciput would prevail even if spouses decided upon division of property community during their lifetime (the deed did not become null).[2] Basically, the preciput would become effective upon death of either spouse, on condition that the matrimonial advantage hadn`t been revoked. Nowadays, a potential divorce determines a loss of these matrimonial advantages.[3] (Before it was amended by Law no.85-1372/1985 regarding the equality of spouses in the matrimonial property regimes and of parents in the management of the property of their children, Art.1518 of Civil Code had stipulated that even in case of divorce, the preciput prevails as it is considered a survival advantage. According to the amendment to Art.1518 the preciput can be revoked upon divorce).

Even for the preciput, a registration fee shall be paid which represents 2.5% of the net value of assets in case of liquidation or modification of the matrimonial regime, divorce or death.

Another aspect debated by the French legislation and typical of all legislations that stipulate this clause is the case when either spouse, for instance the wife who benefits from the preciput, may request termination of the property community during marriage, adoption of the regime of separation of property, and obviously, the turning of the common assets into private ones. Things even went so far as to propose that the preciput should be enforced, complying with other terms and conditions, even if the asset is no longer part of the property community and has become private asset of the deceased spouse.[4]

Borrowed from the same French legislation the preciput is also regulated by the Belgian Law.

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[1] Daiana Banc, „The Preciput Clause – an unsolved controversy", *Studia Universitatis, Jurisprudentia* 3 (2016): 69.

[2] J. Flour and G. Champenois, *Les régimes matrimoniaux* (Paris: Armand Colin, 1999), 585.

[3] Banc, *The Preciput Clause – an unsolved controversy*, 69.
Isabelle Dauriac, *Les avantages matrimoniaux: pertinence d'une technique?* in Clothilde Grare-Didier, Isabelle Dauriac, Sophie Gaudemet, *Quelle association patrimoniale pour le couple?* (Dalloz, 2010), 25.

[4] Trib. civ. Seine, 16 avr. 1902: D. 1902, II, p. 239 Trib. civ. Rhône, 17 déc. 1926 : JCP 1927, I, p. 642, cited by Guiguet-Schielé, "La distinction des avantages matrimoniaux et des donations entre epoux", 407.

Art.1451 of the Belgian Civil Code stipulates that the object of the matrimonial convention can contain a preciput clause. Art.1457 provides that the surviving spouse can, prior to the division of goods, take possession of a portion of the common property, such as an amount of money, some goods in kind, or a certain quantity of some clearly established category of goods (including goodwill or a land plot). The preciput can be mutual. The surviving spouse can acquire ownership only of a common asset resulting from a universal community regime or a community of acquisitions. Similar to the French law, the Belgian legislation clearly states that the preciput should not be perceived as donation but as a matrimonial convention. Yet, the same provision (Art.1458) stipulates that the preciput could somehow be considered donation in the limit of half of the total value of the property only if its object is assets that the deceased spouse has added to the common property by express stipulation in the marriage contract (some authors even refer to the preciput as preciputary donation).

Under Art. 1465, the preciput is also subject to reduction, upon request of the children who do not belong biologically to both spouses; at the same time, the preciput is not subject to liberalities.

The assets which are the object of the preciput can be used to pay the common debts, except when it is about the nature of an asset, in which case the beneficiary may use the rest of the common property. This is an advantage worth to use also in case the asset which is the object of the preciput has been disposed of.

Although the preciput is much more beneficial (including fiscal benefits) than the donation, the French doctrine has recorded fewer conventions than donation contracts which contain this clause.

CONCLUSIONS

At the confluence of the Family Law and Inheritance Law, the preciput clause has a certain tradition in the legislations that have inspired our Civil Code.

The preciput clause is definitely intended to be a matrimonial advantage in favour of either or both spouses. Unfortunately, just as emphasized by the current paper and by the great works of the specialists in the field, this institution is not well regulated by the law-maker.

In the absence of important judicial practice to settle various disputes like, for instance, the juridical nature of the clause (notarial practice is also very scarce), the moment to take possession of the preciputary assets, the execution of the clause, the execution by equivalent, the preciput applicability to the regime of separation of property, a lot of time is expected to pass until the law-maker takes into account *de lege ferenda* proposals made by the specialists in this matter.

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LEGAL EXPRESSION OF EMPLOYEES IN THE MANAGEMENT OF THE WORKPLACE

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Abstract:

The participation of employees in the management of the workplace results directly from the value of work.. It allows for the incorporation of the principles of solidarity, dialogue and cooperation on the level of ideas in the legal and social life.. This phenomenon is evident in the area of employment in involving employees in the management of the workplace. Co-management, carried out jointly by the employer and employees, makes both parties feel responsible for the fate of the business. The scope of employee participation varied in different periods. Along with social and economic changes the normative regulations of workers' participation in management of the workplace have also evolved. Its current shape is the result of the experience of previous regulations, the impact of changes in the structure of employment and the influence of EU law, as well as an increase in the employees' awareness about their empowerment in the workplace.

Key words: *work place; community of work place; co-determination of work place; informing employees; consulting employees; civil society; social market economy*

„When man works, using all the means of production, he also wishes the fruit of this work to be used by himself and others, and he wishes to be able to take part in the very work process as a sharer in responsibility and creativity at the workbench to which he applies himself."

John Paul II, *Through Work. Laboremexercens,* Wrocław 1995, p. 56.

INTRODUCTION

The events of the 1980s initiated the actual inclusion of the issue of employee participation in Polish legislation. Over time, employees have been increasingly involved in the management of their workplace. One of the changes that took place was the registration of the Independent Self-Governing Trade Union Solidarity on 10 November 1980. From the point of view of the legislative activity of the Polish State, it is appropriate to enact a law on the self-government of the crew of a state enterprise on 25 September 1981. As a consequence, already in the period of political

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transformation, the Act of 23 May 1991 on trade unions was adopted. Then, in the Labor Code, under the Act of February 2, 1996, the provisions of article 182 were added.

Due to the political system the most important was the adoption and entry into force of the 1997 Constitution of the Republic of Poland, the anniversary of which we celebrate this year. In its provisions, there are no regulations directly related to employee participation, including the incorporation of employees in the management of the workplace. However, it is legitimate constitutional basis to derive the taken issue with the rules governing the principle of civil society and the principle of a social market economy.

Besides, co-management of the workplace by the employer and the employee is not the only subject of national regulation. Poland's internal legal order is influenced by all international legislation, including EU law, which also recognizes the need to involve workers in the management of the workplace. This is done at the level of primary law. Art. 155 sec. 2 of the TFEU states that one of the forms of implementation of European labor law is the obligation of the social partners to agree with the authorities of a Member State interested in introducing EU labor law standards into national law. This provision mainly promotes two concepts of social dialogue. As the first one should indicate a two-way exchange of views and negotiations on a common issue, of course, after previously made negotiations and conclusions of binding arrangements in domestic sources of labor law. The result of the dialogue conducted by the social partners is the collective work agreement or other normative agreement. The obligatory premise of effective adaptation of national labor legislation to EU law is the universal application of the findings of the social dialogue .

On the other hand, secondary legislation is particularly desirable in the Directive 2002/14 / EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community . It provides employees and their representatives with the right to obtain information and to express their views on matters concerning their employing companies. This directive applies to undertakings operating in Member States not covered by Directive 2009/38 / EC of 6 May 2009 on the establishment of a European Works Council or a procedure for

informing and consulting employees in undertakings or groups of community-wide undertakings.

The adopted formulation of the subject of this study refers explicitly to the content of Article 182 of the Polish Labor Code, which clearly states that the legislator, expressing the direct participation of employees in the management of the workplace, refers only to one of the elements of participation. „In addition to management, the doctrine distinguishes the weaker forms of participative rights, namely the right to collective information, the right to collective consultations and the right to negotiate. Of the forms of participation mentioned above, only the latter comes close to management rights, but only in cases where the law requires a specific management decision by the employer in agreement with the employee representation. The doctrine also expresses the view that the participation of employees in management is all the means of influencing people employed to make management decisions by the employer. In this sense, participation in management is linked to all forms of participation (including consultation), and not only to the participation in the direct meaning" . Understanding the second view allows us to apply the provisions of the Labor Code 182 to all possible manifestations of workers' co-operation in the management of the workplace, while fully realizing the constitutional values.

CONSTITUTIONAL CONDITIONS FOR THE INCLUSION OF WORKERS IN THE MANAGEMENT OF THE WORKPLACE

Employee participation and its principles - as previously indicated - are not explicitly expressed in the Polish Constitution. Nevertheless, the principle of civil society and the principle of a social market economy are undoubtedly its systemic basis. Their cumulative treatment allows the conclusion of a proposal by the legislator to support the participation of employees in the management of the company (workplace).

Not only does the lack of explicit expression in the constitutional provisions of employee participation impede the decoding of its content and meaning. It is an additional difficulty to base it on the principle of civil society, which the legislator does not expressly state in just one of the provisions of the Constitution of the Republic of Poland. To identify the principle of civil society and its content, it is necessary to refer not only to the very provisions of the Constitution, but also to the doctrine

and case-law. "The constitutional framework for the model of civil society is contained in the provisions of constitutional articles 11 to 13, with special regard to article 12"[1]. This statement is important because it refers to the provisions contained in Chapter I of the Constitution of the Republic of Poland, in which "the most important principles and institutions determining the shape of Poland are enumerated - juridical, political and axiological - thus identifying the identity of society and the state"[2]. As L. Garlicki rightly points out, the norms contained in Chapter I of the Constitution of the Republic of Poland "are also of great concern to the organization of society, not undermining their direct connection with the«constitution of the state»."[3]. Conclusion of Art. The 12 Constitutions in its Chapter I, which inevitably occupies the exhibited place and influences the hierarchy of its norms, inevitably emphasizes the norms contained in it[4].

The multiplicity of definitions of civil society allows us to assume that it is "a free society, aware, active, and engaged in the public affairs of citizens"[5]. In civil society, each member may in any manner not prohibited by law to organize themselves appropriately to their needs, goals and interests. Manifestations of individuals are also possible in a civil society. It turns out therefore that there is no way to close down the catalog of possible actions that individuals make about the existence of civil society Many of them can undoubtedly be implemented in the sphere of employment. Worker participation is a basic example.

As already stated, employee participation is equally anchored in the social market economy, which according to the legislator is to be based on the freedom of economic activity, private property and solidarity, dialogue and cooperation between the social partners and thus form the basis of the economic system of the state. The construction of

[1] Judgment of the Constitutional Court of 27.5.2003, K 11/03, OTK-A 2003, Nr 5, pos.43.

[2] S. Gebethner, „Rzeczpospolita w świetle postanowień rozdziału pierwszego Konstytucji z 1997 roku", in *Podstawowe pojęcia pierwszego rozdziału Konstytucji*, E. Zwierzchowski, M. Mączyński (red.) *RP(* Katowice, 2000), 19.

[3] L. Garlicki, „Rozdział I ‚Rzeczpospolita'", in *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warszawa: L. Garlicki, 2007), 3.

[4] Por. P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (*Warszawa: 2000), 14.

[5] Judgment of the Constitutional Court of 27.5.2003 r., K 11/03, OTK-A 2003, Nr 5, pos. 43.

Article 20 of the Polish Constitution indicates three basic pillars of the principle of a social market economy, and one of them is solidarity, dialogue and cooperation between the social partners. "The Constitution imposes on the« social partners »the obligation to act in a way that respects these three values, which may include the requirement to sacrifice particular interests for the common good"[1]. This provision therefore also legitimizes the idea of community in the economic dimension. The perception of the community in article 20 of the Constitution further highlights the material dimension of solidarity, dialogue and cooperation between the social partners. In this context, it is worth stressing that, according to the Constitutional Court, article 20 "imposes the concept of balancing the interests of market participants and respecting their autonomy by creating a constitutional guarantee of negotiating a way of settling disputes, enabling overcoming tensions and conflicts in the management process. The sources of the above values should be seen in the social philosophy known as social solidarity. According to the views of its representatives, social life is based on the interdependence and co-responsibility of all its participants. Solidarity proclaims the compatibility and community of interests of all individuals and social groups within a given community, as well as the obligation to participate in the burden on society "[2].

Solidarity, dialogue and cooperation of the social partners, which are the pillar of the social market economy principle, also have two procedural dimensions. In this way, it is compulsory that the legislator takes positive action aiming at creating a legal and institutional framework and guarantees for these three values, which are complementary to each other, contributing together with the economic and private property indicated in Article 20 of the Constitution of the Republic of Poland. For this reason, the values indicated in this article of the Constitution should be treated in a comprehensive and complementary way[3]. The regulator does not require the indications from article 20 of the Constitution to always lead to consensus, as this may

[1] L. Garlicki, „Artykuł 20", in *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* 13.
[2] Judgment of the Constitutional Court of 24.1.2001, K 17/00, OTK 2001, Nr 1, pos. 4.
[3] Por. A. Sobczyk, *Prawo pracy w świetle Konstytucji RP. Tom I. Teoria publicznego i prywatnego indywidualnego prawa pracy* (Warszawa, 2013), 43.

result in the inability to make any decision[1], it stresses the negotiating nature of the social partners' cooperation[2].

Solidarity, dialogue and cooperation between the social partners in the sphere of employment undoubtedly affect both sides of the employment relationship - employees and employers. They seem to have contradictory goals, but the contradiction is apparent, for each of them depends on the behavior and development of the common good, which in the microscale is the workplace for them. The perception by the legislature of community workplace, even if it is intuitive (unconscious), results in the subsequent adoption of normative solutions from the sphere of co-governing or at least co-participation of employees in the management of an operation. Worker activity in this area can be defined by employee participation, which, finding its constitutional basis in the Constitution of the Republic of Poland, is also recognized in EU law and developed in the national legislation.

PARTICIPATION OF EMPLOYEES IN THE MANAGEMENT OF THE WORKPLACE IN THE POLISH LEGISLATION - SELECTED EXEMPLES

Polish legislation differentiates powers of participation on the type of workplace. State enterprises are governed by the law on the self-government of the crew of a state-owned enterprise, which gives rise to the formation of a staff council and the assembly of a general staff. In the other entities "there is no analogous to the employee board of the crew representative, the gradual commercialization and privatization of the state sector leads to the disappearance of companies in which the employees' self-governing bodies operate"[3]. Regulation of this scope is also included in the provisions of the Act on Commercialization and Privatization. The Trade Unions Act is a legal act relevant to the issue of involving employees in the management of a company. Due to the nature of the present paper, there will be presented the basic regulations

[1] See judgment of the Constitutional Court of 1.9.2002., K 17/02, OTK ZU 2002, Nr.5, pos. 68.
[2] See judgment of the Constitutional Court of 26.2.2003., K 30/02, OTK ZU 2003, Nr.2, pos. 16.
[3] J. Wratny, *Kodeks pracy. Komentarz (*Warszawa, 2016), Legalis [accessed: 30.09.2016; 20:24].

governing the participation of employees in the management of the workplace and contained in the Labor Code[1], the Trade Unions Act[2], the Act on the Self-Government of Crews of a State-owned Enterprise[3] and the Law on Information and Consultation of Employees[4].

Employment law plays a key role in article 18^2 of the Labor Code. While article provisions express the basic principle of labor law, the standard contained in it is of a blanket nature[5], and for the actual implementation of the principle it is necessary to refer either to other provisions of the law or to other laws regulating the participation of employees in the management of the workplace. One of such regulations is included in the provisions of Article 38 of the Labor Code on consultation of termination with the trade union organization.

Firstly, in Article 38 of the Labor Code, the legislator makes the consultation a method of co-operation between the employer and the trade union. The employer is required to consult a trade union for the purpose of terminating an indefinite employment contract. However, the final decision is up to the employer - the employer decides the termination, and any objections are not binding on the employer. Secondly, the consultation in question is intended to be prior and therefore should be carried out before the employer makes the final decision to terminate the employment contract. It can therefore be assumed that the position expressed by the trade union will result in the employer waiving his intention to terminate the employment contract with the employee. The legislator requires the employer to notify in writing, which refers to "both the notice of workers' representation of its intention to terminate the employment contract of employment, and the reason justifying the termination of the contract"[6]. Since a trade union

[1] Labor Code Act of June 26, 1974. (Dz. U. of 2016, pos. 1666 with later changes).
[2] Trade Union Act of May 23, 1991 (Dz. U. of 2015, pos. 1881 with later changes).
[3] The self-government of the crew of a state-owned enterprise Act of September 25, 1981 (Dz. U. of 2015, pos. 1543 with later changes).
[4] Act on the informing employees and conducting consultations with them of April 7, 2006 (Dz. U. Nr 79, pos. 550 with later changes).
[5] The blanket formula for its effective performance needs to be issued with other provisions, usually detailing the content of the formulas. Until a provision is made to substantiate the content, making a blanket provision is difficult or even impossible - S. Kaźmierczyk, [w:] *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, A. Bator et al. (Warszawa, 2006), 180.
[6] Resolution of the Supreme Court of 19.5.1978, V PZP 6/77, OSNCP 1978, Nr 8, pos. 127.

representing an employee takes a position not only on the intention to terminate the employment contract but also on the grounds for the contract, the reason for the consultation must be the same as stated in the notice of termination of the employment contract. The legislator provides for exceptions to the rule in Article 38 of the Labor Code, and therefore the obligation to consult is excluded in case of bankruptcy and liquidation of the employer (Article 411 § 1 of the Code) and concluding an agreement on collective redundancies (Article 5 paragraph 1 of the collective redundancy). In these cases, the specific circumstances of the employer's activity change the general rule. The departure from the consultation of the intention to terminate the trade union and the obligation for the employer to agree to terminate the employment contract is related to the intention to terminate the employment contract with a union activist (Article 32 (1) of the Trade Unions Act).

The manifestation of employee participation in the practical sense is also regulated by Article 104 of the Labor Code, which deals with reconciling the content of the work regulations with the trade union organization. The provision this article makes the content of this factory source of labor law subject to negotiation, by requiring the rules of procedure to be agreed upon with the trade union organization. It should be remembered that "the rules of employment issued by the employer without the required agreement with the trade union organization have no binding force"[1]. However, this statement does not mean that the behavior of an employer's trade union organization can block the employer on the way to issuing a working regulation. If the content of the work regulations with the trade union organization is not complied with within the time limit set by the parties, and if the employer does not operate a trade union organization, the employment regulations are determined by the employer (Article 104^2 § 2 of the Labor Code). This means no more no less, that the employer can not ignore trade union organization in the proceedings of issuing work regulations, but "no agreement authorizes the employer to unilaterally establish the rules"[2].

Unfortunately, in the absence of a trade union organization, the employer is not obliged to make arrangements with any employee representation for negotiating the content of the regulations, which

[1] Resolution of the Supreme Court 21.3.2001, I PKN 320/00, OSNAPiUS 2002, Nr 24, pos. 599.
[2] L. Mitrus, in *Kodeks pracy. Komentarz,* A. Sobczyk (Warszawa, 2014), 501.

results in only those employees who are represented by the trade union. The impact of workers on the workplace, in particular on the rules governing in-house legal acts in force, should not be limited solely to the presence of an employer of a trade union organization.

The provisions of the Law on trade unions are inherent in nature because they derive from the nature of these organizations[1], they associate the co-management of the workplace by the workers. Therefore, reference is made to the regulation of a fundamental nature. This is also the provision of Article 6, which states that trade unions are involved in creating favorable working, living and resting conditions,. This provision defines the area of trade union activity. „Creating favorable working, living and leisure policies is a very important tool for the employment process for both the employer and the employee. From the employer's point of view, an appropriate and well-thought-out policy is about its attractiveness in the labor market, and it also affects the proper functioning of the company it manages. For an employee, a guarantee of compliance with the rights due to him for employment under the employment relationship. Of course, trade union activity in the specified area will rely on the participation of the employer in terms of finding solutions more favorable than those which are contained in the labor code."[2].

It should also be noted that the competence of trade unions to monitor compliance with the interests of workers, pensioners, the unemployed, the unemployed and their families. It conforms to the statutory rights of trade unions, referred to in article 6 of the Trade Unions Act. Competences with article 8 of the Act can not be implemented directly on the basis of the law, because the legislator refers to other provisions of this law and other laws, which indicate the scope and forms of control carried out by trade unions. Trade union inspection powers are not absolute because they are limited by statutory provisions[3].

The union dimension of employee participation is clearly reflected in Article 26 of the Trade Unions Act - in the microscale by

[1] The Trade Union is a voluntary and self-governing organization of working people established to represent and defend their rights, occupational and social interests.

[2] Maria Bosak, „Art. 6. in: Trade Union Act. Commentary" [online], *Wydawnictwo Prawnicze LexisNexis*, 2016-09-11 23:08 [accessed: 2016-11-13 16:13]. Available on: https://sip.lex.pl/#/komentarz/587492128/289568.

[3] See resolution of the Supreme Court of 16.7.1993, I PZP 28/93, OSNC 1994, Nr 1, pos. 2.

defining the scope of the company's trade union organization. First of all, it is his responsibility to take a position in individual labor affairs within the scope of the labor law. Trade unions are also entitled to hold positions vis-à-vis the employer and the crew self-government authority on collective interests and employee rights. Thirdly, the scope of operation of the trade union organization is also to control the observance of labor law in the workplace, and in particular the rules and regulations on occupational safety and health. They direct the activities of the social labor inspection and cooperate with the National Labor Inspectorate.

From the above it is the employer's duty to provide the trade union with the information necessary for the conduct of trade union activity, in particular information on working conditions and remuneration policies. "The scope of information to which an employer should provide access to its occupational organizations is constantly being substantiated and goes beyond the narrowly understood issues of workers' rights and interests. This includes, in particular, information on the employer's economic, financial and market situation and on all aspects of his or her situation and activity, which may, indirectly, affect the legal, economic, professional, social and worker situation of workers and their families.[1]. Workers' participation through trade unions also covers the sphere of occupational safety survey as referred to in article 29 of the Trade Unions Act. Workplace union organizations have been granted a preventive right to apply to an employer for appropriate research, notifying the competent district labor inspector at the same time if there is a reasonable suspicion that there is a danger to the life or health of workers at the workplace. The employer is obliged within 14 days from the date of receipt of the application notify the trade union organization of its position. In the event of a survey, the employer shall make available to them the results of the establishment's trade union organization together with information on the manner and date of removal of the identified threat. Notifying the employer's union of the rejection of the application or the failure of the employer to take a position against the application within 14 days of its submission authorizes the trade union organization to carry out the necessary studies at the expense of the employer. The employer intends to notify the employer in writing at least 14 days in advance of the intention to undertake studies, their scope and anticipated costs. The

[1] G. Orłowski, [w:] *Zbiorowe prawo pracy. Komentarz,* J. Wratny, K. Walczak (Warszawa, 2009), Legalis [accessed: 2016-11-11, 12:24].

employer may, within 7 days of the date of receipt of the notice of intention to study, request the appropriate District Labor Inspectorate to determine the purpose or intentions of the intended investigations. Conducting research contrary to the position of the labor inspector will release the employer from the obligation to cover the cost of these tests.

The Act on the Information and Consultation of Employees defines the conditions for informing and consulting employees and the rules for the selection of workers' councils. The provisions of the law apply to employers engaged in economic activity employing at least 50 employees. The provisions of the Act concerning the rules for the election of employees' councils and the protection of their members do not apply to state-owned enterprises in which self-government of the enterprise is created; mixed companies employing at least 50 employees and state film institutions. In these entities, the right to obtain information and to conduct consultations is vested in the staff council. The statutory definitions of the terms used in the title of the Act are worth mentioning. This problem is all the more interesting since they differ in their wording from the definitions set out in Directive 2002/14. On the basis of the law, this information is: the transfer of data on matters relating to the employer, allowing the acquaintance to know the case. On the other hand, the EU legislator explains that information means the transfer of data to employees' representatives by the employer in order to enable them to become acquainted with the subject matter and to examine it. Conversely, the consultation is an exchange of views and a dialogue between the employer and the staff council. For the purposes of the Directive, consultation means exchanges of views and the establishment of a dialogue between workers' representatives and the employer. However, it must be acknowledged that "the differences between the text of the Law on information and consultation with employees and the Directive are small and it is possible to assume that the definitions contained in the two instruments have the same meaning"[1]. Costs related to the selection and activities of the employees' council are borne by the employer.

The legislator makes the number of members of the staff council dependent on the size of the employer (Article 3) determined by reference to the number of employees. The Employee Council may establish with the employer the number of members of the employees'

[1] M. Wojewódka and A. Pabisiak, [in:] *Zbiorowe prawo pracy. Komentarz.*

council other than those referred to in article 3 sec. 1 but no less than 3 members of staff council. Membership in the employee council ceases in the event of employment, waiver of a function or request for termination of membership signed at least by 50% of employees employed at the employer for at least 6 months. The statutory catalog of arrangements made by the workers' council with the employer includes the principles and procedures for the provision of information and consultation; the mode of settling disputes and the rules governing the cost of the selection and operation of the workers' council, including the costs of carrying out the necessary expertise. The employee Council may also set up a policy with the employer to cover the costs of helping people with specialist knowledge that is used by the employees 'council, as well as the dismissal of members of the employees' councils, depending on the number of employees employed. In this way the legislator points to the obligatory and optional elements of the agreement made by the employer with the employee council.

The employees 'council established by the Act of the Information and Consultation of Employees does not take over the functions and tasks of other employees and employees' organizations working with the employer. It is another forum for cooperation in the workplace. This applies to both permanent and ad hoc delegations. The competence of the workers' councils defines the rules in an unequivocal manner, their extension requires the provisions in this respect. It is permissible for the employees to be empowered to refer the matter to a board other than a specific law, but such transfer must be clear.

The scope of information for employees' representatives covers the employer's business activities and economic situation and the changes envisaged in this regard; The state, structure and anticipated changes in employment, and measures to maintain employment[1], as well as activities that may cause significant changes in the organization of work or the basis of employment. There are therefore three main areas for employee information: activity and economic situation, employment and changes in

[1] The practice of applying the provision of article 13 section 1 (2) of the Law on informing employees and conducting consultations with them has brought with it employees' requests to inform them about the earnings of individuals. Clearly, it must be emphasized that such an interpretation of the prescribed provision is inadmissible and does not fall within the hypothesis of the norm that follows.

the organization or background of employment.[1]. The phrases referred to are of a high degree of generality, which will naturally result in "the detailed scope of the information being disseminated will vary from one employer to another and will result from the specific nature of the establishment, its activities and organizational structure"[2], in particular, the information obligation is not subject to all data related to the activity of the employer.

The employer is obliged to provide the employee council with the information mentioned above. This is the responsibility, though not explicitly stated by the legislator, but as a consequence of the whole regulation, the transfer of information obtained from the employer to the remaining employees. The employer provides the information in a timely manner, in form and scope, which enables the staff council to review the case, analyze the information, and maintain employment levels, as well as activities likely to cause significant changes to the organization of work or the basis for employment - preparation for consultation. On the other hand, the employees' council may provide opinions on the matters of activity and economic situation of the employer and the changes envisaged in this matter. Adoption of the opinion requires consent of the majority of the members of the employees' council, and each member of the board of employees may present a separate sentence, which should be presented to the employer.

The conduct of consultations concerns the state, structure and anticipated changes in employment, and measures to maintain employment and activities that may cause significant changes in the organization of work or the basis of employment. The legislator outlines six principles for conducting consultations. First of all, the term, form and scope should allow employers to take action on the issues covered by consultations. Second, depending on the subject of discussion, at the appropriate management level and, thirdly, on the basis of the information provided by the employer and the opinion presented by the staff council and the opinion of a separate member of the staff council. The legislator also points out that the manner of conducting the consultation should enable the employee's council to meet with the employer in order to obtain his/her position together with the reasons for

[1]See more in B. Raczkowski, „O czym, kiedy i jak informować i konsultować?", *MoPP*, 9 (2006).
[2] M. Wojewódka, A. Pabisiak, [in:], *Zbiorowe prawo pracy. Komentarz*.

his or her opinion. Consultations should be conducted to enable agreement between the staff council and the employer. And finally, sixth, the staff council and the employer are obliged to conduct consultations in good faith and respect the interests of the parties. It is unacceptable to depart from the guidelines for consultation. If, however, respect for them does not result in a common position between the employer and the employee representation, this does not mean that the employer must refrain from planned activities. The previously mentioned definition of consultation does not require an agreement. After the consultation meeting, the parties may continue to hold their positions.

For correct implementation of the provisions of the Act, the provisions of articles 15, 16, 17 and 19 are relevant. They safeguard the interests of both employers and workers' councils. On their basis, the staff council may be assisted by experts in the performance of their duties. The employees' council and specialists are obliged not to disclose confidential business secrets obtained by the employer in respect of which the employer reserves the obligation to maintain confidentiality. Non-disclosure of information obtained shall also be made upon termination of service but not longer than for a period of three years[1]. In particularly justified cases, the employer may not even provide employees with information that the disclosure of which could, according to objective criteria, severely disrupt the activities of the undertaking or undertaking concerned or expose them to significant injury. The legislator includes the members of the employees' councils in particular protection of the durability of the employment relationship, and violation of the provisions are sanctioned.

CONCLUSION

Worker participation is the result of the values that result from the work. Their perception brings about the idea of solidarity, dialogue and cooperation on the level of positive law. The natural expression of this is the inclusion of employees in the process of governing the establishment

[1] This regulation refers to the provisions of article 11 section 2 of the Law on Combating Unfair Competition, in which the act of unfair competition may also be admissible by a person who has worked on the basis of an employment relationship or other legal relationship for a period of three years after his termination, unless the contract provides otherwise or ceases to be a state of secrecy.

of work (co-government). Transformation of ownership structure in Poland after 1989 resulted in the economy based on private property. However, this does not mean that employees can not participate in co-management. Exemplary normative regulations show that the employee factor in the management of the workplace is becoming more and more visible. Apart from the traditional regulations already in force in Poland related to the activities of trade unions or the self-government of the employees of a state-owned enterprise (minor importance of the latter due to the disappearance of state-owned enterprises), also the regulations of EU law affect the scope of employee rights. In particular, it is important to inform employees and their responsibilities in consulting certain types of cases.

The "soft" nature of the majority of the entitlements of the various employee representations may seem insufficient. These are, in the whole sphere of statutes and regulations contained in them, primarily obligations imposed on the employers of informational or at the most consultative nature. Rarely, employees (their representatives) have a real chance to influence the workplace situation. They are often off the decision-making process and their participation in the management of an operation is merely formal. The employer only fulfills the statutory duty without regard to the employee's voice. And it can not be considered as his bad will. This is the result of understanding of property and attachment to it in Poland. The employer's assessment of employee representation refers to a small percentage of cases, such as the protection of the employee's employment durability (Article 32 of the Trade Unions Act). The normative solutions being introduced by the Polish legislature tend to cover more and more areas connected with the activity of a company which involving the people employed in the process of co-deciding. However, the soft nature of employee participation is still an attempt to reconcile values in the form of private ownership and employee participation in shaping the workplace of the workplace in which they are employed.

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STUDY ON THE MODALITIES TO EXPRESS WILL WITHIN NOVATION

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Abstract:

The present study aims at pointing the role of psychological element in novation. The most important lines which were largely debated among experts, refer to the fact that when the express will of parts is meant to cut off the first obligation, even when the objective premise idem debitum is lacking between the old and the new one, the least being characterized by a quantitative attribute as compared to the first, the novation is being validly stipulated. Starting from this point, we tried to realize a pronounced voluntarism character reconstruction of norms in novation matter which originated back in time from Medieval and modern era. The idea of awarding animus novandi an important role as an element able to convey novation even when the objective premises are lacking, made us analyse novation under all forms of will manifestation: partial, express and tacit one.

Key words: *novation, will, partial, express, tacit, animus novandi, idem debitum.*

INTRODUCTION

Reconstruction, with a volunteer emphasised character, of norms in terms of novation is not new in our juridical tradition, the idea of attributing *animus novandi* a prominent role as element capable to spread novation even in the absence of objective premises being prospected already from a long time by legal experts until modern times.

This interpretation, in turn, acquires an important historical profundity, as it originates from a passage with Roman origins, although rather controversial; it is about the fragment from Digeste, attributable to Salvius Iulianus.

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In order to outline the role of psychological element in novation, the fragment which registers the lively interest and which caused heated debates between experts is that comprised in the last part of the fragment.

Here it is found the assertion according to which in any case, when the parties' will is meant to cut off the first obligation, even when the objective premise *idem debitum* is lacking between the old and the new one, the last being characterized by a quantitative attribute as compared to the first, the novation is being validly stipulated.

An author from the last century commented this fragment saying that: "Novation, according to Roman law, can take place also by changing the object; but when it is stipulated a smaller quantity than that due previously, it is necessary, on grounds easily to understand, an explicit and clear proof of the contractors' will". Although this fragment was considered, by the greatest part of the doctrine, which was late on the matter, interpolated, it is still irrefutable the fact that we assisted, still from the early Middle Age, at a progressive erosion of the objective premise of the novation which, consequently, is progressively admitted even in the absence of such objective request (identified by *idem debitum* in Roman law and by objective discontinuity in modern law), on the condition that there is the will to novate, expressed by the contracting parties.

The gloss, based in the above cited fragment and on the reform of novation in the era of Justinian, confirms the possibility to give birth to novation even when the object of the second obligation is just a part as compared to the one established by the original one (therefore, in the absence of *idem debitum* request), on the condition that will to novate is expressly manifested.

Thus, it is ratified the admissibility of partial novation, rejected in Roman law by the lack of objective premise of *idem debitum*.

On the other hand, a legal adviser of the age arrives at asserting that novation can take place even in the total absence of *aliquid novi*, but on the condition to have the opportune support of an express volition of the parties.

In commenting the general Latin rule, attributable to the legal adviser Pomponius, according to which does not obligate himself more than once that who promises twice *idem*, the famous scholar asserts that novation takes place even in the precence of two identical obligations, on

the condition that this is the parties' will and thus obtaining an appreciable utility (*commodum*).

It seems persuasive the argumentation of another author, who outlines a precise physiognomy of *commodum*, clarifying that this, usually, is produced only to the benefit of the debtor, while for the creditor does not derive any utility out of such stipulation. Utility, for debtor, is found in the clearing of all encumbrances which eventually would be part of the primary obligation.

The argumentative and logical followed route imposes, at this point, a comparison with the theme of express novation and tacit novation, of which study led many commentators to conclusions similar to those prospected until here.

The latter, in fact, although do not find correspondence in a certain part of doctrine and jurisprudence, including that of cassation, find, on the contrary, numerous echoes in the opinions of those in that part of the doctrine who shows itself, in total, more deferent in comparison of a reading of novation in key more accentuated volunteering and, thus, it elaborated the distinction which has its roots in *ius commune*, between express novation and tacit novation.

PARTIAL, EXPRESS AND TACIT NOVATION

Article 1609 of New Civil Code should be read, through this hermeneutic canon, as norm which aims at interpreting an unexpressed will [1].

In the direction of this doctrinal thesis it can be held that, when the parties do not manifest the will to novate, the primary obligation is cut off as effect of its objective incompatibility with the new one. So that the investigation of effective will occurs, in these cases, superfluous, and, consequently, lacking significance the question if, in this case, the will of the parties meant to produce novation occurs, even in tacit form, or not; from the point of view according to which law establishes a presumption, in particular, does not seem necessary the qualification of will as an integrative request of the case.

Searching the subjective element becomes relevant, instead, in cases where modification results to be compatible with the persistence of the original report. In any case, many authors agree on the fact that neither the general regulation of the contract, nor the regulation of novation interposes limits to parties' autonomy, up to the interdiction of a novation which does not involve a substantial change of the report[2].

The two forms of novation, the express and the tacit novation, although are the result of a doctrinal elaboration performed in the modern age, were already spread in the use of the commentators in the Middle Age.

Starting with the reform of Justinian it was necessary the express manifestation of the will to novate; medieval interpreters tried to resolve the presence of this request and succeeded indeed, recognizing the efficiency of stipulation, even if *ope exceptionis*, when the will to create a novation, even if not expressly manifested, could be unequivocally deduced from the analysis of the global analysis of the parties.

Therefore, still from the last glossators, we can identify the presence of two types of novation, one express and which involves an effect of automatic cut off, the other tacit, which can be raised by way of exception by the debtor who has the interest to determine the cut off of obligation.

[1] Law 287/2009 on the New Civil Code updated 2017
[2] Corneliu Bîrsan, *Civil Law. Principal rights in rem* (Bucharest: Hamangiu, 2013), 209 et seq.

This second type of obligation is deduced, by interpretative way, when there were circumstances which formed certain enough indices about the occurrence of a so-called tacit novation.

Among the elements which received the greatest consideration were, naturally, the *idem debitum* şi *aliquid novi* requests, as well as the incompatibility between the first and the second report, everything being, of course, evaluated in view of the global contractual agreement.

From the elaboration, together with the express novation, of the tacit novation, to the recognition that between the two case would occur a qualitative difference more visible than the simple presence or absence of a manifestation of will - in the sense that, in express novation, unlike the tacit one, opportunely manifested, was allowed to produce a more ample further result, in another words to produce novation even independently of the objective premises - the step was small.

In the view of these opinions, a part of the modern doctrine demonstrated a significant condescendence towards the possibility that the express will of the parties determines the cut off by novation of the prior obligation even without modifying the object or the title.

According to these authors, even if the modification of the term of execution of the obligation or of any accessory obligations does not constitute a novation, not having as effect the cut off of the old obligation and the concomitant creation of a new obligation - this being just a modification of the original contract. However, these must not be considered an obstacle, not being obligatorily for private autonomy. On the contrary, this last one is freely left to self-determine and freely choose the contractual type, by virtue of the general principle stipulated by article 1169 of Civil Code, the freedom to contract - *„The parties are free to conclude any contracts and to determine their content, within the limits imposed by law, by public order and principles of morality."*

PRESUMPTION COMPRISED IN ARTICLE 1609 OF THE CIVIL CODE

One of the original affirmations is, therefore, that according to which the modifying event, being given its general character, could take place, after the express manifestation of the parties' will, even in the presence of a substitution in the object or in the title. The other is that the event of novation can take place even in the absence of *aliquid novi*, the latter being understood as a modification with essential character of the previous report.

Proceeding, at this point, to the more detailed analysis of legislative mechanisms which create the presumptions comprised in articles 1609 and the following in the Civil Code and which, ultimately, lead to the distinction between the event of novation and that of modification of the report, we notice as it follows:

Firstly, taking into consideration what was argued until now, the norm stipulated by article 1609 of Civil Code would be reconstructed in these terms: in the presence of will (even unexpressed, on the condition to be unequivocal) to create a novation, the substitution of the object or the title involved in the will (this time, necessarily expressed) to modify the report without cutting it off, the event will be qualified as modification; finally, in the absence of any tangible sign of will (express or tacit, on the condition to be unequivocal), a duplication of reports is determined.

Thus, the norm proposes to plot the borders between novation, modification and duplication of reports in the presence of a substitution in the object or in the title.

The norm provides a discretionary criterion between adjacent cases but it does not seem to establish a presumption in favour of the novation, being necessary the presence of a minimum of volitional determination.

It is necessary, in fact, a tangible manifestation of will, with positive contents, although less intense than the express manifestation.

On the other hand, art. 1609 of Civil Code does not establish an objective feature (modification in the object or in the title) inseparably connected to novation: neither in the sense that novation must, obligatorily, produce this type of effects, nor in the diverse sense according to which, upon the production of these effects, it is necessary

to take place the novation[1]. The norm seems, rather, to state that, at the occurrence of *aliquid novi*, understood as an innovative contribution regarding the object or the title, the psychological component must not necessarily be manifested in express form, on the condition that it exists unequivocally: as for the occurrence of the objective request, this shows, by itself, a probable intention of novation and legitimates, consequently, if not the suppression, at least an attenuation of the objective request[2]. The wish of the contracting parties in the sense of novation must be explicit. As *"novation is not presumed. The will to do must obviously result from the act"* - art. 1130 Civil Code – from 1864. Taking into account the above mentioned aspects, the Supreme Court established that the will to perform a novation must unequivocally result from the contract where the parties obligated themselves by a bounding legal relation to cut off an existing obligation by its replacement with a another new obligation. The absence of the express manifestation of creditor's express wish to release the original debtor, by signing a novation act, leads to the lack of fulfilment of validity conditions of novation. In this situation, the legal act thus concluded cannot produce effects as a novation contract, the original debtor being obligated to fulfil the assumed obligation[3]

Starting from these premises, it is not, thus, necessary, that the intention of the parties be expressly manifested; if we look carefully, it is not necessary not even a positive sign of the will, on the condition to occur indices to put in doubt the fact that this volitional contribution exists.

In this way, volition never remains completely absorbed by the *aliquid novi* request. It is possible that novation does not occur, not only when it occurs a contrary will, clearly manifested, but also when there is a grounded reason of doubt in respect to the effective intention of novation of parties, with the consequence that the objective elements, itself, as we will see, not only that is not always unnecessary – on the other hand, the norm does not establish any interdiction in this sense –

[1] Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Elementary treaty of real right. Obligations* (Bucharest: Universul Juridic, 2012), 264 et seq.
[2] Constantin Stătescu and Corneliu Bîrsan, *Civil law. General theory of obligations*, 9th edition (Bucharest: Hamangiu, 2008), 121 et seq.
[3] See C.S.J., Commercial Section, Decision no. 5394 of 10 October 2001, in *The Jurisprudence Bulletin, 1990-2003*, 309; as well as I.C.C.J., Commercial Section, Decision no. 1213 of 28 March 2006, in *Law* 2(2007), 221.

but certainly is not even enough: it is necessary, in addition, the absence of indices which make equivocally the direction of will.

There are no impediments that, in the presence of an act of will more intense, manifested in express form, novation be produced also in the presence of a different objective premise, more labile.

In summary, we say that the norm stipulated at art.1609 and the following of the Civil Code, does not outline the scope of novation rather than the premises for the action of attenuation of the subjective requirement. This attenuation seems more opportune, as a clear index of the will to novate is already included in the substitution of one of the fundamental elements of the relation. When substitution is produced in relation to an accessory element, novation must be reinvigorated by the will to novate manifested in express form, as it is indirectly deduced also in the article 1610 of the Civil Code[1].

This last norm, in turn, establishes a premise of modification, allowing the modifying event to determine without not even that minimum volitional contribution which the article 1609 of Civil Code, in the matter of novation, (apparently) requires – but, as we anticipated will clarify at short time, this affirmation is not entirely clear, as, in the presence of an objective modification of an element which has an essential character, although in the absence of any manifestation of will, express or tacit, *in the absence of contrary indices*, it acts a type of presumption (simple), in favour of novation, while, in order to have the duplication of relations, it is necessary that, out of any other element, to be created a doubt in respect of the effective consistency of will.

In any case, this, although slight difference between the two norms (which in practice, more than anything, tends to be dissolved, as research in respect of the content of will does not take place neither in a case nor in the other) is justified based on the different order of consequences which results based on the different order of consequences resulting from the two cases. The seriousness of the effects resulting from novation, in fact, illustrates the circumstance that the psychological requirement is, in this case, attenuated, but not absent, as it happens in the different case of modification.

[1] Carmen Tamara Ungureanu and Gabriela Răducan, in *New Civil Code. Comments, doctrine and jurisprudence*, vol. II, ed. Mădălina Afrasinie et al.(Bucharest: Hamangiu, 2012), 208 et seq.

In both cases, a different will, expressly manifested, can imprint another direction to the effects of the contract, which will have, consequently, a cause which is different than that presupposed by law, usually, in such cases.

In conclusion, if, usually, a modification in the object or in the title determines novation, in this operation being, typically, included the will (if not presumed – as the existence of a presumption in a technical sense would exclude even in an abstract matter an finding regarding the will – at least easy to deduce from the absence of contrary indices) to cut off the primary obligation by will, we cannot, though, exclude that the will of the parties be, instead, directed to the accumulation of new obligations with that prior or to bring a modification to the primary obligation, including in its essential elements, but without determining the cut off by novation of the primary relation.

Within the frequent referrals between the different historical ages, it can be interesting to notice that the prospected reconstruction of the provisions comprised in article 1609 of the Civil Code has contact points significant with the regulation stipulated in Roman law (classic), where, as we saw, at least on the basis of the predominant reconstructions from the sources of the age, novation was produced regardless the presence of the psychological element (*animus novandi*), resulting, in exchange, as legal effect of a formal contract, which comprised a referral clause meant to exclude the duplication of relations, meaning meant to exclude *in limine* what overflow outside the scope of the regulation of novation[1].

Article 1610 of the Civil Code imposes an unquestionable, unequivocal manifestation of the intention to novate.

Under this aspect, the norm seems to solicit a *quid pluris* as compared to the simple passive, silent behaviour, which, in itself, seems to be insignificant, in other words irrelevant to the purpose of producing novation

However, at this point we wonder what is happening in the presence of a substitution in the object or in the title, not supported by any psychological feature, neither in favour, nor against novation.

In a first moment, we could consider that it acts as a presumption unfavourable to novation, having as consequence the duplication of relations, the primary one and the subsequent one; nevertheless, in compliance with art. 1609 of Civil Code, the scope of this presumption,

[1] Paul Vasilescu, *Civil Law. Obligations* (Bucharest: Hamangiu, 2012), 112 et seq.

admitting that is like this, seems falling again the scope of the case where is at least one index (although objective, namely not the embryo of a manifestation fulfilled by will) which can put in doubt the effectiveness of the intention of novation.

This precaution is explained, as we have already clarified, by the seriousness of the consequences resulted from novation and which the system does not admit they occur in the presence of an incertitude, though, regarding the effectiveness of the direction of will.

This is why the legal qualification of the event in terms of duplication of relations takes place in the presence of at least one doubtful element, while it stops at the threshold of the field of complete neutrality of objective indices, characterized by the total absence of any exterior index which allows deduction of the nature of internal will, except for the dimension of modification.

In these cases, the only element which can orient the process of legal qualification of the case seems to be exactly the dimension of modification: if it affects the object and the title, being excluded (in the absence of the express will in this sense) to be about a simple modifying contract, seems in compliance with the legislative provision, we consider that it is about a case of novation, the will of novation being able at least to infer, based on the common sense, from the essential character of the modification[1].

This reconstruction causes a further attenuation of the subjective requirement and leads us in the proximity of an authentic presumption, from which the norm analysed separates by the fact that it continues to arise the problem of an investigation, even minimum, of the volitional content. However, we have to admit that, thus reconstructed, the norm ends by abdicating almost entirely at a recognition of the effective will of the parties in the primary relation.

It is necessary, although, to take into account the fact that, in case it is insinuated the least doubt regarding the real intention which actuates the parties of the contract, the „presumption" would become contrary as, in situation of incertitude, the norm places automatically the case outside the scope of novation.

In respect of the case of modification of an element with accessory nature, according to which the issuance of a document or its

[1] Ioan Adam, *Civil Law. General theory of obligations* (Bucharest: C.H. Beck, 2014), 185 et seq.

renewal, introduction or elimination of a term and any other accessory modification of the obligation, do not produce novation, we want to specify as follows.

In an attempt to carry out am analysis between this situation and the regulation of novation stipulated by the Civil Code, we have, ultimately, the following scenario.

The modification of a main element of the primary obligation, even if it is not expressly supported by a psychological feature, determines the novation as long as there are no elements which can raise doubts regarding the effective direction imprinted by the parties to their will.

In this last case it acts an (authentic) presumption (*iuris tantum*) contrary to novation; the qualification stipulated by the system is, though, in terms of accumulation of the two obligations.

Only in the presence of an express will shall be performed the simple modification of the primary obligation, which shall not lead to its cut off and its succession as a new relation.

On the contrary, the substitution of an accessory element, at least normally, does not involve, according to article 1609 of the Civil Code, the novation of the primary obligation.

This provision offers to the will even a much more reduced importance, as (probably out of reasons which can be attributable to greater seriousness of the legal consequences resulting from the cut off of the relation), when certain conditions are met, it lays the foundation of an authentic presumption in favour of a qualification in terms of modification (thus being omitted any research regarding the real content of will)[1].

On the contrary, in article 1609, the existence of a legal presumption (which acts in the sense of publication of relations and, once again, against novation) is less obvious, as it can be deducted only *a contrario*; it is a presumption *iuris tantum* and it is, any way, excluded from the character of essentiality of the elements on which is called to act the substitution, thus presupposing the absence of some further circumstances which can cause some doubts in respect to the real will of the parties.

Given the above-mentioned affirmations and in respect to the modification of an accessory element which does not produce novation,

[1] Dorina Zeca, in *New Civil Code. Comments, doctrine and jurisprudence*, 115 et seq.

the question arises whether to establish of thus established presumption has an absolute (*iuris et de iure*) or relative (*iuris tantum*) character. As we have already clarified, the answer must be inferred from the general principles of the system and cannot be but in the sense that the presumption could be exceeded based on a different will of the parties.

Indeed, extending to the novation the same reflections made by doctrine in relation to the modifying event (according to which, as it is known, the „contract is the agreement of two or more parties for the constitution, regulation or cut off between them of a patrimonial legal relation"), we must provide an adequate amplitude phenomenon of novation, which has general character, like those of modifying and cut off de: on the other hand, we do not find reasons of principle to prevent the free action of the private autonomy in this field, and the interest to create a new novation even in the presence of an accessory modification it could very well reside in the will to produce legal consequences related to novation[1].

Consequently, just in the field of a novation, which is determined on the premise of a modification of an a element with purely accessory character of the relation, *animus novandi* sees concentrated at maximum the role in the novation field, as essential requirement.

Vice versa, in terms of modification, the contribution of the psychological element is maximum in the case it is operated this essential element of the relation, even without involving its cut off by novation; in exchange, in the normal case of modification of an element of accessory nature, the role of the psychological element is drastically resized, if not completely compressed.

ANIMUS NOVANDI AND THE LIMITS OF PRIVATE AUTONOMY

From an analysis conducted based on the legislative provisions, the conclusion is, thus, in the sense that novation can be prospected even in the care where modifications purely accessory and vice versa, that modification is compatible with alterations more or less substantial of the relation.

It cannot be omitted the fact that, following the more liberal approach, the subjective element ends by acquiring a potentially

[1]Pop, Popa and Vidu, *Elementary treaty of civil law. Obligations*, 239 et seq.

disruptive relevance. However, we do not consider that it must be omitted the reconstruction prospected bye excessive voluntarism. In addition, the prospected interpretation, besides it emphasizes the role of the psychological element, it allows to be awarded a role not significant at all and the presumption with objective character, which remains the only discriminatory criterion in all those case where presumption is called to act, in lack of an express volition. Then, in practice, it is increased more and more the relevance of the objective feature: in fact, it is known that, in most of the cases, there is no express volition for the purposes we are interested in[1].

On the other hand, in compliance with article 1169 of Civil Code, private autonomy is left in our system to freely manifest in all the forms which do not contrast with legal norms, public order and common laws.

The above mentioned limits, on the other hand, do not seem obligatory in this case.

S for the legal limits, especially the norms stipulated in articles 1609 and the following of the Civil Code are ambiguous and, they, themselves, do not prevent the reconstruction of the proposed dogmatics.

Agreements caused by pure caprice do not receive any protection from our legal system.

Because of this, we consider that the requirement of value is satisfied to the extent where it can be detected, in theory, an interest which deserves protection so that the parties stipulate a certain contract.

On the other hand, if the interest to maintain in force a certain legal relation, even in the situation of modification with non accessory character, it is obviously and is linked, predominantly, to the need to keep possible stipulations and accessory clauses, such as the guarantees, the dates and the modalities, otherwise, in case of a will which proposes to produce a novation even in the absence of an objective premise, and therefore in the situation of a modification with pure accessory character (at the limit, in the absence of any innovative feature under objective aspect), the identification of a potential aspect of interest is a process maybe not as immediate as we thought.

However, it cannot reside but in the intention to produce, in respect to the original relation, and the next one, all the typical consequences of novation and which results to be, on the contrary,

[1] Ion Dogaru and Ponpiliu Drăghici, *Basics of civil law*. *Vol. III, General theory of obligations* (Bucharest: C.H. Beck, 2009), 306 et seq.

extraneous to the modifying event: let's think of the normal cut off of the criminal clause, if it has been compliant with the original relation, and except of a different will of the parties, of the unfolding and the amount of penalty interests, for some authors even of exclusion, except for a different will of the parties, of the action of resolution for the non-fulfilment and the relevant exception regarding the new obligation, in case the primary obligation originated from a bilateral contract, as well as the regulation of the prescription[1].

The moment the parties agree to modify an accessory element of the obligation, the interest to determine a „substitution" of the report, with succession of two obligations, rather than to keep in force the primary relation, must be identified in the special configuration of le legal consequences which represent the corollary of the effect of cut-off – constitution.

Indeed, it is obvious that, if it is performed a novation, it is wanted to be produced a different result and subsequent to that which would follow to a simple modification. Once verified if this interest cannot be followed *recta via* through other legal instruments, we do not see by what reason this interest should not be admitted by our system in the forms of novation.

To all this must be added another empirical observation: it seems fully legitimate, in our legal law system, a chain of contracts having as effect the cut off of the primary relation, for example by remission (unsupported, in this case, by the spirit of liberality, but casually related to the previous contract) and the constitution of a new relation, copied from the previous one, except for one or several elements of accessory nature, all happening, at the limit, on one single chronological and formal context. In such situation, novation could be certainly preferable, at least under the aspect of the economy of legal means[2].

On the other hand, it is obvious, however, the danger of recognizing the full legitimacy of novation, expressed in the above mentioned terms, to fully devoid the requirement *aliquid novi*; to that extent that there were voices considering necessary, for the exclusive

1 Flavius Antoniu Baias et all, *New Civil Code.Comment by articles* (Bucharest: C.H. Beck, 2012), 345 et seq.

2 Stătescu and Bîrsan, *Civil law. General theory of obligations* (Bucharest:All,1995), 287 et seq.

purpose to prevent emptying, that novation produce a change, no matter how secondary.

CONCLUSIONS

Diverging from the literal content of the norms, some authors recognise that novation could have take place even without modifying in any way the objective physiognomy of the obligation, as, anyway, it would modify the regulation of the relation.

It was noticed, in this sense, incidentally, that normally is modified the object or the cause, understood as regulation of the relation (the latter, though, is changed in the absence of the *direct* modification of any element, whether essential or accessory, of the relation, as modifications are necessarily produced by *indirect* way, as reflection of novation, in terms of the complementary elements of the relation, such as the prescription term and the guarantees).

The historical source, in exchange, is not susceptible of any modification to it (starting from the premise that it novates an obligation with contractual source) could also be added the novation contract, (or any other contract which would produce its effects and those of novation).

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PLEA AGREEMENT DURING THE CRIMINAL PROSECUTION OF A CRIMINAL TRIAL

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Abstract:

The Plea Agreement is one of the latest institutions and one of the special procedures introduced by the New Romanian Criminal Procedure Code.

The Romanian procedure law adopted it because the State wanted a reduced cost of the justice action; thus, the courts would have fewer trials and the procedures would be accelerated. This work wants to analyze the congruity of this procedure with the right to a fair trial.

Key words: *agreement, recognition, guilt prosecutor, trial.*

INTRODUCTION

The Romanian quick social and economical development has been constantly claiming the need for adjusting the judicial system to the contemporary reality, for a good, prompt and efficient justice action.

One of the important institutions introduced among the special procedures, regulated by Title 4, Chapter 1 of the Special Part of the New Criminal Procedure Code, is represented by the plea agreement.

It is considered special because it is regulated mainly by some norms, derogatory from the normal procedure, applicable unitarily in solving criminal cases.

The special derogatory character draws from aspects concerning the limits of the law court assignment, the object of the trial, the rules set for the trial whenever the instance is informed about such agreement.

Some states have been using this special practice for a long time now. For instance, in the United Kingdom of Great Britain, the first pieces of evidence of this procedure date since 1743, whereas in the USA from 1804.

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This work wants to study the circumstances of signing this type of agreement, used only during the criminal investigating stage.

We are going to analyze the duties of both the criminal prosecutor and his hierarchically superior, and at the same time, the obligations of the accused person when accessing this procedure during the criminal investigation stage of a criminal case.

AUTHORS AND PROCEDURE INITIATION

According to art 478 paragraph (1) Criminal Procedure Code, the defendant and the prosecutor are the authors of the plea agreement.

This document can be signed either by the prosecutor who investigates the criminal case, according to art. 56 paragraph (3) Criminal Procedure Code, or the prosecutor who supervises the criminal investigation carried out by criminal investigating bodies.

Pursuant to art 82, Criminal Procedure Code, the defendant is the person against whom a criminal action has been started. As the law doesn't make the difference, the plea agreement can be signed by both a natural and legal person[1] representing the defendant.

It is worth mentioning that when a defendant is confronted with a criminal prosecution for having committed several crimes, he has got the possibility, provided the legal requirements are complied with, to reach an agreement regarding only some of these offences. The rest of criminal deeds, not included in the plea deal, are to be subjected to the regular legal procedure.

At the beginning, the underage defendant was not allowed to access this procedure, neither personally nor through a legal representative. Nowadays, such restriction is no longer in force but its validity depends on the clearly expressed agreement of the underage legal representative[2].

When there are several defendants in the case, it is possible that only some of them to express their acceptance for a plea bargain; in such

[1] See Nicolae Volonciu and Andreea Simona Uzlău (coord.), *The New Criminal Procedure Code - commented*, 2nd edition (Bucharest: Hamangiu, 2015), 1266.

[2] Paragraph (6) art. 478 Criminal Procedure Code has been amended by art II p. 118 of the Government Decision no 18/2016 on amending and completing Law no 286/2009 on Criminal Code, Law no 135/2010 on Criminal Procedure Code, also for completing art 31 paragraph (1) of Law no 304/2004 on judicial structure, Official Gazette No 38 /23.05. 2016.

case, each of them will have a separate agreement, without affecting the presumption of innocence of those who haven't consented to the deal.

The capacity to initiate the procedure is valid for both of its authors.

Article 108 paragraph (4) thesis I of the Criminal Procedure Code states that "the judicial body must inform the defendant about the possibility to reach a plea agreement during the criminal prosecution". The defendant is informed about it and his other rights and obligations in writing, under signature, before his first hearing; in case of incapacity or refusal to sign, a minutes shall be drawn up pursuant to art 199 Criminal Procedure Code.

If the procedure is initiated by the defendant, though the law doesn't mention the form, the jurisprudence accepts it either as a written demand addressed to the prosecutor or an oral request put down in a minutes by the criminal prosecuting bodies.

Nevertheless, it is necessary to underline the fact that appealing to such procedure is recognized and guaranteed as a right rather than an obligation for its authors. So, any of them have the right to choose whether to initiate it or to refuse its initiating action done by the other author, if there are reasons to believe it is not favorable, or legal provisions are not observed. When the procedure is announced by one author or is already begun, the judicial body doesn't have to notify it to the victim, the civil party or to the responsible plaintiff party.

THE OBJECT OF THE PLEA AGREEMENT

According to article 479 Criminal Procedure Code[1] "the plea agreement represents the recognition of the offence and the charge, object of the criminal action, and also the way and the length of the punishment, together with the manner of application of the educative measure or, if it is the case, the solution to give up or postpone the punishment order."

It is important to stress the fact that compared to the procedure of guilt recognition, the plea agreement includes both recognition of the offence and the acceptance of the charge. Pursuant to art 482 letter g) Criminal Procedure Code, this recognition must be expressed as a clearly identified statement and not as a result of an interpretation of the

[1] Amended by art II p 119 of Governmental Decision no 18/2016.

defendant attitude as silent recognition (for instance, when the defendant understands to make use of his right to remain silent and not to cooperate with the judicial authorities).

Yet, nothing stops the defendant or his layer to ask for the change of the legal classification of the offence before the procedure begins.

The statement given by the defendant according to art 109 Criminal Procedure Code, and recorded according to art 110 Criminal Procedure Code, even when he admits his guilt and the legal classification at that particular time, but before the beginning of the plea bargain procedure, cannot be considered as guilt recognition in the spirit of art 479 Criminal Procedure Code, because it is not a proof of evidence that can be used against the defendant.

As for the punishment, in the absence of a clear distinction, both the main punishment (fine or prison) and the secondary one are to be taken into account.

About the kind of punishment, according to art 485 paragraph (1) letter a. Criminal Procedure Code, stating the solutions to be ruled by the Court, (related to the plea bargain), the parties, meaning the prosecutor and the defendant accompanied by his lawyer, can agree upon the prison punishment as liberty deprivation measure (with or without accessory punishment or complementary punishments) or upon the fine, by negotiating their length and sum, or upon the application manner for the suspension of probation.

The solution reached through agreement could be waiving the punishment or postponing its application.

Besides the observance of general terms for concluding the plea agreement, the prosecutor must verify the compliance with the provisions of art 80 Criminal Procedure Code in order to reach the solution of waving the punishment application.

When the negotiation focuses on the solution of postponing the punishment application, the prosecutor must also verify the observance of provisions of art 83 Criminal Code; after that, they will negotiate the number of days for unpaid labor for the community and the obligations stated by art 85 paragraph (2).

When negotiating the punishment suspension, it is necessary to register the fulfillment of provisions of art 91 Criminal Code, establishing a clear supervision term[1], the number of days of unpaid labor

[1] Probation time is between 2-4 years, minimum the time of the ruled punishment.

for community and which obligations, stated by art 93 paragraph(2), Criminal Code, are to be ruled.

The presence of these supplementary conditions has a direct influence on the maximum punishment length admitted in case of plea agreement[1].

We have to underline the fact that, besides the possible acceptance of the plea agreement for the underage defendants, its object can be made up by the form and manner of the applied educative measure, but it is clear that its length is not negotiated.

We can notice that safety measures are not negotiable. Yet, the Court has to rule also on them as based on art 487 letter a) Criminal Procedure Code, the sentence must contain also the mentions provided by art 404 Criminal Procedure Code, among them being the ones related the safety measures.

CONTENT PROVISIONS FOR THE PLEA AGREEMENT

After analyzing art 478 – 482 Criminal Procedure Code, we can see that there are some circumstances that must be collectively observed in order to reach a plea agreement.

Even from the start we have to say that such agreement is allowed only during the criminal prosecution stage. The solution seems to be justified by the reasons of its introduction and also by the fact that during the trial, the defendant can make use of the procedure of guilt recognition.

This circumstance is also fulfilled when the criminal prosecution is re-started pursuant to art 335 Criminal Procedure Code, art 341 paragraph (6) letter b. Criminal Procedure Code or art 341 paragraph (7) point 2 letter b) Criminal Procedure Code, but not when the criminal prosecution is restarted when the case is referred to the prosecuting body by the Judge of the Preliminary Chamber, according to art 334 Criminal Procedure Code.

The first condition, stated by art 480 paragraph (1)[1], envisages the maximum limit of the punishment provided by law, in the logic of art

[1] Waving the punishment can be ruled only for the crimes where the law provides maximum 5 year prison time and for punishment postponement, the law provided punishment must be less than 7 years.

187 Criminal Code: "the punishment provided by law which incriminates the committed offence, without considering the causes for its reduction or increase." This procedure can be started when the punishment provided by the law for the committed offence is maximum 15 years prison (as single punishment or alternatively with fine punishment) or a fine, without limitation of its quantity.

The law maker chose to refer to the degree of the deed abstract danger, with no consideration for committing an attempt, for the mitigatory circumstances or the special cases of punishment reduction nor the aggravating circumstances (aggravating circumstances, continuous crime and recidivism after the enforcement).

We have to point out here the difference between the mitigated types of a crime and the special cases for punishment reduction. In the first case, the reference is made to the highest level mentioned by the text incriminating the deeds, related to the type form crime.

On the other hand, the special cases for punishment reduction don't have any influence over the possibility to reach a plea agreement related to their beneficiaries.

Art 480 paragraph (2) Criminal Procedure Code, introduces the condition that all evidence should result into sufficient data for the existence of a crime considered the cause of the beginning criminal prosecuting action and for the defendant guilt.

In case the procedure is initiated by the prosecutor, the evidence charging the defendant present at the file must observe the provisions of art 309 paragraph (1) Criminal Procedure Code[2], stating that "a criminal action is begun by the prosecutor, by order, during the criminal prosecution, when he finds that there are pieces of evidence proving that a person committed a crime and none of the special cases provided by art 16 paragraph (1) can be applied here". Therefore, the plea agreement is also blocked if one of the special cases of preventing the beginning or the exercise of the criminal action is enforced.

The reason of this term is the very special feature of this procedure and it represents a supplementary warranty for the observance of the presumption of innocence and of the right to a equitable trial, a real

[1] Punishment limit allowed in this matter was extended by art II p. 120 of the Gov Decision 18/2016.

[2] Ion Neagu and Mircea Damaschin, *Treaty on Criminal Procedure. Special Part* (Bucharest: Universul Juridic, 2015), 472.

pertinence of the in dubio pro reo principle instituted by art 4 paragraph (2) Criminal Procedure Code.

During the trial stage, in the absence of the adversarial principle, there will be no further evidence produced nor shall be analyzed the ones employed during the criminal prosecution, considered sufficient to make up the Court opinion, beyond any reasonable doubt, regarding the existence of the crime and the defendant's guilt. It is therefore understood that for benefiting from such agreement, the defendant must accept that the judgment shall be made only based on the evidence employed during the criminal prosecution.

The prosecutor is the one that has to verify the observance of such condition. If the defendant express his will to have a plea bargain, and should the prosecutor finds that the provision of art 480 paragraph (2) Criminal Procedure Code is not complied with, he shall reject the demand by means of an order, according to art 286 Criminal Procedure Code. This order can be fought against pursuant tart 339 Criminal Procedure Code, but, in this case, the hierarchically superior prosecutor shall study only the lawfulness of the reasons of the rejection, with no appreciation on the opportunity to have a plea agreement. This shall be assessed only by the prosecutor, and therefore, the hierarchically superior prosecutor shall not begin or ask his subordinated prosecutor to begin the procedure.

Another controversial[1] condition, according to art 478 paragraph (2) and paragraph (4), Criminal Procedure Code, is represented by the necessity to get the previous approval of hierarchically superior prosecutor.

By means of a first approval, the hierarchically superior prosecutor decides the limits of the negotiations or even the solutions to avoid, whereas through the approval, subsequent to the negotiations, checks the observance of conditions imposed by law and by the previous approval for the plea agreement.

Here, the hierarchically superior prosecutor has a rather guiding role, whereas the final assessment is to be made by the prosecutor in charge with the criminal prosecution, as, enjoying the best position in analyzing the evidence, he is the only person responsible for the main ruling documents in the case.

[1] See "Plea Agreement Procedure. Analysis." Public Ministry. Prosecutor's Office of the High Court of Justice and Cassation, April 7th 2014.

By reconsidering the benefits given to the defendant who chooses to undergo this procedure by applying the provisions of paragraph (4) of art 480 Criminal Procedure Code, nowadays, the limits should not be between the maximum and the minimum line of the punishment provided by the special part of the Criminal Code or other special laws, but between the reduced limits by a third for the prison punishment or the corrective measures with deprivation of freedom, and a quarter for the fine punishment. Given the fact that, when negotiating, the prosecutor has to comply with the limits of the previous approval, he couldn't oversee this rule either.

After the negotiations, in order to preserve the balance with the procedure of informing the Court by means of indictment, when the hierarchically superior prosecutor verifies whether this action is complying with the law, during this special procedure, as an additional guaranty of lawfulness and of limits imposed by the previous approval, it is considered highly necessary to issue a new approval, as it is now that the agreement becomes good for producing effects, representing the act of informing the Court.

If the hierarchically superior prosecutor totally agrees with the prosecutor's proposition, as responsible for the criminal prosecution (content, de jure and de facto motives), it is sufficient for him to express his approval directly on the plea agreement paper. Should the hierarchically superior prosecutor considers some amendments are necessary, due to different opinion on the agreement content, he shall draw up a reasoned order, offering de jure and de facto motives as merits of his decision. As the law doesn't provide such aspect, pursuant to provisions of art 304 paragraph (2) Criminal Procedure Code, the same way will be followed in case of rejected agreement.

If the plea agreement is rejected when being approved, either before or after the negotiations, the prosecutor shall go on with the criminal prosecution according to the usual procedure.

At the same time, the plea agreement must be the result of the negotiations carried out between the prosecutor and the defendant, who, according to art 480 paragraph (2) Thesis I Criminal Procedure Code, shall be accompanied by a lawyer, observing the provisions of art 91 paragraph 2) and art 92 paragraph 8) Criminal Procedure Code. Non compliance with this obligation leads to absolute annulment of the

agreement pursuant to art 281 paragraph (1) letter f) Criminal Procedure Code, and the defendant has the right to invoke any time during the trial.

Negotiation is the key of this procedure and implies that both the prosecutor and the defendant make concessions while observing the law provisions.

As the law doesn't clearly describe the procedure, we conclude that the negotiations shall be held directly between the prosecutor and the defendant assisted by his lawyer, either through dialogue or written documents. It is certain that the direct dialogue is the clear way to obtain promptness.

Taking into account the powerful personal character of the agreement, ant that the punishment shall be enforced after the probable admissibility, It must be able to assure the prevention and correction purpose of the criminal code. Consequently, the prosecutor has to envisage the general individualizing criteria[1] stated by art 74 Criminal Code. Several aspects will be taken into consideration collectively: circumstances and the modus operandi, the means[2], danger risk for the property, type and seriousness of the result or other consequences of the crime[3], the crime motive and purpose, the crime type and repetitiveness, representing the criminal record of the defendant4, his conduct after committing the crime and during the criminal process5, education level, age, heath status, family and social situation.[6]

The powerful personal character of the agreement is also pointed out by analysis of the subjective criteria.

[1] The analysis of the individualizing general criteria is not a judicial individualization, being the exclusive attribute of the Court.

[2] The following are to be analyzed: place and time of the crime together with the modus operandi and the means used in order to establish the danger risk of the author.

[3] It is important for the result crimes, for the study of the crime direct and indirect results.

[4] For instance, the absence of criminal record is a favorable element for the defendant whereas his perfection in a criminal field will lead to more severe punishment. Maybe, the time between the previous sentences and the moment of committing the new crime would be taken into consideration.

[5] It is important to see if there was any attempt to prevent the crime result, to restore the stolen goods, to hide the crime traces, to escape from criminal prosecution, to intimidate the witnesses etc.

[6] There will be an analysis of poor health state, family enviroment, entourage influence, psychological troubles(that don't impair judgment) etc.

On the other hand, the defendant also enjoys the possibility to draw the prosecutor's attention on the favorable criteria.

If the defendant committed several crimes, he can express his interest in reaching an agreement for all or part of them. In this case, the analysis of the above mentioned conditions shall be exercised for each crime. When agreement are made concerning several committed crimes, the resulted punishment, according to art 39 paragraph (1) Criminal Code, shall be set by reference to the negotiated punishments.

LEGAL PROVISIONS ON THE PLEA AGREEMENT FORM AND CONTENT

When the content of the plea agreement is approved by its authors, they will write it down. It is a form condition provided by art 481 paragraph (1) Criminal Procedure Code. In case of defendants who chose to follow this procedure, the prosecutor will not make up the indictment and the Court will receive the plea agreement directly.

This agreement shall contain as provided by art 482 Criminal Procedure Code:

a) the date and place of signature;

b) last name, first name and capacity of its authors;

c) information on the defendant person, according to art 107 paragraph (1);

d) description of the deed object of the agreement;

e) legal classification and punishment provided by law;

f) evidence and evidence means;

g) express statement of the defendant admitting his guilt and his agreement with the legal classification which started the criminal action;

h) the type and the time (clearly mentioned, not by reference to two limits), and also the punishment application manner or the solution of waving to the punishment or the postponement of punishment application object of the agreement between the prosecutor and the defendant;

i) signatures of the prosecutor, defendant and his lawyer.

If there are several defendants in the case and if many of them or even all of them expressed their desire to reach a plea agreement and the prosecutor finds that the legal terms are complied with, he shall sign a separate agreement with everyone of them. Practically the negotiation has to be held separately, given its powerful personal character.

The specialized literature showed the necessity to present the defendant a copy of the agreement immediately after it was signed..

CONCLUSION

As we can see from the analysis of these legal provisions, the prosecutor is the representative of the general interests of the society, in charge with defending the lawful order and the citizens' rights and freedoms. Therefore, during the procedure, his role is to watch over the balance between the general and the particular interests, in other words, the balance between the opportunity of the procedure and the compliance of the legal provisions in order to have a valid agreement.

We consider this theme important and extremely useful given the fact that the prosecutor takes into account the defendant's will to cooperate for the criminal prosecution and also his position regarding his own crime.

Nevertheless, as we have already mentioned it, we are talking about a general interest as by using this plea agreement we have a fairly and expeditiously trial with fewer costs.

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TECHNICAL SURVEILLANCE DURING THE CRIMINAL TRIAL

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Abstract:

As the criminal activity grew more and more sophisticated by using advanced communication techniques, the legal system had to accept the employment of some phone calls interception and recordings together with other communication media, especially for crimes where evidence couldn't be obtained otherwise.

Technical surveillance is a complex area of activity, which has developed step by step, in time, together with the need to update laws and specific methods following the trends of society and technology but also of criminality environment.

Key words: *criminal case, operational surveillance, interception, recording.*

INTRODUCTION

Democratic societies recognize the secrecy of correspondence and phone conversations as fundamental right of citizens. That is why, at the beginning, it was not allowed to be used by justice in producing evidence.

Law no 51/1991 of Romanian legal system stipulates the possibility to intercept and record phone calls and other communications whenever it the risk of preparing and committing crimes considered threats for the national security.

Afterwards, Law no 26/1994 on Romanian Police, this possibility was also adopted for cases of organized crime and some serious crimes. In 2014 the current Criminal Procedure Code was adopted, comprising Chapter IV called "Special methods for surveillance and investigation", which states the legal frame for interceptions and recording of phone calls and other communications.

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PRELIMINARY ASPECTS ON TECHNICAL SURVEILLANCE

According to art 53 of the Constitution, the enactment of some rights and freedoms can be limited by law in order to get security of national interest, health and public ethics, rights and liberties of citizens and also of criminal justice. The legal provisions of such interceptions and audio or video recordings are all observant of this constitutional frame, moreover the imitation didn't affect the right existence, corresponding to the situation which determined it.

After the constitutional revision of the same article together with the proportionality requirement, the paragraph (2) of the same article was completed with the requirement for non-discriminating enforcement[1]. Admissibility of audio and video recording as evidence had to take into account the provision regarding the secrecy of correspondence. This is a fundamental right seeking to protect the possibility of the natural person to communicate in writing, by phone or by other means, without being publicized or censured by others. Correspondence represents letters, phone calls, mail etc.[2]

According to law, it is allowed to make ambient recording, to locate or track by using G.P.S. or other techniques. Persons who are or may become parties in a criminal case are allowed to make audio or video recording with their own audio or video devices.

Exceptions of the right to privacy of phone calls and communications, of private and family life, of home residence and correspondence are also approved by CEDO (art 8 paragraph 2) and by UDHR (art 29 point 2), also ratified by our country, in case of national security, public safety, defense of public order or prevention of criminal acts. Based on these, modern legislations adjusted their laws on audio or video recording.

Classified as means of evidence supervised by special laws, it is obvious that they belong to a procedure clearly set for which it is highly necessary to have an already started in rem criminal case prosecution.

Taking into account, on one hand, the investigating judicial bodies which make use of these actions, and, on the other hand, the huge

[1] Ioan Muraru and Elena Simina Tănăsescu, *Constitutional Law and Political Institutions, vol. 1* (Bucharest: AII Beck, 2003), 175.
[2] Ibidem, 220.

interest in protecting the people's fundamental rights and freedoms, supervised by the judge, the performance of such surveillance actions before the beginning of the criminal prosecution is annulled and it is possible to have justice action lodged by the targeted people.

The audio or video recordings, considered means of evidence, contain deeds and circumstances which help finding the truth. Photos belong to the category of image recording.

Other law frames consider "interceptions" as the interference of authorized institutions in any kind of communications by phone or other means – radio, private or close circuit television – enjoying confidentiality among its users.

MEANING AND LEGAL PROVISIONS

"Interception" represents the access of authorized institutions to any kind of communication, by phone or other electronic communication means - radio, private or close circuit television whose confidentiality is assured by its users. Audio recordings are authorized the impression on magnetic band or other support type of discussions or communications, between two or several persons, at a certain moment in time and in a certain place; they use microphones installed in certain rooms in such manner so that the subjects shouldn't know about the recording action.

The law also has effect on video recordings, containing operative photos and movies, obtained by the criminal prosecuting bodies without previous approval or the subjects' awareness. Image recording is also considered the recording made by using hidden devices in banks, institutions, big malls, recording persons who enter, commit the crimes, and then leave the place, being identifying means for persons who prepare or commit crimes.

Audio recording represent collection of discussions or communications, either authorized or which are to be made in the future, between two or several persons, at a certain moment in time and in a certain place; they use ambient microphones in such manner so that the subjects shouldn't know about the recording action.

Video recordings are the operative photos and recordings made by criminal prosecuting bodies in such manner that the subjects are not aware of them. They use hidden cameras in banks, institutions, big malls, recording persons who enter, commit the crimes, and then leave the

premises, being identifying means for such persons who prepare or commit crimes.

Within the limits of law, it is also possible to make ambient recording, to locate or track using G.P.S. or other electronic surveillance devices.

After the 1990 events, it has been highly necessary to have a law on Romanian national security, more appropriate for the geopolitical tendencies and changes that took place after the abolishment of communist regime. Thus, Law no 51/1991 gives the definition of national security concept, the way it can be achieved and also the supervision of the activity leading to such information.

According to art 1 of Law no 51/1991, Romanian national security represents "the legal, balanced and social, economic and political stability necessary for the existence and development of the Romanian State as a sovereign, unitary, independent and indivisible state; necessary for maintaining the law and the climate for the free enforcement of people's fundamental rights, freedoms and obligations pursuant to Constitutional democratic principles and norms." The next article states the legal provision on the manner of attaining State security: "National security is achieved by knowing, preventing and elimination the internal or external threats that can affect the values mentioned by art 1".

So, the conclusion of art 2 Law no 51/1991 is that attainment of national security implies the exercise of three functions: knowing, preventing and eliminating threats. According to art 2, finding out means gathering information necessary to stress out the threats to the national security. For this, it is decisive to have a continuous process of data searching and gathering, followed by verifying, confirming, completing, analyzing, processing, concluding and valuing, using information sources with a vital role performed by technical devices.

The enforcing of Law no 535/2004[1] on prevention and fight of terrorism allowed the detailed implementation of the judicial system necessary to carry out the information gathering activities and offered solutions for the need to modify and complete the Criminal Procedure Code.

[1] Eliodor Tanislav, „Criminal protection of the right to privacy", in *Criminal Law Magazine* 3 (1998), 42.

Therefore, the prosecutor and the court will be requested to issue warrant for actions aiming at obtaining information within the legal limits by institutions in charge with the national security in case of:

1. Threats affecting Romanian national security as they are provided by art 3 of Law no 51/1991;
2. Terrorism actions stipulated by Law no 535/2004.

The request for warrant has to contain information or clues leading to the existence of a threat for the national threat; in order to discover, prevent and counteraction, together with activities category for which it is necessary to know the identity of the person whose communications are to be intercepted and also the validity period of the warrant.

The specialized published works and the positions of the civil society have raised the issue regarding the applicability of provisions of Law no 51/1991 on hr Romanian national security, more precisely, whether provisions of art. 13 of the mentioned law have still been enforced. The answer is yes, as the Law no 281/2003, state that "Every time other laws envisage regulations concerning the prosecutor's warrant for (...) intercepting and recording discussions (...), art 1 hereof is to be applied"; thus, the Criminal Procedure Code points out that the warrant can be issued only by a judges[1].

Here, the provisions of art 13 of Law no 51/1991, using both "authorization" and "warrant", together with the provisions of the Criminal Procedure Code using only authorization, cannot justify the interpretation according to which a prosecutor's competent is needed to issue a "warrant". So, both words, used by law, concern one competence: to authorize the completion of some actions, which is a procedure measure, and the application way of the authorization is through "warrant", representing the procedure act. Moreover, "authorization" of Law no 51/1991 has a wider meaning, not only interception and recording or communications; it also considers aspects

[1] SRI expressed a contrary opinion through a notice immediately withdrawn after its publication, stating that it is considered necessary that phone calls interceptions and recording be made according to an authorization issued by a judge; it is not enforced in cases provided by art 3 combined with art 13 of the Law on national security no 51/1991, as it is thought that it is sufficient to have a warrant issued by the prosecutor assigned by the General Prosecutor of the Office upon the High Court of Justice and Cassation. See Romanian judicial system – independent report - September 2006, Chapter V, Human Rights, www.SoJust.ro.

related to other judicial institutions, such as "search" and "holding and distribution of mail and objects".

Therefore, the warrant is issued by the High Court of Cassation and Justice due to the high level of social danger of these crimes and due to the classified character of this information.

According to this special law, the warrant has 6 month validity. Its extension has to observe the same rules as the issuance procedure. In exceptional cases, when it is urgent to take measures, the competent bodies are allowed to carry out such actions without the mentioned authorization (art 20 of Law no 535/2004); it will be issued later.

Decisions regarding the discussion interception and recording are also present in other special laws, such as:

1. Law no 191/1998 on structure and function of Guard and Protection Service (art 14 paragraph 1 letter d);
2. Law no 143/2000 on fight against illegal drug trafficking and consumption (art 23);
3. Law no 678/2001 on prevention and fight against person trafficking (art 23);
4. Law no 39/2003 on prevention and fight against organized crime (art 12);
5. Law no 78/2000 for prevention, discover and punishment of corruption acts (art 27, as it was amended by Law no 161/2003 on some measures to assure transparency in exercising public positions and working in the private sector, to prevent and punish corruption);
6. Law no 591/2002 on approval or Government Emergency Decision no 79/2002 regarding the general legal frame for communications (with legal provisions for providers of networks or electronic communication services).

In time, there were many opinions against this means of evidence mainly due to the fact that they can easily be falsified1. In matter regarding the evidence, art 64 Criminal Procedure Code of 1969 was created by law maker by making a limited list with evidence means, although the communist party, through its repressive institutions often

[1] Nicolae Volonciu, *Treaty on Criminal Procedure, General Part, vol. 1* (Bucharest: Paideia, 1999), 510.

used phone calls interception, didn't mention it in the criminal procedure law[1].

Given the investigation modern techniques, the main change was the Law no 141/1996, aiming at correcting the current Criminal Procedure Code for a better organizing and functions of the criminal trial. Part V was introduced by this law, called "audio and video recordings". Later, it was modified by Law no 281/2003 becoming "audio and video interceptions and recordings". This was modified by Law no 356/2006.

We have to say that the time when the Criminal Procedure Code had its evidence provisions completed with the above mentioned technical means, these had already been authorized by special laws such as Law no 51/1991 on Romania national security and also Law no 26/1994 on Romanian Police structure and functioning[2].

Due to secrecy of correspondence and phone calls, considered as fundamental right in democratic societies, at the beginning the justice didn't accept the use of discussion or communication interception. But, the growing criminal phenomenon using technical and communication techniques led to acceptance, in some circumstance, of the usage of some interception and recordings especially in cases where evidence production was impossible to be obtained otherwise. Nowadays, there are very few legal systems where such audio and video interceptions and recording are not approved as means of evidence.

Our country, by Law no 51/1991 on national security (art 13), states the possibility to intercept ad record phone calls and other communications in case of preparing the performance of crimes considered threats for the national security; Also, Law no 29/1994 on Romanian Police, extended this possibility to the case of organized crime and some serious crimes, if it was considered necessary for the criminal investigation.

Law no 141/1996 on modifying and completing the Criminal Procedure Code, introduces a new Part, with art 91, called "Audio and video recordings", after the adoption of art 64 completed with audio, video and photo recording as new means of evidence.

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[1] Grigore Theodoru and Lucia Moldovan, *Criminal Procedure Law* (Bucharest: E.D.P., 1979), 139.

[2] Carmen Silvia Paraschiv and Micea Damaschin, „Audio, video and photo recordings", in *Criminal Law Magazine, Year VIII, 3 (2001).*

According to art 53 of the Constitution, some rights and freedoms could be limited by law in order to protect national order, health, moral ethics, rights and freedoms of citizens. This Constitutional article provides such audio and video interceptions and recordings, given the fact that the limitation didn't affect the existent right, corresponding to the situation which determined it.

Otherwise, adoption of such restrictions concerning secrecy of phone calls and communications, private and family life, residence and mail, if such measures help maintaining the national security, public order safety and prevention of criminal acts, is stipulated by CEDO and by UDHR, documents ratified by our country. These were the starting point for modern legal systems to elaborate appropriate laws on audio and video recording.

SPECIAL TECHNIQUES FOR SURVEILLANCE AND INVESTIGATION

In the Criminal Procedure Code, interception and recording of phone calls and communications, video, audio or photo surveillance, in private spaces, location or tracking by using GPS or other techniques are listed in Chapter IV, called "Special surveillance or investigation techniques". Additional name of the art 138 — "General provisions" — offers indicators for the regulation procedure, completely different from the one of the old Criminal Procedure Code.

Thus, paragraph (1) of art 138 offers the limited list of specific methods:

1. Interception of communications or of any type of distance communication;
2. Access to an IT system;
3. Video, audio or photo surveillance;
4. Locating or tracking by using technical devices;
5. Date on financial transactions;
6. Hold, ledge or search of mail and parcels;
7. Undercover investigators or partners;
8. Authorized participation to some activities;
9. Watched delivery;
10. Data provided or processed by public communication networks.

Starting with paragraph (2) of art 138, the authors of the present Criminal Procedure Code chose to define each tactical procedure, showing that "interception of discussions or communications means interception, access, monitoring, gathering or recording of discussions or communications made by phone, IT system or by any other means of communication, and also the recording of traffic data showing the source, destination, date, hour, size, length or type of communication made by phone, IT system or any other communication means ".

Similarly, by "video, audio or photo surveillance in private spaces the law understands taking pictures of people, observing watching pr recording conversations, movements or other activities, carried out in private spaces", whereas "locating or tracking by using GPS or other surveillance techniques" consists of using some devices that determine the location of a person or attached object.

Furthermore, paragraphs (5), (6), (7), (8), (9) and (10) give definition for "IT data control", "video surveillance", "location by using different means", "search of mailed parcels", "monitoring the financial transactions" and "usage of undercover investigators". Technical surveillance presents its methods which are:

1. Interception of discussions and communications;
2. Video, audio and photo surveillance in private spaces;
3. Location and tracking by using GPS or other technical methods;
4. Monitoring financial transactions by disclosing financial data.

Based on reasons C.E.D.O. decisions and on doctrine theories, the criminal procedure code stipulates that usage of undercover investigators be ordered by the Judge for rights and freedoms when the followings are fulfilled:

1. there is reasonable suspicion about a serious crime preparation or enactment;

2. the measure is necessary and appropriate to limitation of fundamental rights and freedoms, due to case particularities, importance information or evidence that are to be obtained, or the gravity of the crime;

3. evidence or location and identification of the suspect or defendant couldn't be obtained otherwise or it would encumber special difficulties causing prejudices to the investigation or it is dangerous for the safety of persons or valuable objects[1].

[1] Criminal Procedure Code, art 148 paragraph (1).

In these circumstances, technical surveillance shall envisage the suspect or the defendant except for cases where there is reasonable suspicion about receiving or sending communications from the suspect or defendant, about the suspect or the defendant using the phone or the communication IT system of the person, or the access point to an IT system, whereas the video, audio or photo surveillance in private spaces would be possible for another person than the suspect, provided there is reasonable suspicion that such measure helps discovering the location of the suspect or the defendant.

The measure consisting in monitoring financial transactions and disclosure of financial data could be possible to be adopted also for the person who participated or is participating to financial transactions of the suspect or defendant or for the person who coordinates financial activities of the suspect or defendant.

PROCEDURE FOR ISSUING THE TECHNICAL WARRANT SURVEILLANCE

The criminal procedure code stipulates the "warrant" as authorizing action, also mentioned by the special laws on national security, issuing procedure being, this time identical, both for the common law crimes and for the ones belonging to the national security area. Thus, the technical surveillance could be ordered during the criminal prosecution, for maximum 30 days, by the prosecutor, by the judge for rights and freedoms of the competent court for first instance or the corresponding competent court within the jurisdiction of the prosecutor's office which issue the order.

The demand ordered by the prosecutor shall contain the requested technical surveillance measure, the name or other identifying information concerning the target person, the evidence or data leading to reasonable suspicion about the commission of a crime for which the measure is ordered, the crime and the legal classification and, for the video, audio or photo surveillance in private spaces, the motivation of the measure extension if it is necessary to issue an approval for the criminal prosecuting bodies to enter the private locations to start or stop the technical devices used for the technical measure.

The request for the technical surveillance is to be given solution the same day in the council chamber, in the absence of parties, and the

participation of the prosecutor will be compulsory. If the request is considered reasoned, the Judge for rights and freedoms shall order, in conclusions, the admissibility of the prosecutor's request and shall issue the technical surveillance warrant immediately, where the minutes becomes compulsory.

The warrant and the conclusion of the Judge for rights and freedoms shall contain:

1. the name of the court;
2. date, hour and issuing place;
3. the first name, the last name and the capacity of the person who issue the conclusion and the warrant;
4. the name of the ordered measure;
5. name of the person subjected to the technical surveillance measure with his/her identifying data;
6. mention of the identifying elements of each phone number, of the access point to IT system or the account number of the suspect or of the defendant;
7. for the video, audio or photo surveillance measure, in private spaces, the approval of the request of the criminal prosecuting bodies to enter in private spaces to start or stop the technical devices that are to be used;
8. signature or stamp of the court judge.

If the Judge for rights and freedoms considers that the legal provisions are not complied with, shall order the rejection of the approval request for technical measure.

Neither the admission nor the rejection is appealable and a new request for approving the same measure could be lodged only if there are new facts or circumstances.

PROSECUTOR'S AUTHORIZATION FOR SOME TECHNICAL SURVEILLANCE MEASURES

As an exception, the prosecutor authorizes the technical surveillance measures for maximum 48 hours, when:

1. there is an emergency and the warrant issuance in the usual procedure would lead to an important delay of the investigations, to the loss, alteration or destruction of the evidence, or it would put into danger

the safety of the prejudiced safety, of the witness or his/her family members;

2. when there is observance of the legal provisions of the law for the warrant issuance.

Similarly, the prosecutor's order which authorizes the technical surveillance shall contain the specific points for the warrant. The prosecutor shall have the obligation to notify, within maximum 24 hours since the measure expiring date, the Judge for rights and freedoms of the competent Court of First Instance or the Court within the jurisdiction of the Prosecutor's Office where the prosecutor issued the order, in order to confirm the measure, lodging at the same time a minutes with the technical surveillance activities carried out and the case file.

Where the Judge for rights and freedoms considers observed the conditions provided be law, he shall confirm the measure ordered by the prosecutor, by conclusions, ruled in the Chamber of council, without the summons of the parties; otherwise, he will deny it, ordering the destruction of the evidence obtained for it; conclusions are not appealable.

ENFORCEMENT OF TECHNICAL SURVEILLANCE WARRANT

The prosecutor shall personally carry out the technical surveillance or shall order to be done by the criminal prosecuting body or other specialized State competent institutions[1].

Similar to the current legal system, the participants to the technical surveillance measures shall have the obligation to keep the secret of the operation; otherwise, breaching this obligation shall be punished according to criminal law. Also, the data collected by using technical surveillance measures shall be used for other criminal case if their content has relevant and useful data or information on preparation and commission of a crime, other than the ones punished by the law project.

If there are no more reasons to justify the measure, the prosecutor shall immediately stop the procedure before the warrant expiry date, notifying the judge, who issued the authorization, about it.

[1] Criminal Procedure Code, art 141.

Data resulted from the surveillance measure, which are not relevant for the deed object of the investigation, unused to identify or locate persons or are not useful in other cases, shall be stored in the archives of the prosecutor's office, in specially designed places, with sealed envelopes, in confidentiality, with the possibility to be transferred to the competent judge or the court responsible with solving the case on their demand. When the final decision is ruled in the case, they will be destroyed by the prosecutor who draws up a minutes for this.

RECORD OF THE TECHNICAL SURVEILLANCE ACTIVITIES

For each activity of this type, the prosecutor or the criminal prosecuting body shall draw up a minutes with the results of the activities carried out in relation with the crime object of the investigation, or they shall contribute to identify or locate the persons, the support containing the results of these activities, the names of persons in case, if known, or other identifying data such as the hour when the procedure began and stopped.

The minutes shall also have a sealed envelope with a copy of the support containing the results of the technical surveillance measures. The support or its certified copy, shall be kept at the prosecutor's office in specially designed places, in sealed envelope and shall be accessed by the court whenever it demands it. After informing the court, the copy of the support containing the activities of technical surveillance and copies of minutes shall be kept at the Court registrar's office in specially designed places, in sealed envelopes, at the exclusive disposal of the judge or the Court responsible with the case solving.

The intercepted or recorded discussions or communications, related to the crime object of the investigation, or which shall help to identify or locate authors, shall be handed by the prosecutor or the criminal prosecuting body in a minutes, certified for authenticity, which shall mention the warrant issued for their performance, numbers of phones, identifying data of IT systems or of the accessing points, names of communication authors, provided they are known, date and hours of each conversation or communication.

The discussions, communications or conversations held in foreign languages shall be recorded in Romanian, by means of an interpreter

which has the obligation to maintain confidentiality. After procedure stops, the prosecutor informs the judge for rights and freedoms about the carried out activities.

EXTENSION OF THE TECHNICAL SURVEILLANCE WARRANT [1]

This warrant can be extended for justified reasons by the judge for rights and freedoms of the competent authority on the reasoned request of the prosecutor provided there is fulfillment of legal conditions, each case for maximum 30 days.

The total length of the technical surveillance measure, for the same person and the same crime, shall not exceed 120 days. The judge for rights and freedoms shall rule a decision, without appeal, in the chamber of council, without the presence of parties, and the minutes shall be compulsory.

CONCLUSION

- We believe this work succeeded in presenting documents on technical surveillance as mean used the criminal trial.
- We showed the major changes suffered by the methods and means used for the operational and technical surveillance employed by State bodies, as consequence of permanent law amending of Romanian legal system.
- The work analyses the surveillance methods in order to create an overall image of the methods and means used during such activity, a complete image of the involved institutions in obtaining and applying surveillance warrants and also of information that can be obtained by using such special method of evidence producing during the criminal trial.

[1] Criminal Procedure Code, art 144.

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THE INTERNATIONAL CONFERENCE
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CURRENT POLICY EUROPEAN SECURITY AND DEFENSE

Ivan ANANE [1]

Abstract

The institutional framework of the European Security and Defense deserves attention because it gives toolbox that EU Member States build consensus on how they will use military and civilian. When heads of state and government of EU member states have decided to give a real European security and defense dimension, they had to ensure both effective mechanisms of decision-making in security. ESDP institutions also contribute to deepening European integration and the development of a safety culture at Community level, a feature currently exist. Election European Union as a tool to strengthen regional security and defense allows the participation of 27 European countries in this building, on par in terms of commitment and responsibilities.

Keywords: *politics, institutions, security, Member States, structures, defense.*

At the European Council in Cologne, Germany, in June 1999, Heads of State and Government of the Member States have decided to develop the European Security and Defense in order to provide the European Union with the means to achieve a common policy truly effective in defense and security, and the ability to make and implement decisions for crisis management and conflict prevention, in accordance with the Petersberg tasks set out in the Treaty on European Union. Heads of state and government agreed on a set of institutions that ensure political control and strategic direction of Petersberg operations conducted under Union control.

Within the next European Council meeting in December the same year (1999), Helsinki and along several meetings that followed, the European Council defined the role of security institutions and their area of responsibility.

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It was then established that these institutions be organized to provide Member States with an efficient decision-making in the event of a crisis, with a capacity at least partial achievement assessments of the security situation based on information from land, and a procedure for operational and strategic planning.

The institutional framework of ESDP deserves attention because it gives toolbox that EU Member States build consensus on how they will use military and civilian capabilities.

RELEVANCE INSTITUTIONAL DIMENSION

It is important to understand why the EU has built its own security institutions within the existing community structure and how this new structure participating in the European Security and Defense Policy.

They can be built four main arguments for understanding the role of the institutional dimension of the ESDP. The first argument is the historical development of European security institutions, while the other three arguments appeal to the general importance of the institutional framework for the process of European integration[1].

For a long time the only European security institution, the Western European Union (WEU) was undermined by a lack of consensus on the role and duties. During the Cold War in the 90s of last century, the main institution that was in charge was NATO European security; WEU remained to play a collateral, taking the EU was focused mainly on civil matters, soft, non-military security.

When heads of state and government of EU member states have decided to give a real European security and defense dimension, they must provide the same time effective mechanisms of decision-making in security. Establishment of institutions has always been an important element of the deepening of European integration.

These institutions are the result of joint rulemaking procedures European Community-wide. The establishment of institutional arrangement for ESDP, Member States are better equipped to develop an approach and a common vision on security aspects of the European Union, and respond to crises affecting European security and beyond.

[1] Lucian Gheorghe, "The fight against crime in the Schengen area and in southeastern Europe, legal and practical aspects of actual accession to the European Union", *XI scientific session, Spiru Haret University* (2004): 151.

ESDP institutions also contribute to deepening European integration and the development of a safety culture at Community level, a feature currently exist.

Election European Union as a tool to strengthen regional security and defense allows the participation of 27 European countries in this building, on par in terms of commitment and responsibilities guy.

European Union includes, as you know, a number of countries that are not part of NATO, it is therefore neutral. The wide range of mechanisms held by EU decision-making allows consideration of security interests and objectives of all limbs.

Moreover, even after the last two enlargements, the EU considers ESDP as an open project and allows participation in the size of defense and candidate countries and of NATO non-EU contributing, for example, missions carried out under the command of the European Union.

After the last round of enlargement, institutional factor has become more important, given the difficulty of reaching consensus on a number of 28 member states to ensure joint action to a conflict.

The 28 Member States of the European Union are: Austria, Belgium, Bulgaria, Cyprus, Croatia, Denmark, Estonia, France, Finland, Germany, Greece, Italy, Ireland, Luxembourg, Latvia, Lithuania, Malta, Netherlands, Portugal, Poland, United Kingdom, Romania, Spain, Sweden, Slovakia, Slovenia, Hungary.

The 25 member states of the Schengen area are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia Slovenia, Spain, Sweden, Hungary.

Liechtenstein is part of the European Economic Area.

Western European Union, created in 1954, has provided the institutional framework for collective defense of the member states[1].

At the summit the European Community of Maastricht in 1991, it was decided that the WEU to become part of the development of the Union and act as its armed hand, maintaining, while autonomy. In 1992 the Council of Ministers of WEU decided Petersberg, define a new operational role structure, saying the organization's ability to deploy units for humanitarian and rescue missions of peacekeeping and combat missions in the context of crisis management including peace enforcement.

[1] Article V of the modified Brussels Treaty

These missions called Petersberg, were included in the Treaty of Amsterdam, which was signed in 1997 and entered into force on 1 May 1999. The Treaty of Amsterdam confirmed also WEU status of part of the European Union providing defense capability for the EU (Article 17 of the Treaty).

Therefore, membership in the two organizations and their meetings were becoming more aligned[1]. However, given the different working methods of the organizations and the reluctance of some of the major European military powers to give greater visibility WEU, the only European institution that was initially constituted solely in defense of Union played a peripheral role in the EU's involvement in the latest crisis requiring military intervention and / or civil.

DECISION-MAKING STRUCTURE OF THE EUROPEAN UNION ESDP

Decision-making process underlying the development of the European Security and Defense is intergovernmental. Representatives of Member States, nations holding the central role in drawing up guidelines on security and defense come together and make decisions that drive future EU policy in this area. Meetings are held at the highest level (European Councils)[2] at the level of Foreign Ministers (Council of General Affairs and External Relations), the national representatives with the rank of ambassador (Representatives Committee Permanent)[3], national representatives military (Chiefs in Military Committee).

Also, in addition to these meetings, it works a whole unit of national experts working in national representations in Brussels. Can participate in decision-making, as appropriate, and the European Commission, while the European Parliament has a consultative role[4].

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[1] Gheorghe Buzescu, *International treaties and conventions on criminal law enforcement while* (Craiova: Sitech, 2016), 89.

[2] European Council Presidency and the Council of the rotating EU Member States for a period of six months. In 2007, the Presidency was provided by Germany in the first half, and Portugal in the second half. In the first half of 2008, the Presidency was provided by Slovenia, which will be followed by France.

[3] Given the intergovernmental nature of Pillar II - CFSP / ESDP, the Commission is only associated to security and defense dimension.

[4] EU Treaty, Art. 13.

The role of the European Council, in accordance with the provisions of the EU Treaty, is to develop general coordinates that builds subsequently ESDP action. Furthermore, the Council of Ministers is responsible for implementing these general coordinates recommending senior national representatives, common strategies, which subsequently implementing them.

The Council of Ministers, which meets national representatives with the rank of ministers, ESDP issues is managed by the General Affairs and External Relations Council (GAERC)[1]. GAERC meets at the level of foreign ministers, usually monthly, and whenever necessary. These meetings not only national representatives, but also delegates from the Secretary General and the Commission.

GAERC meets in different formats, depending on the issues discussed. Defense ministers meet format GAERC two to four times a year (while NATO ministerial level meeting are three in number, both informal and formal one).

Half of the two meetings organized by each Presidency of the Council as part of the first is informal and is held in mid-presidency, and the second is formal (involving decisions guiding the development of ESDP) and takes place at the end. The meetings are chaired by the foreign minister of the country holding the EU presidency.

Permanent Representatives of Member States are COREPER (Permanent Representatives Committee) and have a very important role in preparing the meetings at ministerial level[2], thus working in two different committees, Coreper I and Coreper II. European security and defense is managed by the national representatives in COREPER II. As a procedure, the European Council sets the main political structure resulting from regular meetings at the highest level. Subsequently, the EU Council, with the support of the General Secretariat and possibly the European Commission cooperate in implementing these decisions by developing specific policies. In the Council, the Political and Security main role in this process.

Political and Security Committee does not act in a vacuum of information and advice. Instead, it relies on the contribution of several

[1] Jordan George Barbulescu, *EU series My Europe. Institutional system* (Bucharest: Triton Publishing, 2007), 140-144.
[2] Jordan George Barbulescu, *EU series My Europe. Institutional system* (Bucharest: Triton Publishing, 2007), 140-144.

institutions such as: the Military Committee, the Committee for Civilian Aspects of Crisis Management, if the European Commission and various administrative and support structures operating in the Council General Secretariat. With these elements, national representatives from the Council of Political and Military (represented with the rank of ambassador) report and endorse the proposals for the Committee of Permanent Representatives, negotiating for harmonization of the various issues on which no consensus was achieved.

Heads of State and Government approved the final document, the European Council meetings in agreement with the foreign ministers meeting in the Council.

ESDP INSTITUTIONAL STRUCTURE

Secretary General of the EU Council has, since the Treaty of Amsterdam and the role of High Representative for the CFSP (SG / HR for the CFSP)[1]. After the Franco-British summit in St. Malo, once it has been integrated ESDP in the second pillar of the Common Foreign and Security Policy, the holder of the functions and duties received on line security and defense. This post is currently held by Javier Solana, who was foreign minister of Spain and Secretary General of NATO.

In order to fulfill those tasks and responsibilities, it was created a special structure, a unit Policy Planning and Early Warning. Under the Treaty of Amsterdam[2], the political unity has the responsibility to analyze, together with monitoring of key developments covered by the Common Foreign and Security Policy analysis of EU interests in foreign policy and security, in the event of situations conflict potential, achieve early warning and writing upon request to various analyzes, policy proposals and strategic projects.

After half of the ninth decade of the last century, with the development of ESDP, the Heads of State and Government of the Member States decided to establish new institutions and structures to be able to provide the European Union Council All documentation and analyzes necessary for making fast decisions ESDP.

Thus it was established structures such as the Political and Security (Political and Security Committee - PSC), the Military

[1] Treaty on European Union, Art. 26.
[2]Treaty of Amsterdam can be found at http://europa.eu/scadplus/leg/en/s50000.htm

Committee (European Union Military Committee - EUMC) and Military Staff (European Union Military Staff - EUMS) in January 2001[1].

POLITICAL AND SECURITY COMMITTEE (PSC)

The main role is busy in developing measures of ESDP, the Political and Security Committee (PSC). Located in the making, the political-strategic level, the Political and Security plays a central role in managing the EU response in crisis management[2].

To act as the main structure outlining the decision PSC regularly evaluate the international security environment, according to policymakers and manage their application and, not least, develop guidelines for the development of military capabilities.

If the opportunity arises a conflict or a crisis, the Political and Security develop various options for action for the EU Council's decision.

On relations with other bodies and institutions of the ESDP, the PSC has developed a special relationship with the Special Representative / High Representative for the CFSP. This relationship is emphasized by the fact that the High Representative may preside, according to discussions, meetings of the Political and Security.

Another is the close relationship of the PSC Military Committee, from which it receives advice and military solutions PSC of developing proposals political-strategy.

As High Representative for the CFSP, President of the Military Committee may participate occasionally in meetings PSC. The European Commission is increasingly involved in the work and activity PSC since 2005, participating in its meetings.

PSC work on intervention in the field of civilian capabilities, the Political and Security supported by the Committee for Civilian Aspects of Crisis Management (CIVCOM), which provide it with policy guidelines. CIVCOM has primary responsibility for developing proposals, recommendations and solutions on issues involving civil crisis management by the European Union.

[1] http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=279&lang=EN&mode=g
[2]The Treaty on European Union (Treaty on the European Union / Maastricht Treaty - TEU), Art. 25 http://europa.eu/scadplus/treaties/maastricht_en.htm

CIVCOM is equivalent civilian Military Committee and its meetings are attended national representatives practicing in the Permanent Representation in Brussels[1]. Returning to PSC activity, in terms of representation and organization of the work of this Committee, EU Member States participating in ESDP are represented at ambassadorial level, with one representative. In addition to meeting the representatives of the Member States are organized meetings with representatives of non-member states (or countries), such as the troika meeting (former, current and future presidency of the EU Council) with Russia and meetings of the PSC with NATO (the North Atlantic Council). PSC meetings attended by representatives of the Legal Service of the General Secretariat of the Council, representatives of the European Commission.

There were also formalized and PSC Troika meeting with representatives of third countries at ambassadorial level (eg PSC troika - Russia) and PSC meeting North Atlantic Council (structure similar to NATO). PSC meetings are held twice a week and are supported by Politico-Military Group (Political-Military Group - PMG). It is composed of Member State experts working in the Permanent Representation.

THE EU MILITARY COMMITTEE (EUMC)

The Military Committee is the most important military structure at EU level. As NATO Military Committee, it is composed of the Chiefs of Defense (Chiefs) Member States. EU Military Committee Chairman is a general. This is called the EU Council for a term of three years[2].

The main role of the Military Committee is to provide advice and offer recommendations to the Political and Security, where there is a need conduct a multinational operation crisis management and development of the concept of crisis management (only military aspects)[3].

[1]For civil structures, see http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1346&lang=en&mode=g
[2]For information on EUMC see http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1065&lang=en&mode=g
[3]For information on the EUMS, see http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1039&lang=en&mode=g

Another attribute provided by the Military Committee is to develop the European Union's objectives in terms of military capabilities need to be developed by PSC's requirements. In relation to subordinated structures EUMC provides guidelines in the military experts of the European Union Military Staff, the administrative structure that supports the work of the EUMC. Referring to cooperation with NATO Military Committee between the EUMC and NATO there is a series of regulations as cooperation arrangements.

For managing the development of military capabilities required in the European Union, it was set up a working structure, the Working Group for Global Objective (HTF), which supports the work of the EUMC and is staffed with experts from the Member States and the Staff Union European.

EU Military Staff (EUMS). This structure, which is mainly focused on supporting the EUMC's work is part and operates within the General Secretariat of the EU Council. It consists of military representatives of Member States that secondează work of the EU military experts. In terms of responsibilities, EUMS The main objectives of providing early warning, situation assessment realization of the security environment and strategic planning to be done for the whole range of EU military missions, with or without the support of NATO capabilities. Specifically, EU missions are envisaged peacekeeping, crisis management missions involving combat forces and missions disarmament and rebuilding the security sector.

In terms of leadership, Director General of the EUMS has a term of three years. Currently, this position is occupied by the British representative, Lieutenant General A. D. Leakey[1].

In addition to the above structures, the ESDP as problematic is manage the Secretariat General Directorate decision-making structure for crisis management operations.

EU Treaty refers to "crisis management", including in terms of operations to be carried out by the European Union. All TEU sets out the role of the EU Council and the PSC this size. In the event of a crisis, and if the Political and Security decides, the EU has two options to launch an operation to crisis management or using their own resources, wire appeal to the capabilities and resources of NATO Concordia and Althea are examples missions carried out with recourse to NATO resources and

[1] http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1039&lang=en&mode=g

capabilities, while Artemis and EUFOR RD Congo are examples of autonomous EU military missions.

If you decide to launch an operation using NATO assets and capabilities, the "Berlin Plus" provides parameters for cooperation. From this point of view, the conclusion in 2003 of the "Berlin Plus", established structured cooperation between the EU and NATO. The 'Berlin Plus "are based on a number of four principles: 1. The European Union has guaranteed access to capacity planning of NATO; 2. available resources and capacities required; 3. The EU has permanent access to NATO's command structures in Europe; 4. exchange of information is managed by means of agreements between the two organizations.

The process of making consultations with NATO's decision-making structures in order to provide the EU the means and capabilities of NATO, if an operation led by the European Union under the 'Berlin +', several steps[1]. If it is decided that intervention is required autonomous EU crisis management, PSC manages the situation and develop options that may be the answer Union. The planning process consists of three main stages: concept development underlying crisis management (the concept of crisis management), development options and implementing strategic-military operational planning, military, concret.

In developing the concept of Crisis Management, the Political and Security is the central actor, presenting this document main political and military mission that is planned to be launched.

Details are included military advice and recommendations from the Military Committee supported by the Military Staff. Where it is a mixed operation (civil and military) and civil recommendations offered by the Committee for Civilian Aspects of Crisis Management.

After finalization by the PSC of the concept of crisis management, it is approved by the EU Council, following the strategic military options are defined by the Military Committee.

It carries military options PSC, together with a series of recommendations. Following its evaluation, PSC proposes a draft Council decision for approval.

Military Committee decision SGP requires development planning military operation. Subsequently, the operation commander outlines the concept of operations (CONOPS) and Operation Plan (OPLAN), which

[1] http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1039&lang=en&mode=g

are valued at the EUMC and submitted to PSC and COREPER. In general, the opinion COREPER is followed by favorable decision of the EU Council. Offers a package of forces shall be made by Member States on a voluntary basis, in a Force Generation Conference, they can participate and propose offers and third countries concerned.

CONCLUSIONS

It is important to understand why the EU has built its own security institutions within the existing community structure and how this new structure participating in the European Security and Defense Policy. These institutions are the result of joint rulemaking procedures European Community-wide.

The establishment of institutional arrangement for ESDP, Member States are better equipped to develop an approach and a common vision on security aspects of the European Union, and respond to crises affecting European security and beyond. ESDP institutions also contribute to deepening European integration and the development of a safety culture at Community level, a feature currently exist.

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JUDICIAL COOPERATION INSTITUTIONS OF THE EUROPEAN UNION

Ivan ANANE [1]

Abstract:

Within the European Union there are several institutions of judicial cooperation at different levels of activity: European Monitoring Center for Drugs and Drug Addiction, the European Anti-Fraud Office (OLAF), Eurojust, the European Judicial Network European Judicial Training Network, the Stability Pact - Stability Pact for South Eastern Europe, SECI - South East Europe Cooperation Initiative, CEI - Central European Initiative, the Organization of Black Sea Economic Cooperation - BSEC initiative against organized crime - S.P.O.C .. These institutions judicial cooperation have particular regard to combating drug trafficking with all activities related to it, human trafficking and money laundering; ensuring national centralization of data on criminal organizations; development of cooperation between Member States of the European Union by making a rapid exchange of information to ensure better knowledge of criminal organizations, structures and their activities; improving cooperation between Member States in investigations to ensure the criminalization of criminal organizations and illicit profits; achieving the involvement of all member countries at the investigation.

Key words: *institutions, judicial cooperation, member countries, criminal organizations.*

INTRODUCTION

Within the European Union there are several institutions of judicial cooperation at different levels of activity in order to combat crime within the Union complex, to enhance the prevention of cross-border crime, to intensify the fight against crime rejuvenation, against serious crime and to facilitate coordination of investigations and prosecutions covering the territory of several European Union countries, to facilitate linking contact points in different Member States, organization of regular meetings of representatives sta¬telor States and providing permanently, the updated information through an appropriate

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telecommunications network, mutual knowledge of legal systems, improve the use of European and international legal instruments, fostering coordination between the various training programs initiated by member countries, particularly in combating illegal trafficking in human beings, drug trafficking, commercial fraud, fraud in the customs procedure, cybercrime and financial, trafficking in small arms and stolen vehicles. Considering the above, further analyze the main institutions of judicial cooperation within the European Union.

1. EUROPEAN MONITORING CENTER FOR DRUGS AND DRUG ADDICTION

Founded in 1993 in response to escalating the issue at EU level and the need for accurate assessment of the size and characteristics of the phenomenon in the Member States. The center, based in Lisbon it aims to achieve and providing EU institutions and Member States of information as objective, reliable and comparable information at European level concerning drugs, to gambling addiction and their consequences. Thus, the Center has the responsibility for collecting and analyzing existing data, improving the comparability of statistics and cooperation with European and international bodies and organizations and with similar services from third countries[1].

2.THE EUROPEAN ANTI-RAUD OFFICE (OLAF) Created and operates from June 1, 1999, as indepen¬dent body within the European Commission, the aim of which reinforce the Community fraud prevention. OLAF is responsible for leading investigations in cases of fraud, being subordinated commissioner responsible for the Community budget. OLAF performs the tasks of investigation conferred on the European Commission by Community law and existing agreements concluded with third countries to promote the fight against fraud, corruption and any other illegal activities affecting the financial interests of the European Union.

[1] Gheorghe Lucian, „The fight against crime in the Schengen area and in southeastern Europe, legal and practical aspects of actual accession to the European Union", in *XI scientific session, Spiru Haret University* (Constanta: Europolis, 2004), 153.

3. EUROJUST

EU wants closer cooperation in fighting crime îm¬potriva, meaning the European Union Council decided to set up Eurojust. The body of the European Union is responsible for investigations and prosecutions relating to serious crime affecting two or more Member States. Its role is to promote cooperation between the competent authorities of the Member States to facilitate the implementation and execution of requests for international judicial assistance and extradition issue.

Eurojust, the European Union set up by Council Decision No. 2002/187 / JHA of 28 February 2002, is to improve judicial cooperation at a continental level to fight more effectively against serious crime and to facilitate coordination of investigations and prosecutions covering the territory of several Union countries European.

In this decision the Council, Eurojust is established as a Union body endowed with legal personality, and each state appoints a national member of Eurojust, being a prosecutor, judge or police officer (the latter must have competencies equivalent).

The national members mentioned above are subject to the national law of the state which he called.

Among other things, the competence of Eurojust covers all crimina¬litate and offenses for which Europol is competent (eg terrorism, illicit drug trafficking, human trafficking, counterfeit money, money laundering), computer crime, fraud and corruption, laundering of crime, participation in a criminal organization.

Eurojust may fulfill its tasks through one or both of its national members and as a collegiate body. Eurojust may, inter alia, the Member States concerned authorities to undertake an investigation or to form a joint investigation team.

Each Member State may appoint one or more national correspondents (taking into account the priorities of terrorism) that can be a point of contact Europene.Eurojust Judicial Network may process only the data relating to persons subject to an investigation, victims and witnesses.

The types of data that can be used relate, inter alia, the identity (name, prenu¬me, date and place of birth, address, profession, etc.) and

the nature of the alleged facts (criminal qualification, date and place of the type of investigation).

Abovementioned data are not accessible than national members, their assistants and authorized Eurojust staff. It should be mentioned in this connection that the obligation of confidentiality is maintained even after the termination of their functions. In Eurojust, a member of staff is specially appointed Data Protection. It provides, among other things, the legal treatment, conservation of a written record, and the reception of the dates.

To fulfill its tasks, Eurojust privile¬giate relations with the European Judicial Network, European Anti-Fraud Office (OLAF) and the liaison magistrates of the Member States. Al¬tele between Eurojust may conclude cooperation agreements with third countries and international organizations or courts through the Council, agreements providing for exchange of information or the secondment of officers. According to the decision, the Council and the European Parliament are peri¬odic informed about the activities of Eurojust and the crime situation in the Union. In its annual report to the Council, Eurojust may, through its president, proposals to improve judicial cooperation in criminal matters.

4. EUROPEAN JUDICIAL NETWORK

In order to improve, legally and practically, mutual legal assistance between Member States of the European Union, in particular to the fight against serious crime (organized crime, corruption, drug trafficking, terrorism) by the Council Joint Action. 98/428 / JHA of 29 June 1998 adopted by the Council and entered into force on August 7, 1998, was created the European Judicial Network. Under Article 1 of Joint Action in order to achieve these objectives, it established a network of judicial contact points between Member States, called the European Judicial Network[1].

European Judicial Network consists of the following elements:

- the central authorities in each Member State responsible for international judicial cooperation;

[1] Lucian Gheorghe and Adrian Rapotan, „Agencies and bodies involved in judicial cooperation and crime prevention", in *The Congress of Penal Sciences, organized by the Romanian Association of Penal Sciences and University Andrei Şaguna*, 2006, 71.

- one or more contact points established in each Member State, each must have a sufficient knowledge of a language of the European Union other than the national language;

- liaison magistrates, that may be associated with the European Judicial Network by the Member States to designate. On April 22, 1996, the EU Council adopted, on the basis of Article K.3 of the Treaty on European Union, Joint Action 96/277 / JHA An exchange of liaison magistrates to improve judicial cooperation between Member States of the European Union. Functions of liaison magistrates normally include any activity for fostering and accelerating, all forms of judicial cooperation in criminal or civil, by establishing direct contacts with the relevant departments and judicial authorities of the receiving State;

- a point of contact designated by the European Commission for its fields of competence.

European Judicial Network is to facilitate the tasks of linking contact points in different Member States holding regular meetings of representatives of the Member States and providing permanently, the updated information through an appropriate telecommunications network.

In turn, the contact points are active intermediaries to facilitate judicial cooperation between Member States, especially where serious crime.

They are available to the local judicial authorities and provides legal and practical information necessary to the local judicial authorities in their own country, contact points of other countries and local judicial authorities of other countries to enable them to establish an effective manner a request for cooperation judicial or to improve judicial cooperation in general.

However, the contact points fosters coordination of judicial cooperation in cases where a series of requests from the local judicial authorities of a Member State requires a coordinated execution in another Member State.

European Judicial Network has regular meetings that are held in principle in Brussels, in order to enable the contact points to meet and exchange experience and to provide a platform for discussion of issues related to the implementation of measures adopted by European Union in judicial cooperation.

According to Art. 7 and 8 of Joint Action Network has four types of information to which contact points should have access at all times, namely: full details of the contact points of each Member State, the list of simplified judicial authorities and local authorities in each Member State, concise legal and practical information concerning the judicial and procedural systems in the Member States and the legal instruments, conventions in force, the texts of declarations and reservations.

5. THE EUROPEAN JUDICIAL TRAINING NETWORK

A French initiative aims at the adoption by the Euro-pean a decision setting up a European Judicial Training Network. This network has the vocation to improve mutual knowledge of judicial systems in Member States, especially among prosecutors and judges, which will contribute to improving practical judicial cooperation within the European Union, to a better knowledge by judges and prosecutors judicial systems respective.Într first phase network will develop only in criminal activities having the following objectives: mutual knowledge of legal systems, improve the use of European and international legal instruments, fostering coordination between the various training programs initiated by member countries.

6. ORGANIZATIONS WITH REGIONAL VOCATION INVOLVED IN THE FIGHT AGAINST TRANSNATIONAL CRIME

a) Stability Pact - Stability Pact for South Eastern Europe. Is a political initiative designed to encourage and strengthen cooperation among the countries of South East Europe and to direct existing efforts to support the region in its integration into political, economic and security in Europe. At the initiative of the Union Stability Pact for South Eastern Europe was adopted in Cologne on 10 June 1999.

The High Level Conference in Sarajevo on 30 July 1999, the pact was inaugurated. Pact does not implement projects that have been placed under the auspices of the two conferences in March 2000 (Brussels) and October 2001 (Bucharest), but is a tool for coordinating and facilitating the implementation of projects by all its partners.

These include countries in South East Europe and its neighbors, European Commission, NATO and the OSCE, the United States, Russia, Japan, Canada, Norway, Switzerland, Czech Republic, Poland and Slovakia. The first Parliamentary Conference of the European Union and countries of the Stability Pact, held in Brussels from 17 to 18 September 2001, established close working links between the institutions and the European Parliament Stability Pact issues.

European Parliament and the Parliamentary Assemblies of the OSCE and Council of Europe agreed in June 2001, to sponsor the parliamentary dimension of the Stability Pact, covering all aspects and all worktops Pact by creating a Parliamentary Troika.

The Stability Pact has three Working Tables: Working Table I - Democratization and Human Rights which deals mainly with refugee issues in the region of former Yugoslavia, which has about 1.2 million people.

Also, within these tables Media Freedom Charter was adopted and was initiated Szeged Process to support independent media in Serbia and Montenegro; Working Table II - Economic Reconstruction, Development and Cooperation has developed a number of projects for regional infrastructure contributed to the signing of a Memorandum on Trade Liberalization and Facilitation in Southeast Europe, aimed at completing the network free trade agreements in the region and the creation by the end of 2002, a market with 55 million consumers; Working Table III - Issues of Security and Defense. In this table, it highlights two initiatives to combat organized crime (SPOC) and corruption (SPAI) as a major contribution to the prevention and control of these problems in the region. It also emphasized the creation Zagreb a Regional Center of Assistance Implementation Verification and Arms Control (RACVIAC), with the participation of 18 countries Pact and initiative Asylum and Migration, aimed at establishing national action plans and the creation of five teams to the country to help create the legal framework and capacities necessary for attaining including aspects of human trafficking.

The sixth meeting of the Working Table III held Take Bucharest between June 5 to 6, 2002, established a number of targets for the enhancement of judicial cooperation in the region, among which stands out in particular on cross, small arms and light weapons and organized

crime, namely establishing the Executive Secretariat of SPOC SECI Center in Bucharest.

b) SECI - South East Europe Cooperation Initiative. On May 20, 1999, Albania, Bosnia-Herzegovina, Bulgaria, Greece, Moldova, Romania, Turkey and Hungary signed in Bucharest Agreement on cooperation in preventing and combating cross-border (and on November 16, 1999 and Croatia), where agreed opening in the Romanian capital, a center re¬gional to combat this type of crime. Each Party SECI center sent two liaison officers, one police and one customs. Headquarters was inaugurated on November 16, 1999, and on October 2, 2000 was signed the Headquarters Agreement between Romania and the Center.

SECI Center's objectives relate to the development of effective regional cooperation via liaison officers in order to identify, prevent, investigate and combat cross-border crime by sharing information; strengthening institutional links between national law enforcement agencies; assistance for judicial and customs investigations on cross-border crime; coordination links with Interpol, Europol and the World Customs Organization and proposals on issues that affect the quality of cooperation between law enforcement agencies in the region[1].

SECI Center signed a cooperation agreement with Interpol on the use of the telecommunications system of this organization. Considered a "service provider" for operational activities carried out by institutions of law enforcement SECI Center it is always about them through the NFP, while having as object supporting "task force" specialized in combating illicit trafficking human beings, drug trafficking, commercial fraud, fraud in the customs procedure, financial and cyber crime, trafficking in small arms and stolen vehicles.

Besides Center they have sent observers and interested in its work following countries: Austria, Belgium, Germany, France, Italy, Netherlands, United Kingdom, Russian Federation, USA, Ukraine, Poland, Czech Republic and Slovakia. The Center also cooperates with a number of international bodies such as the International Organization for Migration, Stability Pact for South Eastern Europe (Initiative to Fight Organized Crime - SPOC), OSCE, ICE, the European Union Agency for Cooperation Law enforcement, International Center for Migration Policy Development and various specialized bodies of the United Nations.

[1] Gheorghe Buzescu, *International treaties and conventions on criminal law enforcement while* (Craiova: Sitech, 2016), 101.

On September 14, 2001, SECI Regional Center adopted a Declaration and a Resolution on the Suppression of Terrorism, which represented countries expressed their determination to fight together against this scourge of the end of the century and the new millennium.

c) CEI - Central European Initiative. Central European Initiative (CEI) is a flexible form of regional cooperation which brings together 10 EU Member States and non-EU countries in August.

Villages participating in ICE are Albania, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Italy, Republic of Macedonia, Moldova, Montenegro, Poland, Romania, Slovakia, Slovenia, Serbia, Ukraine, Hungary. Between 9 to 10 October 1998, held in Trieste / Italy, where it has its Executive Secretariat of the Organization conference interior ministers of member states of the Central European Initiative, during which it adopted a declaration on combating organized crime which was recognized the need to adopt the following measures: promoting the harmonization of laws of the member States ICE and examining the possibility of having an indictment common facts of field and focus efforts investigation into the activities carried out by criminal organizations, which have become illegal transnational, affecting the territory of the member States ICE, especially drug trafficking with all activities relating to this trafficking and money laundering; ensuring national centralization of data on criminal organizations; development of cooperation between CEI Member States through an exchange of information quickly to ensure a better knowledge of criminal organizations, structures and their activities; improving cooperation between Member States in investigations to ensure the criminalization of criminal organizations and illicit profits; Contact National Office realization involvement investigative level.

Within ICE operates a permanent working group on countering organized crime, which was mandated by the interior ministers to assess through regular meetings at least twice a year, developments in cooperation between national law enforcement and media fight against organized crime.

Between 26 to 27 March 2001, held in Trieste (Italy) Conference of Ministers of Justice of ICI countries that have adopted a joint declaration on judicial cooperation and legislative harmonization in order to create a common legal space within the region by: legislative and administrative harmonization of Member States exchange information on

existing legal systems (referring to criminal law and criminal procedure), joining regional and international treaties; promoting mutual assistance and judicial cooperation in criminal business of the ICE; developing an appropriate network of contact points for a rapid exchange of information and coordination procedures regarding cross-border crimes; establishing appropriate modalities for the exchange of liaison magistrates and improvement opportunities on joint training of judges and prosecutors.

d) Organization of Black Sea Economic Cooperation - BSEC. It is based on a proposal made by Turkish President Turgut Ozal, during his official visit to Bucharest in 1990. States that initiated the BSEC are Turkey, Bulgaria, Romania and the former USSR.

Fundamentals of economic cooperation in the Black Sea were made in the Declaration of Istanbul, adopted in 1992 during a regional meeting convened at the initiative of Turkey, which was also attended by representatives of Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russia and Ukraine. In subsequent years there have been efforts to institutionalize relations intertwined between countries of the Black Sea, efforts that have materialized materialized by the BSEC Charter, adopted in Kiev in 1997, signed in Yalta on June 5, 1998 and entered into force on May 1, 1999, following the deposit of instruments of ratification by a total of 10 countries at the meeting of foreign Ministers of the signatory countries, held in Tbillisi.

On October 8, 1999, the Organization acquired observer status with the United Nations by resolution A / 54/5 General Assembly.

Founding member states: Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russian Federation, Turkey and Ukraine. Serbia joined by decision BSEC Foreign Ministers Council in Yerevan (April 18, 2003).

BSEC Observers: Austria, Egypt, Israel, Italy, Poland, Slovakia, Tunisia, France, Germany, the Energy Charter Conference, Black Sea Commission, European Commission, International Black Sea Club, Czech Republic, Croatia and Belarus.

BSEC sectoral dialogue partners with Hungary, United Kingdom, Montenegro, Jordan, Iran, Slovenia, Japan, the Danube Commission, the Conference of Peripheral Maritime Regions of Europe Union of Road Transport Associations in the BSEC region and the Black Sea Universities Network.

BSEC has its headquarters in Istanbul and enjoys legal personality, has its own budget established under the financial contributions from Member States. The organization is also supported by several international organizations, including the European Union, Council of Europe, OSCE etc.

The objectives and principles OECMN circumscribe the main objective of the Black Sea Economic Cooperation, which is to make the region an area of peace and prosperity.

To this end, the Charter provides that it will act in a spirit of friendship and good neighborliness to enhance respect and mutual trust, dialogue and cooperation between Member States will develop and diversify cooperation bilateral and multilateral cooperation between Member States and between and other countries, will work to improve the business environment and promoting individual and collective initiative.

OECMN organizational structure comprises biannual meeting of foreign ministers; Senior Officials Committee consisting of ministers authorized level; permanent working groups and ad hoc working groups; Secretariat as a body with permanent activity, led by a Secretary General. Presidency organization is owned by the Member States in turn for a period of six months. Romania held the presidency between 1 May to 31 October 2000. The Organization also has a parliamentary dimension, represented by the Black Sea Parliamentary Assembly (PABSEC), established on February 26, 1993 and composed of representatives of national parliaments of the Member States.

Regarding judicial cooperation judiciary, an important role is incumbent interior ministers meetings in member countries of the organization, analyzing developments and trends of crime phenomena, agreed every time concrete measures to prevent and combat it. An important role in this direction lies the Cooperation Agreement between the Governments of the States participating in the Economic Cooperation of the Black Sea in combating crime, especially its organized forms, signed in Kerkyra on October 2nd, 1998 on the occasion of the third meeting of the Ministers interior from member countries and set up a collaboration institutionalized in order to reduce risk to an acceptable level unconventional due to various manifestations of transnational crime.

The agreement provides fields forms and means of cooperation, ways to request cooperation[1], working languages, how bearing the expenses involved cooperation and provision for controlled deliveries of drugs[2], and the creation of a working group to examine ways application and promotion of cooperation under this agreement[3].

On the occasion of the fifth meeting of interior ministers from member states of OECMN held in Kiev on March 15, 2002, it was adopted and signed an Additional Protocol to the Agreement which were established, inter alia, measures: establishment, organization and functioning of a network of liaison officers to combat crime, the status of the network in OECMN venue to network meetings, NCPs, protection of information and personal data, tasks and responsibilities of liaison officers.

Romania has ratified by Law no. 164 of 22 April 2003. Also, on days 10 to 11 December 2002, Moscow hosted a meeting of the working group for combating crime to develop the text of a new Protocol to the Agreement regarding cooperation in combating international terrorism.

e) Initiative against organized crime - S.P.O.C.[4] . The overall objective of S.P.O.C. It is to strengthen regional capacity to fight organized crime, in accordance with recognized standards of U.E. The mandate S.P.O.C. is to facilitate dialogue with international and regional representatives of the academic, legal and law enforcement in preventing and combating cross-border organized crime.

Special Coordinator of the Stability Pact of Southeast European countries said at the outset that support Southeast European countries require coordination of multiple simultaneous level to fight organized crime.

To be effective S.P.O.C. It was launched in October 2002. S.P.O.C. It operates under the auspices of the working meeting of justice and home affairs Interne.Conducerea S.P.O.C. meets twice a year and is composed of representatives of countries of South East Europe members states U.E. main international organizations, major donor countries and NGOs working in the research against organized crime.

[1] Art. 1,2,4,5,7 of the Cooperation Agreement signed in Kerkyra in 1998.
[2] Art. 3 of the Cooperation Agreement signed in Kerkyra in 1998.
[3] Art. 6 of the Cooperation Agreement signed in Kerkyra in 1998.
[4] Initiative Against Organised Crime – S.P.O.C.

In general, the board is open to all players who are working to fight organized crime in Southeast Europe. It includes representatives of the law enforcement community, legal community, academia, regional experts and the donor community. Expect strategies and the national and regional capacity to implement a legislative reform. President Working Meeting ID, supervises the activity S.P.O.C. and as interim from 1 March 2006.

The Secretariat based in Brussels and Bucharest supports its work. Secretariat S.P.O.C. It serves as a central point of information and act as a support unit. It became operational in 2003 and has provided legal expertise of the region in harmonizing their legal framework law U.E. and developing new mechanisms for regional cooperation against organized crime.

The Secretariat works with the support of the Romanian Government, supported by three lawyers and an executive assistant.

An expert in Brussels in collaboration with the Secretariat Bucharest working team working session III of Justice and Internal Affairs of the Stability Pact of Southeast European countries.

This team provides legal expertise and maintain regular contacts with the parties involved in the Stability Pact of Southeast European countries related to organized crime.

It also communicates with his counterparts from the European Commission and the Council Europei.Oficialul Brussels, responsible for Justice and Home Affairs supports the work S.P.O.C. the working sessions of the Stability Pact of Southeast Europe. Activity S.P.O.C. It is based on a wide range of tools most notably: Statement on Organized Crime in London (November 2002); Statement Western Balkans in Thessaloniki (June 2003); Ministerial Meeting U.E.-Western Balkans (February 2006); S.P.O.C. board session Bled (October 2005) and working session III meeting in Prague (November 2005). Activities S.P.O.C. They are consistent with the acquis communautaire and the Stabilization and Association process.

CONCLUSION

Institutions judicial cooperation within the European Union described above have particular regard to combating drug trafficking with all activities related to it, human trafficking and money laundering; ensuring national centralization of data on criminal organizations; development of cooperation between Member States of the European Union by making a rapid exchange of information to ensure better knowledge of criminal organizations, structures and their activities; improving cooperation between Member States in investigations to ensure the criminalization of criminal organizations and illicit profits; achieving the involvement of all member countries at the investigation.

At the same time efforts are intense judicial cooperation and legislative harmonization in order to create a common area of legality in the region through harmonization of legal norms and of the Member States exchange information on legal systems existing adherence to regional treaties and international ; promoting mutual assistance and judicial cooperation in criminal business in the European region; developing an appropriate network of contact points for a rapid exchange of information and coordination procedures regarding cross-border crimes establishing appropriate modalities for exchange of magistrates and improvement opportunities on joint training of magistrates.

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IMPLICATIONS REGARDING THE SUBSIDIARITY CONTROL MECHANISM IN THE EUROPEAN UNION

Mihaela Adina APOSTOLACHE[1]

Abstract:

This paper addresses some issues raised by the subsidiarity control mechanism, a mechanism that allows EU national parliaments to send reasoned opinions where they consider that a legislative draft act does not comply with the principle of subsidiarity. The application of this mechanism is done in areas where the Union has common competences with the member states and does not apply in areas where the EU has exclusive competence and nor to documents without legislative character such as communications or green cards.

Protocol no. 2 on the application of the principles of subsidiarity and proportionality annexed to the Lisbon Reform Treaty contains the rules that apply in this control mechanism. Thus, there are provided several steps called "yellow cards" and "orange cards". The Commission responds to all reasoned opinions received from national parliaments. But the number of opinions on a particular proposal, expressed within eight weeks from the submission of the respective proposal, has an impact on the legislative procedure.

Key words:
subsidiarity, proportionality, control mechanism, exclusive competence, notifications, yellow cards, orange cards.

INTRODUCTION

The legal interaction between the European Union and the member states is supported also in terms of the attribution and division of competences, aspects governed by subsidiarity, which has an essential role. Initially, the principle of subsidiarity was included as a guiding principle of the EU in the Maastricht Treaty, a moment when both its implementation and its compliance proved to be extremely difficult. At the Maastricht moment, subsidiarity was seen as an opportunity to slow

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down the legislative function of the Commission[1]; The Commission revised its legislative proposals and withdrew those which violated the subsidiarity principle[2].

The principle, mentioned in the Preamble to the Maastricht Treaty, was enunciated in Article B6 and defined in Article 3b, subsequently corresponding to Article 5. The Amsterdam Treaty was annexed a Protocol on the implementation of the principles of subsidiarity and proportionality, requiring institutions to take subsidiarity into account when exercising their prerogatives, and also containing certain procedural requirements, in particular for the European Commission. The Lisbon Treaty sought to reform the juridical framework and increase the control of the subsidiarity principle by the EU legislation.

In practice, subsidiarity is considered a guiding principle that would lead to defining the boundary between the competences of the Member States and those of the European Union. In other words, subsidiarity answers the question: "*Who must act?*". Proportionality intervenes, as a principle, in terms of determining how the Union should exercise its competences, both the exclusive and the shared ones; it would answer the question: "*what should be the form and nature of the EU action?*".

II. EVOLUTIONS REGARDING THE INSTITUTION OF A SUBSIDIARITY CONTROL MECHANISM

The subsidiarity control mechanism, introduced by the Reform Treaty of Lisbon has led to a strengthening of the role of national parliaments regarding the review of European draft laws and conferring the right to issue reasoned opinions if there is a violation of the subsidiarity principle. Depending on the number of reasoned opinions

[1] See also K. Van Kersbergen, B. Verbeek, "Subsidiarity as a Principle of Governance in the European Union", *Comparative European Politics* 2 (2004): 143-163 in Simona Constantin, "Reconsiderarea subsidiaritatii si echilibrul puterilor in UE in lumina Tratatului de la Lisabona si dincolo de acesta", *Revista Romana de Drept European*, 3(2010): 141

[2] It is relevant, in this respect, the directive published in 1991 in JO C 249, p.14 regarding the welfare of animals in zoos, which has subsequently been withdrawn due to violation of the principle of subsidiarity. The directive reappeared in 1999 as Directive 1999/22/CE of the Council of 29 March 1999 relating to the keeping of wild animals in zoos.

which mention that the respective proposals violate the subsidiarity principle, the Treaty provides two procedures, the so-called "yellow card" and "orange card", each and every one involving a review of the draft legislative act, even amending or withdrawing the proposal.

All the draft legislative and non-legislative acts of initiating European institutions are transmitted to national parliaments. The term "draft law" includes, according to Article 2 of Protocol no. 1 and Article 3 of Protocol no. 2, the proposals of the Commission, the initiatives of a group of member states, the initiatives of the European Parliament, the requests of the Court of Justice, the recommendations of the Central European Bank and the requests of the European Bank of Investments concerning the adoption of a legislative act.

Identifying the legislative or different nature of the European draft act is important for the parliamentary supervision of the subsidiarity principle, as *this control concerns only the proposals for legislative acts* (directives, regulations, decisions), not the non-legislative ones (such as delegated acts or implementing acts), nor the ones without binding legal nature (recommendations, opinions, guidelines, orientations) or without legal character (consultative documents: white cards, green cards). These categories of documents may be still subject to parliamentary examination based on the common regime of participation in European affairs.

The organization of the subsidiarity control in national parliaments or within their chambers represents a matter of their own autonomy. This parliamentary control is conditioned by informing the parliaments regarding European legislative proposals and other types, by the period of time in which national parliaments can react, by the institutional framework, as well as the resources available for both selecting and processing the information received, and for supporting their position in relations with the government[1].

The doctrine[2] has found an asymmetry existing between national legislatures and executives in terms of access to the information conveyed by European governments and institutions to parliaments concerning the European draft laws and the afferent documentations.

[1] Anamaria Groza, "Parlamentele nationale si procesul decizional european: o acomodare dificila?", *Revista Romana de Drept European*, 5(2010): 85.
[2] Groza, "Parlamentele nationale si procesul decizional european: o acomodare dificila?, *86.*

This aspect was also supported by the fact that the parliaments, not being directly involved in the European decisional process, had no access to negotiations within the Council and could not know how their own government representative had acted. However, this problem was remedied by certain internal legislative and European regulations that led to the establishment of institutional channels of communication between European governments, parliaments and institutions.

Information as a tool to exercise the role of national parliaments within the EU is defined and regulated by the provisions of Protocol No. 1, Title I, articles1-8. The Lisbon Treaty has established the rule of direct transmission of the consultation documents from the European Commission to national parliaments (green and white cards and communications), together with the annual legislative program of the Commission and of "any other the document of legislative programming or political strategy"[1]. The communication of such documents is done simultaneously by transmitting them to the European Parliament and the EU Council. This rule of direct transmission applies also in the case of *draft laws*, thus regulating, by Article 2 of Protocol No. 1 on the role of national parliaments in the European Union and by Article 4 of the Protocol on the aplication of the principles of subsidiarity and proportionality, what had previously been only a practice of the Commission.

Besides these formal consultation arrangements, national parliaments can opt for other media, such as: the direct consultation of public documentation of European institutions, exchange of information with other national parliaments, informal meetings with government representatives. All these contribute directly to an effective parliamentary scrutiny.

An important aspect in terms of the subsidiarity control mechanism is the timeframe available to national parliaments to express their opinion, a timeframe which in practice is nothing more than a procedural *conditioning*. Thus, national parliaments must receive/acquire the necessary documentation in a timely manner, whereas the time to formulate a national point of view should be reasonable. Article 6 of Protocol No. 2 of the Treaty on European Union and of the Treaty on the Functioning of the European Union provides for a period of **eight weeks**, set between the moment when a legislative act is made available to

[1] Article 1 of Protocole no.1 on the role of national parliaments in the European Union.

national parliaments and the date when it is registered on provisional agenda of the Council. In the doctrine, this tool was called *early warning mechanism (MAT)* [1], which requires an **ex ante political control**.

One can observe a change in terms of the period stipulated by the old Protocol annexed to the Treaty establishing a Constitution for Europe, which was of six weeks. The period of eight weeks begins only from the translation of the project in all EU official languages; more specifically, the period begins with the communication of a letter of referral[2] from the Commission to national parliaments. In this timeframe, as a rule, the legislative draft is not subject to review by the Parliament or the Council, leaving national parliaments the possibility to examine the draft and see if it complies with the principles of subsidiarity and proportionality.

The European draft law which is submitted to national parliaments must be justified in relation to the principle of subsidiarity. In a broader sense, Article 296 TFEU requires the motivation of all legal acts of the Union. According to Protocol No. 2, the European Commission is obliged to carry out extensive consultations before proposing legislative acts, taking into account the regional and local dimension of the action envisaged; in an emergency, if no consultations are performed, the Commission must motivate its decision. Every project is accompanied by a detailed statement that contains elements related to: the legal basis; substantiation for adopting the legislative proposal; the need for action at European level; the normative and financial impact for member states, local regions and communities; qualitative and quantitative indicators.

The subsidiarity control mechanism envisages that, if during the examination of a legislative proposal, it is considered that the proposal violates the subsidiarity principle, the national parliament (or a chamber) may decide to adopt a *reasoned opinion*. The form of the reasoned opinion and the procedure for adopting this act are within the national competence, for EU there are no forms or adoption procedures stipulated.

An important aspect that should be mentioned is related to the fact that the reasoned opinion, as an act of the national parliament, should not

[1] Philipp Kiiver, "Implementing the Early Warning Mechanism for Subsidiarity: National Parliaments beyond the Constitutional Treaty", Paper presented at the Conference "Fifty years for Interparliamentary Cooperation", Berlin, 13 June 2007, p. 3.
[2] See also Mihaela Adina Apostolache, *Rolul parlamentelor nationale in elaborarea si aplicarea dreptului european*, (Bucharest: Universul Juridic, 2013), 147.

be confused with the act that the European Commission addresses to a member state within the procedure for infringement by the member state, based on Article 258 TFEU, before the complaint to the Court of Justice by the Commission. Similarly, the reasoned opinion issued by the national parliament should not be confused with the reasoned opinion issued by the European Commission under Article 7 paragraph 3 of Protocol No. 2, when the Commission decides to maintain its proposal that reaches the "yellow/orange card" limit[1].

The procedure of the yellow card envisages that within eight weeks from the submission of the European draft law, any national parliament or national legislative chamber can address the Presidents of the European Parliament, of the Council and of the Commission a *reasoned opinion* setting out the reasons they consider that the respective project does not conform to the principle of subsidiarity. In case the reasoned opinions on a draft law failing to comply with the principle of subsidiarity represent at least one third of all the votes allocated to national parliaments, the draft must be reviewed. This threshold is a quarter for a legislative proposal concerning the area of freedom, security and justice, in accordance with the provisions of Article 76 TFEU[2].

Based on Protocol No. 2, each national parliament has two votes, which are distributed according to the national parliamentary system. If it is a bicameral parliamentary system, each of the two chambers has one vote.

After the review, the initiator of the proposal – the Commission or, where appropriate, the group of member states which issued the proposal, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank - may decide to maintain, amend or withdraw the draft through a reasoned decision. Although the Treaty does not specify, it can be inferred that it refers to draft laws pertaining to areas subject to a procedure other than ordinary.

The procedure of the orange card, which applies in a situation where, within the ordinary legislative procedure (formerly the procedure

[1] Costantin Mihai Banu, *Ghid pentru controlul parlamentar al respectarii principiilor subsidiaritatii si proportionalitatii*, Direction for the European Union, Chamber of Deputies, Parliament of Romania, April 2011, updated in January 2016.

[2] Article 76 TFEU provides that the acts and measures in the field of judicial and police cooperation in criminal matters are adopted at the initiative of the Commission or of a quarter of the member states.

of co-decision), the *reasoned opinions* on the failure of a draft law to comply with the principle of subsidiarity, represent at least a simple majority of the votes allocated to national parliaments, the legislative proposal must be reviewed. The European Commission may decide, on one hand, to withdraw or amend them, or, on the other hand, to maintain the proposal, having to issue a reasoned opinion in this regard. Both the Commission's reasoned opinion that it supports the compliance of the legislative proposal to the principle of subsidiarity, as well as the reasoned opinions of national parliaments are transmitted to the European Parliament and the Council, in order to be considered in the review process.

Before concluding the first reading, the European legislators (the Parliament and the Council) examine the compatibility of the respective proposal with the principle of subsidiarity, considering both the grounds raised by the majority of national parliaments and the Commission's reasoned opinion. The legislative procedure is concluded if the two institutions (the Council or the Parliament) shall decide by a majority of 55% of Council members, or a majority of votes cast in the Parliament, that the legislative proposal does not comply with the principle of subsidiarity.

Another possibility conferred to national parliaments or only to their Chambers is to refer to the Court of Justice, claiming the breach of subsidiarity principle, this appeal before the ECJ being considered ***an ex post judicial review***. According to Article 263 TFEU, the EU Court of Justice has the power to "review the legality of legislative acts, of the acts of the Council, of the Commission and the European Central Bank, other than recommendations and opinions, and of the acts of the European Parliament and the European Council intended to produce effects on third parties. [...]"

According to Article 8 of Protocol no. 2 of the Treaty on the European Union and the Treaty on the Functioning of the EU, the Union Court of Justice settles the actions regarding the infringement of the principle of subsidiarity by a legislative act of the EU, actions that are issued by member states or transmitted by them in accordance with national law on behalf of their national parliament or a chamber thereof. Such actions can be also formulated by the *Committee of the Regions* against legislative acts for whose adoption the Treaty on the Functioning of the EU stipulates to consult the respective Committee. One could

assert that this Committee has a limited influence[1] on the process of decision-making and controlling the legislative proposals advanced by the Commission, as a consequence of the fact that it has a purely advisory role. However, its activity has represented a contribution related to emphasizing the shortcomings in applying the principle of subsidiarity[2].

CJEU confirmed for the first time the possibility of monitoring the subsidiarity principle in the Case UK/Council[3], and subsequently, more explicitly, in other cases. The Court found that the violation of the principle of subsidiarity is a condition imposed by the requirement to motivate EU acts, but usually was limited to verifying whether the reasoning was presented in the preamble of the adopted acts. Therefore, it can be stated that "there is little room left for a judicial *ex post* review of EU legal acts, founded on the principle of subsidiarity"[4], which is also supported by the jurisprudence of the CJEU, where the subsidiarity had only a "low value as a control standard"[5].

Based on the new provisions set by the Lisbon Treaty, some countries (France, Germany, Austria) have amended their constitutional provisions, introducing explicitly the right of the legislative national chambers to participate in the mechanism of early warning of breaching the principle of subsidiarity by European draft laws, as well as the right of parliaments to refer *ex post* to the Court of Justice of the EU.

[1] Simona Constantin, "Reconsiderarea subsidiaritatii si echilibrul puterilor in UE in lumina Tratatului de la Lisabona si dincolo de acesta", *Revista Romana de Drept European*, 3 (2010): 142.

[2] In 2005, the Committee of the Regions has instituted a monitoring network to follow the principle of subsidiarity, seen as an information exchange tool between regional actors and proposals of the Commission that could determine certain effects on them. Thus, there have been compiled two tests which provided information connected to the reaction of the regional actors to four legislative proposals.

[3] Case C-84/94 United Kingdom/EU Council to annul the Council Directive no. 93/104/CE concerning certain aspects on the organization of the work program, ECR [1996], p.I-5755.

[4] Constantin, "Reconsiderarea subsidiaritatii", 144.

[5] Christoph Ritzer, Marc Ruttloff and K. Linhart, "How to Sharpen a Dull Sword - The Principle of Subsidiarity and its Control", *German Law Journal*, 7 (2006): 760.

CONCLUSIONS

Regarding the control procedures to respect the principle of subsidiarity by European draft laws, in the doctrine[1] it has been stated that the Treaty does not clearly stipulate whether the two procedures, the "yellow card" and the "orange card" respectively, can be used concomitantly or if they are mutually exclusive. Thus, the "yellow card procedure" requires the initiator of the proposal to motivate by a notice their decision to maintain it, whereas, in the "orange card procedure", the Commission is not obliged to explain the maintenance of the European draft law, but its compliance with the subsidiarity principle.

Analyzing the provisions of the Treaty and the current practice, it can be seen that the "orange card" procedure applies only to the initiatives of the Commission, and not to those coming from other European institutions or on behalf of a group of member states. Also, one can distinguish the fact that it is not mandatory for EU institutions to withdraw or amend the respective acts, the Protocol containing the expression "(the initiator) *can*" that would leave it up to the institution involved to decide what happens to the European draft act.

Regarding the protection of the subsidiarity principle, the doctrine recorded a degree of skepticism: "This mechanism was introduced primarily as a response to the concerns of legitimacy and is likely that its impact remain modest" [2].

As such, despite the innovations introduced by the Treaty of Lisbon, it has been argued that the role of national parliaments remains a purely consultative and symbolic one, although it is clearly increased compared to the previous applicable regime. This argument is based on the number of votes that parliaments must raise in order to act the early warning mechanism that is high and difficult to obtain, and if they succeed in doing so, the Commission is not obliged to amend the legislative draft. The Treaty provides, indeed, the possibility that, before concluding the first reading, for the European legislature to decide (the European Parliament with a majority of votes and the EU Council by a

[1] G. Barrett, "The king is dead, long live the king: the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments", *European Law Review* (1) 33 (2008): 68.
[2] Tapio Raunio, "National Parliaments and European Integration, What we know and what we should know", *Arena Working Paper*, 2 (2009): 12.

vote of 55% of the members) to reject the proposed European act, based on the reasoned opinions of national parliaments; however, this situation is not the consequence of a direct action of national legislatures[1], but as the result of decisions taken at European institutional level.

Therefore, in the European legislative process national parliaments can only intervene to the extent that the principle of subsidiarity is violated. Any conflicts that arise regarding the breach of subsidiarity by a European legislative act (hence *ex post*) are resolved by the ECJ, the only one with jurisdiction in the matter.

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THE PRINCIPLES OF APPLYING THE CRIMINAL LAW IN SPACE IN CERTAIN EUROPEAN STATES

Cătălin BUCUR[1]

Abstract:

The application of the criminal law in space it is a matter which should be seen in its ensemble, the notion of space being a subject which should be analysed beyond the borders of each individual state.

The principles of the application of the criminal law in space are found within the legislation of each state because without them the efficiency of the criminal law could not be achieved.

Key words: *criminal law, spatial application, principles, European states*

INTRODUCTION

The application of the criminal law in space it is a matter which should be seen in its ensemble, the notion of space being a subject which should be analyzed beyond the borders of each individual state.

Because no region should give the possibility for any person to evade the criminal liability for the offences he committed, it is mandatory that regarding the application of the criminal law in space to take into consideration the interpretation given by each state to its own laws, but also to the international conventions and treaties to which is part, as well as to the legislation of other states.

The principles of the application of the criminal law in space are found in the legislation of each state because without them the efficiency of the criminal law could not be achieved.

Therefore, brief considerations are necessary from the perspective of some of the most relevant European legislations.

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THE CONTENT OF THE PAPER

The French criminal law applies the principle of territoriality for all the offences committed within the French territory, as the notion of *territory* is defined by the legislation of this state. It must be mentioned that the definitions given by the French law to the notion of territory also refer to the ships or aircrafts referred to by the definitions given by the doctrine, but in practice the French law being applied also for them.

For the purpose of protection its own citizens, the French criminal law expands the applicability of the French law for multiple cases, as in the situation in which the victim or the perpetrator are French, if the aircraft on board of which the offence has been committed has landed in France or has been given in location without a crew to a person having as headquarters or residence within the French territory.

Like other states, the French doctrine recognizes the jurisdictional immunity but only for the cases in which the offence has been committed in the exercise of the positions of those enjoying the jurisdictional immunity.

The Italian, German and Portuguese legislations have an approach similar to the Romanian criminal law, while the Spanish notion of territory refers both to its geographic meaning, as well as to its legal one.

The principle of personality is governed also in the French criminal legislation by the condition of the double incrimination, as the requirement from the Romanian state[1].

According to the French legislation, the personality of the French law is present even when the person has committed an offence before receiving the French citizenship.

While the Italian criminal law briefly addresses the principle of the personality of the law, the Dutch law extendedly treats this subject and expands the application of the criminal law for the foreign citizens residing within Holland.

A different approach is seen in the German criminal law where the principle of personality and reality of the criminal law were merged, the German legislator both referring to the person of the perpetrator, as well as to the social values which are protected.

The reality of the criminal law is widely approached; in comparison with the Romanian criminal law, both the French and the

[1] Franck Terrier et al.,. *Nouveau code pénal mode d'emploi* (Paris: 10-18, 1993), 23.

Italian criminal laws widely describe the values to be protected using this principle in accordance with the human's rights and the efforts lay down by the states in their fight to combat cross border criminality.

In France the universality of the French law is not stated, and in the absence of such provision certain aspects stated by the Criminal Code regarding the competence of the French courts are being taken into consideration[1].

Germany applies this principle with certain particularities. The German criminal legislation merges the principles of reality and personality by applying them against *de jure gentium* offences committed abroad against a German citizen.

Similar to the Romanian legislation, Finland, Portugal and Italy[2] state the principle of universality, which in comparison with other legislations does not enjoy a universal applicability.

Because the application in space of the criminal law is in its excellence a cross border problem whose limits can be established only by adjusting the legislation based on the provisions of other states, the supranational legislation generates its effects. Regarding its applicability in the domestic law of each state, the approach is almost similar to the one of the Romanian legislation, the sovereignty and independence of other states being simultaneously observed. By subjecting itself to other norms than the ones mentioned by the national law it can be said that each state has given a part of its sovereignty to a supranational organism[3].

Thus, the Spanish Criminal Code states the principle of subsidiary in relation with the supranational legislation to which is part.

Similar to this provision, also Finland specifies the conditions for limiting the applicability of the Finnish criminal legislation in certain cases in which international treaties or conventions to which Finland is part are applicable.

The French criminal legislation also refers to the applicability of the international treaties and conventions when it is specified. For instance, the applicability of the French law is active also after the

[1] Frédéric Desportes and Francis Le Gunehec, *Le nouveau droit penal*. 1st Volume (Paris: Economic Press, 1998), 256-259.
[2] Ferrando Mantovani, *Diritto penale, parte generale* (Padova: CEDAM, 1993), 115.
[3] George Antoniu, *Aplicarea legii penale în timp şi spaţiu* (Bucharest: All Beck, 2004), 21.

territorial waters when an international treaty or convention states so. Moreover, most European states recognize the principle of the subsidiarity of the national laws in relation with the international provisions to which are part, generating a good collaboration between them given the fact that in certain cases none of the domestic laws of a state is applicable, a joint solution being necessary to be found, beyond the borders of any state[1].

The extradition also represents one of the institutions implying relations of extraneity, which determines an analysis from the perspective of the compared law of this institution mainly derivative from the international treaties and conventions resulted from the necessity for collaboration of states against cross border criminality.

If regarding the means of requesting the extradition by the requesting state, the practice did not generated over time numerous controversies regarding the procedure performed within the requesting state, two systems or principles being created.

Thus, there is the *principle of control* or the formal examination and the *principle of revision*, or the material examination.

Regarding the *principle of control*, it has been adopted by most of the European states and the Latin-American states, according to the rules imposed by this principle, the competent organs to comply with an extradition request shall examine only its regularity. Therefore, their duty is to examine whether are fulfilled the specific conditions for the extradition to be performed.

Regarding the *principle of revision* or of the material examination, it has been adopted by the states using the Anglo-Saxon legal system, and within the procedures of these states, the judicial organs of the requesting state have a more important role, besides the examination of the substantial and formal issues of the extradition request, they shall rule including upon the guilt of the person on whose name the request for extradition has been filed.

Also, there is an *intermediary system* resulted from the combination of the two principles, adopted by the Nordic states, which apply the system of the formal examination when the extradition is requested based on a treaty and the system of the material examination when the surrender of the person is requested based on an European arresting warrant.

[1] Terrier et al., *Nouveau code pénal mode d'emploi*, 23.

Given that the collaboration between the states is firstly achieved based on reciprocity and confidence, it is to be considered that during the procedure for extradition it is preferable the system of the formal examination performed by the requested state following that the requesting state to rule upon the guilt of the perpetrator considering that the latter one has the majority of the evidences and may justify its decision.

Otherwise, it is difficult to understand the reasoning of the extradition considering that its main purpose is precisely the application of the law in space correctly in accordance with the rules of competence.

Also, the involvement of the state's institutions has generated the creation of three systems of approaching the extradition: governmental, joint and judicial.

Starting from the sovereignty of each state, certain states as Portugal have adopted a governmental system.

The exclusively judicial system is usually met in the states which have adopted an Anglo-Saxon legal system in which the decision on the course of an extradition request totally belongs to the judicial organs.

Regarding the joint system, it has been adopted by most of the European states, and according to it the balance of power between the state's organs provides the necessary stability in such relations for the achievement of the joint purpose aimed through the extradition procedure or based on a treaty or convention, either the surrendering based on an European arrest warrant.

CONCLUSION

From the perspective of the application of the criminal law in space, most European legal systems are homogenous, having common features.

The Romanian legal system, being part of the Romanic-German group (system) has features that bring it closer to the French, Italian, Spanish and Portuguese legal systems.

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THE INDEPENDENCE OF JUSTICE – PART OF THE CONSTITUTIONAL STATUTE OF THE ROMANIAN LEGAL SYSTEM

Florina MITROFAN[1]

Abstract:

The current paper analyses the constitutional statute of the Romanian legal system, by emphasizing the aspects regarding the constitutionality of the law by adjusting the legislation on the judicial system with the constitutional norms and principles, with special reference to the principle of the independence of justice.

Key words: *independence of justice, constitutional statute, state of law, legal system*

INTRODUCTION

It can be said, with full motivation, that the adoption of the Constitution in 1991 laid the foundation of a judicial reform, by stating the general principles of the state of law, as well as by mentioning the principles for the organization and functioning of justice.

The norms referring to the independence of justice represent one of the criteria for development of the judicial system, as well as a guarantee for the state of law.

The constitutional court has constantly been preoccupied with the definition and conceptualization of these principles, by establishing that "the essential feature of the state of law is represented by the supremacy of the Constitution and the compliance with the law"[2], concluding that the state of law "involves, primarily, the compliance with the law, and

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[2] Decision of the Constitutional Court of Romania, No 232/5 July 2001, published in the Official Gazette of Romania, Part I, No 727/15 November 2001; Decision of the Constitutional Court of Romania, No 234/5 July 2001, published in the Official Gazette of Romania, Part I, No 558/7 September 2001

the democratic state is by excellence a state in which the rule of law is manifested"[1].

After the fall of the communist regime on 22 December 1989, under the conditions of the global restructuration of the state institutions, it emerged the need of the reformation of the judicial system. It was an axiomatic truth that the old judicial authorities, designed to serve a totalitarian state organization, based on the rule of society by a single governing party, did not corresponded with the exigencies of the democratic rule of law, set up by the revolution.

The courts and prosecutors' offices have continued to function based on the old organic laws, of course, until the emergence of the new reality, until the application of the laws for judicial organization adopted in accordance with the Romanian Constitution of 1991. Thus, it has been obtained a time for reflection on how the democratic justice functions, insufficient for a systematic and in-depth analysis, but extremely fruitful for establishing the direction of the much-needed judicial reformation and for shaping its first steps[2].

1. THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT REFERRING TO THE INDEPENDENCE OF JUSTICE AS PART OF THE CONSTITUTIONAL STATUTE OF THE LEGAL SYSTEM

The Constitutional Court has permanently been preoccupied by the insurance and guarantee of the functional and personal independence of the magistrates, by approaching aspects related to the organization and functioning of justice, by the role of the judges and prosecutors in a state of law.

Significantly to mention is the fact that starting from the provisions of Art 126 of the Constitution, according to which "justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law", the Constitutional Court has stated that it cannot characterize the Courts of Accounts as a supreme organism because "the jurisdiction of the Court of Accounts is administrative, not

[1] Decision of the Constitutional Court of Romania, No 13/9 February 1999, published in the Official Gazette of Romania, Part I, No 178/26 April 1999

[2] Nicolae Cochinescu, „Constituționalizarea normelor care reglementează sistemul judiciar în România", *Buletinul Curții Constituționale*, 2 (2009)

judicial" and "it is under the jurisdictional control of the court of administrative contentious" and the "notion of supreme court, regarding the activity of the Court of Accounts is unconstitutional"[1].

In the same meaning, by Decision No 788/28 September 2007[2], the Court has stated that the Supreme Council of Magistracy is not a judicial court when, according to Art 134 Para 2 of the Constitution "it shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and public prosecutors".

Also, by Decision No 148/2003[3], referring to the attributions of the Supreme Council of Magistracy, as established by Art 134 Para 2 of the Constitution, the Court has stated that this constitutional provision cannot prohibit the free access to justice of any person trialled by this "extra-judicial court". The Supreme Council of Magistracy is a judicial authority whose organization and functioning are being established by the Law No 317/2004. The involvement of the Senate in appointing the members of this council sets the activity of appointing the judges and prosecutors, as well as the jurisdictional activity in disciplinary matters within a professional and moral framework adequate for the guarantee and supremacy of the Constitution.

By Decision No 61/7 February 2017[4] the Court has stated that, due to the fact that the judicial power refers only to the courts (not the entire judicial authority, which also enlists the Public Ministry and the Supreme Council of Magistracy), it cannot establish a procedure for the interpretation of the normative acts since the courts do not have the competence to generate themselves normative acts. Therefore, when the object of the law is ambiguous, aiming the procedure for the interpretation of the normative acts, the reference of the law to the courts would lead to their classification as state bodies having the competence to adopt normative acts, which would violate Art 1 Para 5 and Art 124 of the Constitution.

The Constitutional Court, by its Decision No 595/20 September 2016[5], in referring to the composition of the commission for equity

[1] Constitutional Court, *Decizii de constatare a neconstituţionalităţii 1992-1998*, Volume 1, (Bucharest: C.H. Beck, 2007): 428-436
[2] Published in the Official Gazette of Romania, Part I, No 745/2 November 2007
[3] Published in the Official Gazette of Romania, Part I, No 317/12 May 2003
[4] Published in the Official Gazette of Romania, Part I, No 219/30 March 2017
[5] Published in the Official Gazette of Romania, Part I, No 963/28 November 2016

research, has ascertained that the criticized legal provisions do not harm the constitutional provisions of Art 125 Para 3 which states the incompatibility of the position as judge with any other public or private office, except for higher education teaching positions. The two judges forming the commission for equity research guarantee the independence and insure the impartiality of its activity, the fairness and objectivity of the solution rules in the matter. Also, the composition of this commission of judges cannot be characterized as a violation of the above mentioned constitutional norms, considering the specificity of the activity of this commission as an intermediate between the National Agency for Integrity and the court. Moreover, the Court refers to the possibility of the legislator to involve the judges in other activities, which do not exclusively refer to the accomplishment of justice, also results from other regulations, such as the ones referring to the composition of the Central Election Bureau and the electoral bureaux of polling stations, as resulted from the Law No 208/2015 regarding the elections of the Senate and Chamber of Deputies, and for the organization and functioning of the Permanent Electoral Authority, Law No 33/2007 on the organization and conduct of elections of the members from Romania within the European Parliament or Law No 370/2004 on the election of the President of Romania.

Regarding the unconstitutionality of Art 15-17 and Art 20 of the Law No 115/1996, the Court states that these norms establish procedural rules on the solving by the court of the reasoned ordinance by which the investigation commission has ordered the submission of the case file to the court of appeal in whose jurisdiction resides the person whose estate is under control, if it ascertains, based on the evidences administered, that the acquisition of a share of it or certain goods is not justifiable. Thus, the president of the court of appeal or the president of the section for administrative and fiscal contentious, after receiving the case file, sets the date of the hearing, according to the law, and orders the hearing of all parties summoned by the Agency. The state, through the Ministry of Public Finances, shall always be summoned in front of the court. The participation of the prosecutor and the National Agency for Integrity is mandatory. The trial of the case file shall be made starting from the evidences administered in front of the investigation commission. In the first day of trial, the parties may request new evidences and the court of appeal shall rule for their approval, by setting a new date. Until the

definitive solution of the case file, the court may order the unbundling of the assets, if this measure has not yet been adopted in accordance with Art 13 of the law.

Likewise, the Court holds that the provisions of Art 20 of the Law 115/1996 state the possibility for the exercise, by the interested parties, by the Agency or prosecutor, of the means of remedy against the decision ruled by the court of appeal, within 15 days since the communication, its solution being under the competence of the High Court for Cassation and Justice – Section for administrative and fiscal contentious. Under these circumstances, the Court ascertains that the criticised legal provisions offer the parties the necessary guarantees to insure the full performance of the right to defence and to a fair trial and, therefore, the critic for unconstitutionality stated in relation to Art 21 Para 3, Art 124 Para 2 and Art 126 of the Constitution, as well as to Art 6 of the European Convention on human rights and fundamental freedoms cannot be maintained.

According to the Decision No 428/21 June 2016[1], in accordance with its jurisprudence (for instance, Decision No 204/29 April 2013[2], Decision No 483/21 November 2013[3], Decision No 604/4 November 2014[4] and Decision No 299/28 April 2015[5]) the Court has reiterated that the National Agency for Integrity does not perform an activity of jurisprudence, but an administrative activity, carried out in a procedure without advertising, orality and contradictory, by evaluating actions or cases with legal meaning whose finality offers the right to notify the competent courts, thus the attribution to sanction, offered by the legislator to the inspector for integrity by Art 10 Let h) of the Law No 176/2010, represents a continuation of this idea. Moreover, the activity carried out, according to the Law No 176/2010, by the inspector for integrity can be subjected to the control of the court for administrative contentious.

By Decision No 207/29 April 2013[6], the Court has ascertained that the National Agency for Integrity does not unfold an activity of

[1] Published in the Official Gazette of Romania, Part I, No 824/19 October 2016
[2] Published in the Official Gazette of Romania, Part I, No 349/13 June 2013
[3] Published in the Official Gazette of Romania, Part I, No 82/31 January 2014
[4] Published in the Official Gazette of Romania, Part I, No 72/28 January 2015
[5] Published in the Official Gazette of Romania, Part I, No 553/24 July 2015
[6] Published in the Official Gazette of Romania, Part I, No 363/18 June 2013

jurisdiction, but an administrative one, because it is performed ex officio within a procedure without advertising, orality and contradictory and because its competence does not cover the solution of litigations nor the sanctioning of the violations of the law.

Referring to the independence of justice, the Court has established by Decision No 404/15 June 2016[1] that "the courts shall not have the competence to carry out the function of accomplishing the justice within the religious cults for actions of violating their internal discipline, because the legal liability in this area is not stated by legal norms from the common law, but by the legal norms of those cults".

Also, in the area of the independence of the judge, by Decision No 263/23 April 2015[2], the Court mentions that the author of the exception for unconstitutionality considers that Art 96 of the Law No 303/2004 hinders the interested person to address directly with a complaint against the magistrate who has caused him a prejudice. A similar critic has been solved by the court for constitutional contentious by the Decision No 633/24 November 2005[3], on which occasion it has stated that "the issue of the judicial errors is mainly raised under the aspect of the reparations which the society is compelled to offer for the person who has unfairly suffered", the constitutional provisions of Art 52 Para 3 stating the principle of the objective liability of the state in this matter. This is why "the regulation according to which the victim shall address with complaint only against the state, and not against the magistrate who has committed the judicial error, offers wider possibilities in valorising a possible right to compensation. Thus, the conditioning of recognizing the right to compensation exclusively from the commission of the judicial error has as consequence the relief of the burden of evidence, unlike the hypothesis in which, together with the judicial error should be proven the bad faith or serious negligence of the magistrate, the constitutional exigencies for the liability of the latter. Moreover, conferring the quality as debtor of the deferment obligation exclusively to the state has the nature of removing the risk of the creditor to not be able to use his claim, since the state is always solvable. Also, the critic for unconstitutionality cannot be maintained, because it is based on a wrong hypothesis, the object of the action referred to by the text subjected to control not being

[1] Published in the Official Gazette of Romania, Part I, No 614/10 August 2016
[2] Published in the Official Gazette of Romania, Part I, No 415/11 June 2015
[3] Published in the Official Gazette of Romania, Part I, No 1138/15 December 2005

the liability of the magistrate for the judicial error generating a prejudice, but solely its reparation. [...] Because Art 96 Para 7 of the Law No 303/2004 on the bylaw of the magistrate's profession has stated the possibility of the state to recover the consideration of the reparation granted for the person who has suffered because of a judicial error. Thus, after the prejudice has been covered based on an irrevocable decision, the state may submit an action in regression against the judge or prosecutor, to the extent to which that judicial error is imputable to them, being caused by the performance with bad-faith or serious negligence of their position. These are conditions for the liability of the magistrate in front of the state, within the limits of the compensation to which the latter one has been compelled to pay to the victim of the judicial error, and not conditions for the direct liability of that magistrate to the prejudiced person. The reasoning of such regulation consists in insuring the protection of the magistrate who, according to Art 77 Para 1 of the Law No 303/2004, has the right to receive special protection against threats, violence or any other actions meant to jeopardize him".

CONCLUSION

The regulation of the principle of the independence of justice represents not only a component of the constitutional statute of the Romanian legal system, but also a guarantee of the state of law, which is insured by the protection of the magistrates against any form of pressure, generated by any person, or for any reason.

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PARTICULARITIES AND RULES REGARDING THE CONCLUSION OF AN INDIVIDUAL LABOUR AGREEMENT BY A MINOR, AS EMPLOYEE OR EMPLOYER

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Abstract:

The exploitation of the child and the abuses of any nature against him have represented a subject of debate for international organisms and organisations. In the wide area of the forms of exploitation, subjecting the child to labour is the most used one. This may have different forms: subjection to very difficult labours, the violation of the minimum age for employment or to obligation to perform activities violating the child's right to dignity. Among the factors which determine this phenomenon we mention: poverty or the negative influence of the child's legal representatives.

Under such conditions, without prohibiting their right to labour, it has been considered as vital the adoption of national and international normative acts establishing certain limitations within which a child could perform a remunerated activity. The compliance with and recognition of these norms represents just another warranty for child protection against exploitation. First of all they aim the activities which can be performed by children based on labour relations, the establishment of the minimum age for employment, as well as the prohibition of forced labour.

Key words: *child protection, employment, individual labour agreement, exploitation*

I. THE CONCLUSION OF THE INDIVIDUAL LABOUR AGREEMENT BY A MINOR, AS EMPLOYEE

The necessity to align the Romanian legislation with the international one, including the minimum age for employment and the establishment of the form and conditions for works which could be

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performed by minors as employees has lead to the adoption of the Law No 53/2003[1] (modified and republished[2]).

Among the numerous international documents taken into consideration by the Romanian legislator we mention: Convention No 138/1973 of the International Labour Organisation, the Recommendation No 146/1973 concerning the minimum age for admission to employment, the Convention No 182/1999 and the Recommendation No 190/1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour, the Understanding Memorandum between the Romanian Government and the International Labour Office regarding the cooperation meant to eliminate exploitation of children's labour[3], the Directive 94/33/EC of 22 June 1944 on the protection of young people at work.

These international documents have set very important rules with the purpose of "effectively abolish child's labour" aiming to increment the minimum age for admission to employment and the use of the youth's labour "to a level which will allow them a complete physical and psychical development".

Art 2 of the ILO Convention No 138/1973 states that "the minimum age shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years". The imperative establishment of a limit regarding the minimum age for employment is enlisted among the objectives promoted by the ILO for the purpose of eliminating child labour. In the same meaning is the provision stated by the Convention No 182/1999 regarding the activities enlisted among the most serious forms of child labour.

Also, at the level of the European Union have been adopted normative acts related to this area. We mention here the Directive 94/33/EC of 22 June 1944 on the protection of young people at work, prohibiting persons under the age of 15 to be employees. Nevertheless, it is stated the possibility for minors between 13-15 years to conclude legal agreements for services with the purpose of performing cultural activities or easy works.

[1] Published in the Official Gazette, Part I, No 72/5 February 2003
[2] Republished in the Official Gazette, Part I, No 345/18 May 2011
[3] Signed in Geneva on 18 June 2002 and approved by G.O No 1156/2002 (published in the Official Gazette, Part I, No 792/30 October 2002).

In concordance with the international norms, the Romanian Constitution[1] and the Labour Code establish a series of rules regarding the employment of minors.

The most important legal provision refers to the minimum age for admission to employment. In this meaning, Art 13 of the Labour Code states that:

1. A natural person shall acquire legal capacity to work at the age of sixteen. Thus it is presumed that at this age the person has the necessary physical and psychical maturity to perform an activity in accordance with the acquired received by then;
2. A natural person may also conclude a employment contract as an employee at the age of 15. The Labour Code states, as it was mentioned by the doctrine, a partial biological capacity[2]. However, the admission to employment of the minor, in this latter case, is subjected to certain pre-established conditions. Thus, it shall be necessary the agreement of the parents or legal representatives, related to activities corresponding to his/her physical development, skills and knowledge, unless his/her health, development and vocational training are harmed;

2.1. The agreement of the parents in concluding the labour agreement by a minor aged between 15 and 16 is an essential condition, its absence generating the absolute nullity of the agreement which could be covered by a subsequent manifestation of will.

The withdrawal of the parents' approval, before the minor reaching the age of 16 generates the termination de jure of the labour agreement, in accordance to Art 56 Let k). Moreover, the minor shall not be entitled to unemployment benefit, for as long as the Law No 76/2002 recognizes this right only for the persons who have reached the age of 16.

The parents' approval has a special feature, being given for a single labour agreement, after taking into consideration its conditions for performance.

2.2. Regarding the second condition, the Labour Code is imperative in prohibiting the employment of the minor for hard, harmful or dangerous works. This is not possible even with the parents' approval.

[1] Art 49 Para 4 of the Romanian Constitution states that minors under the age of fifteen may not be employed for any paid labour.

[2] Alexandru Ţiclea and Veronica Zaharia, "Reflectarea normelor Convenţiei OIM Nr. 138 privind vârsta minimă de încadrare în muncă din anul 1973 în legislaţia internă", *Romanian Labour Magazine* 3 (2004): 17

Thus, it must be mentioned that, unlike the former Labour Code (Law No 10/1972), the Law No 53/2003 emphasizes the need for professional protection of the minor, reason for which the law prohibits the admission of minors for labours which could endanger their vocational training.

3. The employment of persons under the age of fifteen years shall be prohibited;

4. The employment in difficult, unhealthy or dangerous workplaces may only take place after the age of eighteen; such workplace categories shall be established by Government Decision.

As the Labour Code stated no interdiction regarding the possibility for youth to be part of activities susceptible of compromising their morality, activities mentioned by the Convention No 182 and the Convention No 138, as effect of the report presented by the Commission of experts for the application of the Conventions and Recommendations presented at the International Labour Conference in 2008, the Romanian legislator has adopted the Government Decision No 867/2009 for the application of the Convention No 182/1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour. The Government Decision stated definitions and explanations for terms and notions such as: child, dangerous labours, unbearable labours, stated criteria for determining the dangerous labours, as well as enlisting the types of such labours.

From the analysis of the norms mentioned by the Labour Code it results that:

a) The national regulations are in accordance with the international ones concerning the minimum age for employment;

b) The national regulation take into consideration only the work performed based on a labour agreement, and not the general work which could be performed outside a legal labour relation. In this meaning, it is considered that the law should also take this aspect into consideration, not only a segment of the labour[1];

c) Unlike the international regulations, the national legislation does not refer to "easy labours" and does not state exceptions from the rule of the minimum age of 15.

[1] Ion Traian Ştefănescu, „O gravă eroare cuprinsă în proiectul Codului muncii", *Romanian Labour Magazine* 4 (2002): 10-11

Though Art 49 Para 4 of the Romanian Constitution imperatively states that minors under the age of 15 cannot be admitted as employees, the legal literature[1] debates the possibility for performing easy and on short-term labours by minors under the age of 15, this thing being allowed even by the Directive 94/33/EC which offers Member States the possibility to legally establish the performance of cultural, artistic, sportive or marketing activities by children who have reached the age of 13. Thus, it is considered that the legal base for performing such activities could be Art 42 of the Civil Code[2]. Such activities could be performed based on civil agreements concluded until the age of 14 by the representation of the parents, and after the age of 14 with their prior agreement.

d) The minimum age of 15 is stated for all types of labour agreements. Concerning the agreement for indenture (particular type contract), the Labour Code states only the maximum age until it could be concluded, namely the age of 25. It must be mentioned that Art 6 of the Convention No 138 states the minimum age of 15.

e) The non-compliance with the minimum age for admission to employment shall be considered an offence and sanctioned as such.

II. THE CONCLUSION OF THE INDIVIDUAL LABOUR AGREEMENT BY A MINOR, AS EMPLOYER

According to Art 14 Para 3 of the Labour Code, "a natural person may conclude individual employment contracts in the capacity of employer after acquiring full legal capacity".

As an effect of the analysis of the current Civil Code and of the Law No 272/2004, it could be mentioned that the child is the natural person who has not yet reached the age of majority and who has not yet acquired the full legal capacity. Depending on this latter aspect, it is recognized for the minor the right to conclude legal acts alone or by legal representative.

[1] Ion Traian Ştefănescu, *Tratat teoretic si practice de dreptul muncii* (Bucharest: Universul Juridic, 2010): 234

[2] Art 42 of the Civil Code states that: (1) the minor shall conclude legal acts regarding labour, artistic or sportive preoccupations or regarding her/his profession, with the approval of the parents or legal representative, as well as with the compliance of the special law, where appropriate.

It is thus noticed that the law makes no differentiation between the full legal capacity and the limited legal capacity. Given that at the age of 18 it is acquired the full legal capacity, and that this is the rule, we consider that from this age on the person acquires the right to conclude a labour agreement as employer[1].

According to Art 272 Para 2 of the Civil Code: "the minor who has reached the age of 16 shall marry based on a medical agreement, with the approval of the parents or the legal representative and with the authorization of the guardianship court in whose jurisdiction the minor has the domicile". It results that in the absence of an express legal provision, from the interpretation of Art 14 Para 3 that he would have the capacity to conclude a labour agreement as employer.

Also, we consider that for the limited legal capacity the minor could not conclude a labour agreement as employer even with the approval of the parents.

The anticipated legal capacity is a novelty of the new Civil Code, being stated as an exception from the rule of reaching majority at the age of 18. Art 40 of the Civil Code states the possibility that, for grounded reasons, the guardianship court shall recognize for the minor who has reached the age of 16 the full capacity of exercise. The competence of recognizing shall be granted for the guardianship court and for the family (Art 107 of the Civil Code). The owner of the request shall be the minor who is valorising a right and who shall be assisted, in the virtue of the limited legal capacity that he enjoys at the age of 16 by the parents or guardian. The guardianship court shall hear the parents or the guardian, for this latter case being necessary the approval of the family council (Art 130 Para 1 of the Civil Code). As the registration of such request by the guardianship court has very important legal effects, it is necessary to be analyzed the seriousness of such reasoning in accordance with the child's superior interest, reason for which it becomes relevant the declaration of the legal representative. The ruling of the court determines that the minor, from that moment on, to perform his rights and obligations alone by concluding valid civil legal agreements, thus having recognized the possibility to conclude a labour agreement as employer.

[1] Raluca Dimitriu, „Particularităţi ale contractului individual de muncă încheiat de către minor", *Romanian Labour Magazine* 1 (2005)

III. THE PROTECTION OF EMPLOYED MINORS IN THE LIGHT OF THE LABOUR CODE

The Labour Code states a series of provisions regarding the protection of employed youth and children. Thus, according to Art 13 Para 5 of the Labour Code "the employment in difficult, unhealthy or dangerous workplaces may only take place after the age of eighteen; such workplace categories shall be established by Government Decision". In order to synchronize the provisions of the Labour Code with the international norms (Convention No 138/1973 on the minimum age for admission to employment, Convention No 182/1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour), the Romanian Government has adopted the Government Decision No 600/2007 on the protection of young people at work[1] and the Government Decision No 867/2009 on the prohibition of hazardous work for children[2].

The content Art 9 of the Government Decision No 600/2007 states the prohibition of employing young people[3] for activities which:

- Obviously overcome their physical or psychical capacity;
- Involves a toxic exposure to toxic or cancerous agents which determine hereditary genetic malformations, having noxious effects for the foetus during pregnancy or having any other toxic effect for the human being;
- It refers to a noxious exposure to radiations;
- Has risks for accidents which the young persons are presumed to not be able to identify, because of the insufficient attention they pay to labour security, of their lack of experience or training;
- Endanger their health because of the extreme cold or heat or because of the noise or vibrations.

A young person cannot perform overtime hours (Art 11) or night activities between 8 am and 6 pm (Art 12).

The provisions of the Government Decision No 867/2009 represent an addition to this decision, by using the term of child for every

[1] Published in the Official Gazette, Part I, No 473/13 June 2007
[2] Published in the Official Gazette, Part I, No 568/14 August 2009
[3] Young person refers to every person at the minimum age of 15 and at the maximum age of 18 (Art 3 Para a) of the Government Decision No 600/2007)

person until the age of 18. Also, are prohibited for children beside the dangerous works, also the unbearable ones[1].

A fact of extreme relevance, which we are subjecting to attention, is the trafficking on human beings, which could have two serious forms, namely the trafficking for *sexual exploitation* and the one for *labour exploitation*[2]. Relevant in this area is the ILO Convention No 182/1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour[3]. Given the fact that the poverty is the main cause generating child's labour and their exploitation, the UN Member States considered as necessary the adoption of a convention establishing new instruments for the prohibition and elimination of the worst forms of child labour, as major concern of the national and international action. Among the worst forms of child labour, in the meaning of this convention, are mentioned[4]: a) all forms of slavery and similar activities, for instance: trading children, servitude for debts and the work as servant, as well as any forced labour, including forced enlistment of children for their use in military conflicts; b) the use or enlistment of a child for prostitution, pornographic materials or shows; c) the use or enlistment of a child for illicit activities, especially for producing and trafficking of drugs, as defined by the valid international conventions; d) labours which, by their nature or conditions under which are performed, are susceptible of endangering the child's health, security or morality.

CONCLUSIONS

The forms of labour enlisted within the category of the ones prohibited to be practiced by children are mandatory to be established by

[1] Art 2 Let c) of the Government Decision No 867/2009
[2] Over time, at the level of the European Union's institutions numerous decisions have been adopted, having a normative feature, regarding the protection of minor victims, also applying a series of programs in the area of the fight against trafficking in human beings and sexual exploitation of children. STOP and DAPHNE are such programs initiated to combat the violence against women and children.
[3] Ratified by the Romanian Law No 203/15 November 2000, published in the Official Gazette, Part I, No 577/17 November 2000
[4] Art 3 of the ILO Convention No 182/2009

the national legislation of each state[1]. By the modifications brought to the Law No 272/2004, are established imperative rules regarding the child protection against labour exploitation, establishing that "he can neither be compelled to a labour, a household activity or outside his family...that is to compromise the education, endanger his health, physical or psychical, mental or spiritual, moral or social development". Also, an imperative norm prohibits the action of the parent to trade his child for a reward or debt, for him to be subjected to labour exploitation.

To an equal extent, in order to stop and prevent the employment of minors by non-complying with the legal conditions for age or their use in performing activities violating the legal provisions regarding the labour regime for minors, the Romanian legislator has incriminated all these actions, representing offences punishable by imprisonment between 1 to 3 years.

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[1] Every signatory state must take all the necessary measures in order to insure the effective application and compliance with the ratified convention, aiming: a) the prevention of enlisting the child to the worst forms of labour; b) the prevention of the direct necessary and appropriate aid to exempt children from the worst forms of labour and to insure their social re-adjustment and reintegration; c) insuring their access to free basic education and, whenever possible and appropriate, to vocational training for all children exempted from the worst forms of labour; d) identification of the children exposed to risks and establishing a direct contact with them; e) taking into consideration the particular situation of girls.

Legislation

1. Convention No 138/1973 of the International Labour Organisation concerning the minimum age for admission to employment
2. Convention No 182/1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour

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SEARCHING FOR THE FUNDAMENTS OF THE MODERN LAW. BRIEF HISTORIC-PHILOSOPHICAL REFLECTIONS

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Abstract:

Starting from the words of Balzac, „There is nothing less known that what everybody should know: the law", the present paper approaches a traditional issue, apparently old, of the fundaments of the law, whose complexity offers it a permanent actuality. Compared to the extent provided by the title, the analysis is merely a reflection and an invitation to return in history to rediscover the origins of modern law.

Key words: *fundaments, modern law, history, philosophy, knowledge.*

INTRODUCTION

The triumph of the law at the end of the 18th century and its climax in the first half of the 19th century are made through its secularization. By losing its divine origin, paradoxically the law finds a new transcendence. The discovery of a new origin of the rule of law triggers the modern age of the law. The evolution of the concept of the natural law and the search for the law's fundaments in reason represent the starting points of this transformation.

1. THE LAW AS RESULT OF THE HUMAN KNOWLEDGE

If in Antiquity and Middle Eve the theory of the natural law states a vision integrating the man and the society in which he lives in the Cosmos, culminating with the Divinity, subsequent to this age it can be

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noticed the trend to offer the man a more important role in knowing the law, using the reason. With Grotius the nature is understood as the social nature of the man endowed with reason. The superiority of the "social nature" (*socialis natura*) being set as primary principle and the hypothesis of the absence of God to the origin of the civil society generates a blow of great intellectual power: "We should accept the natural law even if it means to assume that, and we could not assume it without the reason, that God does not exist or does not handle with human problems"[1].

Following Aristotle, Grotius states that the man is a social animal, and the natural law originates precisely from his need of living in a society: "This concern to preserve the society which is relevant to human understanding, is also the source of law, in the true meaning of the word"[2].

In literature[3], it has been shown that the natural law of Grotius is placed between the dogmatic current of the natural Cristian law, which tends to subordinate the natural law to the divine positive law and to the rationalist current of the modern natural law, which tends to eliminate the divine positive law.

According to this new vision any moral-philosophical construction has as epicentre the man. For the representatives of the School for natural law or for the contract theorists, the natural law has as starting point the human nature whose essence is the reason, the absolute trust in the human reasoning. The modern conception according to which by reasoning the man can achieve everything, leads to the independence of the man from anything related to the natural.

Therefore, the modern natural law is no longer the Aristotelian-Thomistic natural law which considered the law as having an independent existence from the man and his reasoning[4]. The natural law

[1] Hugo Grotius, *Despre dreptul războiului şi al păcii* (Bucharest: Scientific Publ.-house, 1968), 84.
[2] Grotius, *Despre dreptul războiului*, 84.
[3] Alfred Dufour, *Droits de l'homme, droit naturel et histoire* (Paris: Presses Universitaires de France, 1992), 60.
[4] Gheorghe Dănişor, *Filosofia drepturilor omului* (Bucharest: Universul Juridic, 2011), 40.

is replaced with the *ratio naturalis*, "moving from a superior to an inferior, from God to humans or from the king to the people"[1].

2. THE SECULARIZATION OF THE FUNDAMENTS OF LAW

From this moment on, suddenly are laid the foundations of a new concept of society and law based on contracts, which gives birth to the concept of the Leviathan-state of Hobbes or the civil government of Locke.

Because the society is based just on the agreement concluded by free and equal men, the law is no longer the word, even publicized, of God. Cleared only by the light of reason, from which it owns just a small part, each individual may discover all by himself the natural law. The respect for other man's property, the refunding of the unlawful profit, the obligation to keep a promise, the repairs of the damage caused because of his fault representing the minimum which allows the satisfaction for the "need for elementary rules of Humanity"[2].

Reinterpreting the perspective of Cicero according to which "The law is the supreme reason engraved in our nature which sees what we need to do and prohibits what we should avoid to do"[3], the philosophers of the 18th century shall emphasize that "generally the law is the human reasoning which rules over all peoples on the Earth"[4].

From here on, people will not seek the foundations of law in divinity, but in themselves. This secularization of the foundations of the law does not diminishes its force, but offers it a new power. Precisely from this perspective, Montesquieu's idea has a special boldness. For Montesquieu, everything is subjected to the action of certain universal laws, expressions of several necessary relations deriving from the nature of things, the law is a universal principle, subjected to reason.

Thus, the laws, in their largest meaning, are necessary relations deriving from the nature of things. The law-report comprises and explains everything: "All beings have their own law: divinity has its

[1] Jean-Cassien Billier and Aglaé Maryioli, *Histoire de la philosophie du droit* (Paris: Armand Colin, 2001), 101.
[2] Jean-Claude Becane and Michel Couderc, *La loi* (Paris: Dalloz, 1994), 15.
[3] Becane and Couderc, *La loi*, 15.
[4] Montesquieu, *Despre spiritul legilor* (Bucharest: Scientific Publ.-house, 1964), 11.

laws, the material world has its own, the superior intelligences, among which humans and animals have their own laws, and humans also have their separate laws. Those who have stated that a blind fatality caused all effects that we see in the world have said a big absurdity, because what can be more absurd than a blind fatality which would have generated rational beings. Thus, there is a primordial reason, and the laws are the relations between it and different entities, as well as the relations between these different entities[1]. For the moment, the spirit of the Age of Enlightenment shall glorify the founding principle: reasoning.

Thus, the conviction of the rationalists of the 17th and 18th centuries is that "by using the reason it is possible to have a knowledge superior to the one derived from the senses"[2].

By debating the connection between the natural law and the positive law, it is emphasized that if the natural law is discovered using the reason, starting from the "basic inclinations of the human nature… [as being] absolute, immutable and universally valid in all times and places", it generates a series of ethical and objective norms, based on which the human actions can be evaluated at any time and place[3].

In the area of the politics or state actions, the natural law offers for men a series of norms which can be quite critical with the current positive legislation, which is imposed by the state. Thus, the very existence of the of the natural law, which can be discovered by reason, represents a threat, a potentially very strong for the status quo and a vivid blame to the traditional and blind ruling of the custom or the arbitrary will of the state. Actually, the legal principles of any society may be established using three alternative means: by a humble conformity with the customs, by an arbitrary whim or by the use of the human reason in order to discover the natural law. Pointedly, these are the only possible ways to establish the positive law. Only the latter method is the most appropriate one for humans, the most noble and human one, but also the most "revolutionary" in relation to any existing *status quo*[4].

[1] Montesquieu, *Despre spiritul legilor*, 11-12.
[2] John Cottingham, *Raţionaliştii: Descartes, Spinoza, Leibniz* (Bucharest: Humanitas, 1998), 17.
[3] Edwin Wilhite Patterson, *Jurisprudence: Men and Ideas of the Law* (New York-Brooklyn: The Foundation Press, 1953), 333.
[4] Murray N. Rothbard, *The Ethics of Liberty* (New York: University Press, 1998), 17

Thereby, the natural law based on reason is distinguished than the positive law based on the will of the political power. While the natural law is common to all rational beings, thus it is immutable, the positive law is relative and depends on the time and place in which the political power expresses its prerogatives. "The relativity of the positive law is imposed by tradition, by culture, being different in each state. In this case, the connection between the individual and universal remains unfulfilled. In order to fulfil itself, any positive law should seek as much as to achieve the ideal of reason"[1].

Finally, it is considered that the true creator of the modern law is J.J. Rousseau, being the one who proclaimed the inclusiveness of the law, because of the fact that it streams from the general will.

Like Bossuet who exalts the divine law, Rousseau also finds a reason to celebrate the human nature: "Only to the law the man owes justice and freedom. It is an organ which rescues everybody's will, which restores in the legal area the natural equality between humans. Only this heavenly voice dictates every citizen the precepts of public reason and teaches him to lead in contradiction with himself". This "unthinkable art" which allows the subjecting of people in order to set them free, forcing them to punish themselves, making everybody to be subjected and no one in charge, this is the work of law. "When all the people decides for all the people, it only considers himself; … Then the matter on which it is stated is general, as the will. It is precisely what I call a law"[2].

Thus, by defining the law as expression of the general will, Rousseau ideationally distinguishes a double meaning, understanding the law as the work of the whole people and for the entire people. First of all, it is about the belief in the necessity of the force of law, a law endowed with the ability to be coercive for safeguarding the group. The law is necessary because it tends to eliminate the fear for another, by instating an order and by ensuring protection, for subsequently to be about the belief that the beneficiaries of the constraint are those for whom it is applied[3].

[1] Dănişor, *Filosofia drepturilor omului*, 59-60.
[2] Jean-Jaques Rousseau, *Contractul social* (translation by H.H. Stahl), (Ploiesti: Antet XX Press, 2005), 135.
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CONCLUSIONS

As a conclusion, initially, the origin of the law was attributed to divinity, subsequently together with the divinity the man appeared who, based on his reason, builds the positive law. Therefore, in modern ages, there are mentions about the creative power of individuals and it is spoken about the human will as single ground for the law.

The triggering moment of the emergence of the law as an expression of the general will it is considered to be the phrasing of Descartes, *cogito ergo sum*, according to which the man can find the certainty of his existence only by thinking. Against this background are built the theories of the social contract by which it is performed the evolution from the natural state to the political state, as effect of a convention.

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THE DONATION IN THE NEW CIVIL CODE

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Abstract:

The relation of donation is one of the important institutions in the area of succession law. The reason for which the legislation inserted this institution in the Civil Code of 1864 and maintain it in the new Civil Code was determined by the idea that through the donations made for the spouse or descendents, it did not intended to advantage the grantee, but just to offer him an advance over the inheritance which that is due to him. This obligation does not have an imperative feature, because the grantee can save the grantee of the relation of donation, under the conditions stated by the law.

The current paper aims to briefly analyze the provisions of the new Civil Code, emphasizing the novelties inserted by the legislator in this area.

Key words: *inheritance, donation, the relation of donations, surviving spouse, descendents, deceased person, the new Civil Code*

INTRODUCTION

The relation of donations is stated by Title 5, Chapter 4 "Successive division and relation", Art 1146-1154 of the new Civil Code.

The new Civil Code defines the relation of donations as the obligation between them of the surviving spouse and the descendants of the deceased person, who effectively and together share the legal inheritance, to return to the inheritance the goods donated to them without statement by the person leaving the inheritance[2].

From the analysis of the legal definition it results that the donation made by the grantee either to the surviving spouse or to their descendants represents only an advantage over the inheritance due to them, according to the law. The purpose of the relation of donation is to insure a legal balance between inheritors.

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[2] See also Art 751 of the Civil Code and Art 1146 of the new Civil Code

The obligation of relation is not imperative because the legislator left the grantee with the freedom to order in favour of his descendants or the surviving spouse without statement. In this case it is considered that the donation has a definitive feature because the grantee-inheritor shall receive in addition the quota of legal inheritance to which he is entitled, according to the law.

THE AREA OF APPLICATION OF THE RELATION

The relation of donations shall be applied only for two categories of legal inheritors, namely:

- The surviving spouse,
- The descendants, namely the first class heirs (regardless if they originate from the marriage, outside the marriage or adopted),

with the condition that they come effectively and together to the inheritance.

Also, it does not matter if the descendants who effectively come to the inheritance are relatives of different degrees or if they come in their own name or by representatives.

Therefore, are excluded from the relation of donations the collateral descendants or ascendants. Nevertheless, in literature it has been stated the case according to which "the relation can be stated also for the donation towards the ascendants or collaterals, but only as imputation of the value of donation on the part of the inheritance due to the grantee"[1].

1. THE CONDITIONS OF THE LEGAL OBLIGATION OF RELATION

For donations made by the person leaving the inheritance to be related to the succession mass, the following conditions must be cumulatively fulfilled:

[1] Francisc Deak, *Tratat de drept succesoral* (Bucharest: Universul Juridic, 2002), 357. See also Mihail Eliescu, "Transmisiunea și împărțeala" *in Dreptul RSR* (Bucharest: Romanian Academy Press, 1966), 238

1. The successor must have the quality as descendant of the deceased person – grantee or to be the surviving spouse, with the condition that they come together and effectively to the inheritance.

According to Art 1146 Para 2 of the Civil Code "in the absence of the stipulation to the contrary from the grantee, the persons mentioned by Para 1 are compelled to a relation only if they had a specific vocation to the deceased persons' inheritance, if it had been opened at the date of the donation".

2. The heir should have had accepted the succession. According to Art 1147 Para 1 of the Civil Code "in the case of renouncing the legal legacy, the descendant or surviving spouse is no longer required to report, keeping the liberty received within the limits of the available amount". Nevertheless, the legislator has created an exception from this rule in the meaning that according to Art 1147 Para 2 "by express stipulation in the contract for donation, the grantee can be compelled to relation also for the case of waiving the donation. In this case, the grantee shall bring to the inheritance only the value of the asset donated overcoming the quota from the deceased person's assets to which he would have been entitled as legal heir".

At the opening of the inheritance, the grantee has the possibility to waive the inheritance if the value of the donation received is higher than his quota of the inheritance[1].

3. The legal heir must also have the quality as grantee[2]. The heir is compelled to relation only for the donations received in person from the grantee (Art 1149 Para 1 of the Civil Code)[3]. If the descendant of the grantee comes in his own name for the grantee's inheritance, he is not compelled to report the donation to his ascendant, even if he has accepted the inheritance from the latter one (Art 1149 Para 2 of the Civil Code).

If the descendant of the grantee comes to the inheritance by representative he is compelled to report the donation received from the deceased person by his ascendant whom he is representing, even if he did

[1] See in this regard, Flavius-Antoniu Baias et al., *Noul Cod civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012), 1190-1191

[2] Carmen-Simona Ricu et al., *Noul cod civil – comentarii, doctrină şi jurisprudenţă* (Bucureşti, Hamangiu, 2012), 356

[3] Art 1149 Para 1 of the Civil Code states that "The heir shall owe the report only for the donations personally received from the grantee".

not inherited the latter one (Art 1149 Para 3 of the Civil Code). These two qualities must exist at the date when the inheritance is opened.

4. The donation to be made without exemption from report. The legislator has allowed the deceased person to express his will in the meaning of the exemption from report[1]. The legal literature has considered that the exemption from report must not harm the inheritance reserve of the resident heirs; if through the donation made with exemption from report has been violated the inheritance reserve of co-heirs, the grantee-heir shall not bear the report, and the donation shall be subjected to a reduction within the limits of the available quota[2].

2. PERSONS ENTITLED TO ASK THE REPORT OF DONATIONS

Art 1148 of the Civil Code states that the right to ask for the report belongs to:

- The descendants;
- The surviving spouse;
- Obliquely, their personal creditors.

The obligation to report is mutual between the descendants of the deceased person and the surviving spouse. Therefore, any of them shall be able to ask for the report of the donation received by the co-heir. The right to ask for the report has an individual feature, thus – if one of the entitled persons waives it, after the opening of the inheritance – the inheritance shall relate only to the extent of the rights of the requesting co-heirs[3].

[1] Supreme Court, Decision No 718/1976, in C.D. 1977, 156: The report is based on the presumed intention of the grantee, the exemption from report being implied from the interpretation of this will. It can result either from an express clause stated by the donation agreement or by other subsequent agreement, or from the means in which the grantee has used the free use in favour of the descendant, if it implies without any doubt the intention that the benefit created be higher than the hereditary share of the beneficiary.

[2] Liviu Stănciulescu, *Curs de drept civil. Succesiuni* (Bucharest: Hamangiu, 2012), 232-234

[3] Deak, *Tratat de drept succesoral*, 362-363

The right to ask for the report of the donations is a patrimonial right, reason for which if one of the entitled persons dies before the performance of this right, it shall be transmitted to his heirs.

From the interpretation of the above mentioned legal text it results that the report of donations cannot be asked by other types of creditors, such as: the creditors of the succession or the legatees, because depending on them the assets donated have permanently exited the deceased person's patrimony, thus from the successive mass.

3. DONATIONS EXEMPTED FROM THE OBLIGATION TO REPORT

According to Art 1150 Para 1 of the Civil Code are not subjected to report:

a) the donations which the deceased person made with exempt from report. The exemption can be made through the donation act or a subsequent act, concluded in one of the forms stated for liberalities;
b) the donations disguised as alienations with gratuitous title or performed by interposed persons, except the case in which it is proven that the person leaving the inheritance has aimed another purpose that the exemption from report;
c) usual gifts, remuneration donations and, to the extent to which are not excessive, the amounts spent for the maintenance or, if necessary, the professional training of the descendants, parents or spouse, the wedding expenses, to the extent to which the person leaving the inheritance did not decided otherwise;
d) the fruits collected, the earning receivable until the day of the opening of the inheritance and the equivalent in currency of the use performed by the grantee over the donated asset.

2) Also, in the case in which the donated asset has perished without the fault of the grantee the report shall not be due. Nevertheless, if the asset has been reconstructed by the use of an indemnity charged as effect of destruction, the grantee shall be compelled to report upon the asset to the extent to which the indemnity has served for the reconstruction. If the indemnity has been used for other purposes, it shall be subjected to a report. If the indemnity results from an insurance contract, it shall be

reported only to the extent to which it overcomes the total amount of the monthly sums paid to the grantee.

4. THE MEANS OF PERFORMANCE OF THE REPORT OF DONATION

If the old regulation (Art 764, Art 772 of the old Civil Code), the report of donations could be made in nature, in equivalent or by making less, in the new regulation – Art 1151 of the Civil Code stated as general rule that the report of donations shall be made by equivalent[1]. Thus, it is considered as unwritten the disposition which imposed for the grantee the report in nature. Art 1151 Para 2 of the Civil Code states an exception from this rule in the meaning that grantee can perform the report in nature if at the moment of the request for report he is still the owner of the asset and it did not entailed it with a real task nor gave it in location for a period longer than 3 years.

It must be noted that the new regulation makes no differentiation between the nature of the assets representing the object of the donation, namely if they were movable or immovable assets.

When performed by equivalent, the means stated by the legislator for the performance of the report are the following:

- by processing – which implies that the inheritors who are entitled to the report have the possibility to take over certain assets from the succession, if possible of the same nature and quality as those representing the object of donation, considering the succession quotas for each of them (Art 1151 Para 4 of the Civil Code);
- by imputation – which implies that the value of the donation shall be diminished from the quota of the heir compelled to a report (Art 1151 Para 5 of the Civil Code);
- in money – which assumes that the person compelled to a report shall lay at the disposition of the other heirs an amount of money representing the difference between the value of the donated asset and the quota of this value corresponding to his successional quota (Art 1151 Para 6 of the Civil Code).

If the report of the immovable assets shall be performed in nature, by the effective reinsertion of the asset in the successional mass, it means

[1] Stănciulescu, *Curs de drept civil. Succesiuni*, 237

that the donation and the exclusive right of property of the grantee shall be dissolved retroactively – the death of the grantee representing a resolving condition – the immovable asset thus becoming the indivision part of the co-heirs, and the grantee-heir shall become the debtor of the restitution of the asset to the co-owners[1].

In the case of the report by equivalent according to Art 1153 of the Civil Code it shall be taken into account the value of the property donated at the time of the trial, but taking into account his condition at the moment of donation, from which is deducted the value of the assumed tasks under the donation contract, at the time of the trial.

If the asset has been alienated by the grantee previous to the request for report, shall be taken into consideration the value of the asset registered into the patrimony at the time of the report and on its nature at the time of acquisition. Though, if the devaluation of the asset registered in the patrimony was inevitable at the time of the acquisition, by the virtue of its nature, the replacement of the asset is not taken into consideration.

The amounts of money are subjected to indexing in relation to the inflation index, in correspondence with the period between their entrance into the grantee's patrimony and the date of the report.

5. MEANS OF ACHIEVEMENT OF THE REPORT ON DONATIONS

Art 1152 of the Civil Code states that "the report shall be performed during the partition, by good agreement or in court". This regulation has eliminated the possibility of the insertion of an action for the reporting of donations on a separate path. The only existing possibility is that of the partition, regardless of its form.

In order to perform the report of donations within the partition it is necessary that the person interested to request the report, because it is considered that the report does not operate properly.

In order to make the donation report within the partition, it is necessary for the person concerned to request the report because the report is not considered to work de jure[2]. It should also be noted that

[1] Deak, *Tratat de drept succesoral*, 361, 368

[2] For a contrary opinion, see also Chirică Dan, *Drept civil. Succesiuni și testamente* (Bucharest: Rosetti, 2003), 505-507

according to Art 1152 Para 2 of the Civil Code[1], the report requested by one of the heirs will be useful to all the heirs even if they have not personally asked for it.

Regarding the (im-) prescriptive feature of the action of reporting the donations there is a controversy in the legal literature. Thus, certain authors consider that this action, having a patrimonial feature, is prescriptive within the general term of 3 years for prescription[2]. Other authors consider that though the action has a patrimonial feature, it is indefeasible because it is an action which cannot be performed outside the partition, or the action of partitioning is indefeasible[3]. As far as we are concerned, we shall agree to the second opinion because the legislator has expressly stated that the only mean to request the report is within the partition procedure, the report being in this context an accessory.

CONCLUSIONS

From the analysis of the provisions of the new Civil Code it results that the report of donations is an important institution, whose content has been modified, its purpose being the one of maintaining the equality between certain categories of legal heirs (the surviving spouse and descendants) who come effectively and together to the division. Rules have been established in this regard both concerning the area of donations under the incidence of this institution, as well as the conditions which must be fulfilled by the persons interested in requesting the report of the donations. In addition, the action for report has received the feature as accessory, its request being possible only using the partition, regardless of the means elected, the notary or judicial procedure

[1] Art 1152 Para 2 of the Civil Code states that the report requested by one of the heirs shall benefit also for the other heirs entitled to request it, except the ones who have expressly waived the report.
[2] Stănciulescu, *Curs de drept civil. Succesiuni*, 240
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THE INTERFERENCE BETWEEN MASS-MEDIA AND THE INDIVIDUAL FREEDOM

Diana Cristina PÎRVU [1]

Abstract:

Attention is Power. An axiom often overlooked by the individual, but never forgotten by Mass-Media. Whatever one gives attention to grows and gains influence over the one who is giving the attention. So who really has the power? The one giving the attention, or the receiver of the attention? When examining the relationship that exists between mass-media and the individual, especially in terms of freedom we would do well to thoroughly examine this question, for it constitutes the foundation of one of the most important Modern-Day freedom dilemmas of the Individual.

In theory the individual is truly 100% free, with Mass-Media holding 0% coercive power over him. Mass media does not have any legal leverage at its disposal by which to force the viewer to do something or adopt a certain view. Yet the question goes deeper than that. Upon closer inspection we see that the individual willingly gives permission to the Mass Media to influence and even shape the opinions one founds his identity and key decisions on.

Is there therefore any ground to state that even though not directly, Mass Media may, by the very nature of the informal and willing relationship with its consumer constitute a danger to the unimpeded Freedom of Thinking and Expression of the Individual? This is what we plan to examine in this paper.

Key words: *Freedom of thinking, freedom of expression, mass-media, influence, restrictions, opinion*

INTRODUCTION

Why is the world today preoccupied more and more about the Media and its social impact?
Because Media influences public opinion, it forges attitudes, it outlines behaviors and reactions.

With every day that goes by, Mass-Media is becoming a more and more influential factor of human action by producing and

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distributing information to the individual and to society. Seeing as the individual is the possessor of freedom, to define the relationship between Mass-Media and freedom is to analyze the relationship between the former and the individual in his quality of finality of any social system.

So who holds the power really: the one who offers attention, or the one who receives it?

When we examine the relationship between the two, especially regarding individual freedom, we had better thoroughly ask this question, for it constitutes the foundation of one of the most important modern dilemmas regarding the freedom the individual possesses.

In theory, the individual is 100% free, Mass-Media having 0% coercive power over him. Mass-Media has no legal leverage at its disposal by which to force its users to do something or adopt a certain view-point. But the question goes deeper than that. If we look in detail, we will see that the individual willingly gives his consent to be influenced by the Media and will even go as far as forming the opinions and mental maps of beliefs the Media advises him to. These opinions and mental maps are the very basis on which individuals construct their identity, make the important decisions and lead their lives by.

When discussing the relationship between the individual and the media, we understand that the individual delegates to the mass-media part of his own freedom, while the media remains free as long as it fulfills its obligations toward the individual. Thus, respecting the freedom of the individual becomes an obligation to the media, which has to respect the individual's freedom of opinion, of expression and of receiving unbiased and objective information and ideas.

Is then any reason to affirm that, even though not directly, Mass-Media may, by the very nature of its informal and voluntary relationship with its client, pose a threat to the freedom of thought of the individual?

This is what we attempt to examine in the following paper.

We will start the analysis of these aspects on the premises that mass-media, by the voluntary and informal nature of the relationship with its client, poses a threat to the individual's freedom of having his own opinions, uninfluenced by a subjective social discourse which replaces objectivity and equanimity with subjectivity and a biased attitude of the media content creators.

We begin by affirming that regardless of the political regime, nothing can limit the freedom of thinking of the individual. Even in a totalitarian

state, the mind and thinking of individuals is their own. As for the freedom to decide and act based on this freedom of thought, democracy offers the largest opportunity for free decision-making.
Still, can we 100% say that even in a democracy the individual is truly free in his thinking which eventually concretizes itself as decision?
Let us be clear from the get go. Between Thinking and Decision there is a Cause – Effect relationship: the decision is in fact the concretization of thinking as action. If there is any power of controlling or even merely influencing individual's thinking, then this translates directly to the power to control or influence the way those individuals make decisions, and thus the way they allocate and distribute their resources of all kinds: time, money, energy, political capital, etc.

Of course, it is inconceivable in a democracy to be talking about direct thought-control through direct coercive means. The very essence of democracy is the freedom to think for oneself and ensuring the freedom to act and decide based on that free thinking.

But can man decide alone upon his thoughts and actions? As a response, we can discuss the situation expressed by John Stuart Mill: „Even if the whole of humanity, with just one exception, would share the same conviction, and just a single person would hold an opposite conviction, humanity would not be any more entitles to silence that one single person than the person would be to silence the whole humanity"[1]

This doesn't mean that in a democracy there is no attempt to influence the way individuals make decisions.

The difference between a democracy and a totalitarian state is that in a totalitarian state, the measures of thought or decision can be direct and quite possibly severe, limiting by a lot the individual's ability to transform free thought into free decision. In a democracy we don't talk about control, but about influence, and this influence is done indirectly, through means not belonging directly to the democratic arsenal.

Social representations, of which social psychologist Serge Moscovici[2] spoke, together with the informal power of mass-media constitutes an important starting point in understanding that which leads

[1]John StuardMill, *Despre libertate,* trans. Adrian-Paul Iliescu (Bucharest: Humanitas 1994), 25
[2]Serge Moscovici and Gerard Duven, *Social Representation. Explorations in Social Psychology*, (Cambridge: Polity Press, 2000)

to the decisions of the individuals (their thinking) is conditioned and influenced day by day by the mass-media.

Serge Moscovici's Theory of Social Representations shows us through its implications how exactly our way of thinking is conditioned even from birth and how slowly but surely, our unique individuality is re-socialized and replaced through the mechanism of social representations of what is acceptable or not.

Even if the individual can consciously fight the informal pressure to be a certain way which is considered by society to be „Correct", he only has a limited ability to do so. Part of the programming that is forced upon him informally will reach his core, formatting his personality.

From here on in, at adult age, through the Mass-Media Machine, the social programming that was installed from early childhood is further strengthened, for some individuals becoming so strong it becomes second nature. Because the inoculation of the dominant social representation was not done directly, but indirectly, the individual's defense system did not feel any direct intrusion to his mind, taking the values given to him by parents, teachers or the media as his own values. The individual identifies with those values and he constructs out of them an identity he proceeds to defend and even pass on to his friends and children. Thus, from generation to generation, through indirect influence mechanisms reinforced at adulthood through mass-media, the representations of the individual are, at least in part, the ones inherited from previous generations, who of course feels it has the sacred role to educate the young generation in "The True Civic Values".

1. INDIVIDUAL FREEDOM

The Debut of Mass-Media history is represented by humankind's fight for personal and political freedom, on which free communication hinges.

Referring to the history of mankind, a great step forward regarding human evolution is due to mass-media, baring the condition to enforce the individual's freedom to create. For this to happen, there has to exist a subordination of communication means to human goals.

But what does this individual freedom translate to?

We begin by saying that trying to define freedom is a Sisyphus work. This is due to the fact that the notion takes on different meanings

depending on which domain of life we look at (psychology, philosophy, sociology, law, etc.)

In our endeavor we will look at freedom as seen from a juridical standpoint. Thus, the notion of freedom appears at the same time as social and normative. "On the one side, law, unlike philosophy or psychology sees the individual only as a social being, permanently in contact with other humans. On the other side, unlike sociology, law is a normative discipline which studies the human individual and its relationships from the perspective of existing rules"[1].

„Freedom is thus that social state in which the coercion which the person is subjected to from others is reduced"[2]. We thus have as an essence of freedom the possibility of the individual to choose according to his own convictions, with no constraints.

What is the minimum of this possibility though? As a response we can look to Hans Kelsen's argument which holds that „Because a rule of law – like any other normative social rule – can only rule out certain actions and omissions, man cannot be totally limited in his freedom, that is to say in the totality of his inner and outer behavior, his action, will, thinking and feeling by any rule of law. A rule of law can more or less limit a person's freedom, commanding his behavior to a greater or lesser extent. But a minimum of freedom, that is to say of legal constraint, a sphere of human existence in which no order or no interdiction can interfere always remains ensured. "[3]

After seeing the minimum of freedom, could we also identify its Maximum? Could freedom be unlimited? The answer can be found in a negative definition of the notion of freedom, namely "freedom consists of the ability to do anything that is not harmful to another"[4].This aspect is foreshadowed by the 4th article of the Declaration of Human and Citizen Rights from 1789[5]which tells us that „freedom consists of the ability to

[1]Sebastian Rădulețu, *Libertăți fundamentale,* ediția a II-a revăzută și adăugită, (Bucharest: Didactică și Pedagogică R.A, 2008), 15

[2]*Idem*

[3]Hans Kelsen, *Doctrina pură a dreptului,* trans. Ioana Constantin (Bucharest: Humanitas, 2000), 64

[4]Dan Claudiu Dănișor, *Drept constituțional și instituții politice. Vol. I. Teoria generală,*(Bucharest: C.H. Beck, 2007), 541

[5]This is the fundamental charter by which on 26 august 1789 the foundation of modern democracy were laid down in France and in the World.

do anything that is not harmful to another; thus exercising natural human rights has no limits other than those who ensure other members of society the exercise of those same rights".

Various meanings of the concept of individual freedom can be grouped in the categories of public freedoms and human rights. In our endeavor we will be referring to freedom from the perspective of psychic non-domination (which entails among others the right to information, the right to culture, freedom of expression and of consciousness, the right to psychic integrity, etc.), of symbolic non-domination (which entails among others the right to one's own image, the right to protect one's personal secrets, the right to the freedom of press, etc.), and also of the private freedom of individual self-determination.

Referring to individual self-determination, by analyzing the link between freedom and information, we can make the following reasoning: If freedom finds its value in the self-determination of the individual which translates itself as individual and social progress, if the materialization of information by the individual and society contributes to the self-determination of the individual, and if the quality of the development of the individual depends on the quality of information he employs, then it follows that freedom depends on the quality of the information.

And because it has no value in and of itself, information must be perceived as a result of individual and collective thinking, of whom the individual and society benefit. This benefit is conditioned by the freedom to participate in the procedure of generating said information which is realized through access to the information, the appropriation of the information, through generating one's own information and then putting it in the public circuit, but also through the possibility of verifying the truth of the information.

The need and power to verify the truth of the information belongs to the individual. Analyzing the truth of the information is necessary so that the individual can operate correctly and rationally all throughout his evolution, an evolution supposed to be centered around the ideal of freedom, but which finds itself ever more often affected by the influences of the media.

While for the receptor (individual) this is a benefit, for the emitter of the information (mass-media) it is a responsibility. We can thus see that between the receptor (the individual) and the emitter (mass-media) a

communication bond is created. For this relationship to work and develop from a pragmatic standpoint, even though the individuals freedom is influenced, the means by which this influence is done are diverse. We could list methods such as seduction, persuasion, informing, convincing and even dominating the respondent.[1]

This is because, most of the time, communication presupposes the attempt to influence, because the communication process is a source of change and influence, and those who are communicated to are subjected to various forms of change and influence in effect all throughout the communication process. „These changes can be more or less significant, more or less perceptible and can range from ideas, opinions, perceptions, behaviors, attitudes, interests, and so on. What is for certain is that comparing to when the interaction started, the participants in communication are not exactly the same person they become when the communication ends"[2]

But these attempts of the mass-media to influence are incompatible with an adequate perception of the phenomenon of freedom. Some of these attempts are:

- The decrease of the role of individual contacts. Communication is predominantly unidirectional, the chances of the individual of intervening in the relationship with the mass-media being minimal;
- An increase of the volume of information. The individual has no time to verify the ever increasing quantity of information. The progress in knowledge thus decreases, also decreasing the degree of freedom of the individual.
- The increase in manipulation activities. The ever increasing activity of the mass-media determines the individual to unconditionally accept the informational offer;
- Mass-media, ever more often appears not only in its quality of distributor of its own product, but also as a redistributor of the information others have produced;
- Offering a distorted view of reality. Mass-media presents events not in line with their real importance to the individual,

[1]Jaques Gerstle, *Comunicare politică, trans.* Camara-Ionesi Gabriela(Iași: Institutul European, 2002), 25

[2]Simona Ștefănescu, *Sociologia Comunicării,* (Târgoviște: Cetatea de scaun, 2009) 278

but in line with the importance content producers place on it. The individual comes to see as "important" those problems to which the Mass-Media calls attention to. If the truth and precision of a piece of news can be verified, its importance is hard, if not impossible to verify.

Communication can be either interested in some ulterior motive, or free from interest, purely informative. Communication that is interested in an outcome, actively wants change, or the creation or replacement of the receptor's opinions, beliefs or convictions. The interest of the emitter is either to produce a change of perspective or of valuation inside the receptor or to persuade the receiver to perform a certain action (for example buy product X or vote for candidate Y).

Of course, not all communication is by necessity interested, not all communication has an underlying intention to change something. People are communicative beings, not built to stay in isolation, without sharing their beliefs, thoughts or opinions with others.

Sometimes communication is just that: communication, with no hidden agenda of influencing or manipulating. But the communication the mass-media uses is not always this clean of intent. There are, of course journalists, radio or TV presenters who are objective, who present the facts in a manner not infused with their own opinion. But not all people in the media are like this.

What makes this state of fact dangerous for the freedom to have a purely individual and uninfluenced socially thinking is an evolutionary trait which pertains to the evolution of the human species: the need to be protected by a "Ruler", by a higher authority.

This "Ruler" or authority figure can take the form of a person, but it can also be something impersonal such as the Rule of Law or the Voice of the People. It is human nature for every individual to want to belong to something beyond him, be it a family, a group, a faith, etc.

The Collectivity, society is thus a supra-individual entity which offers the individual a symbolic and abstract feeling of belonging and safety, needs which psychologist Abraham Maslow talks about in his famous pyramid of needs. How does the individual manage to feel that he belongs to society as an abstract and overarching organism?

In everyday, less religious and formal terms, individuals manage to feel they belong to society by sharing in the thinking, beliefs and morals of said society. To think, be and act „as a normal person does" is the

fundamental act of the individual declaring his status and allegiance as a member of society.

Mass-media is the dissemination machine of the unwritten laws and collective opinions of society. Because out of his own free will the individual actively seeks membership into the society, he will pledge his allegiance to and be responsible for upholding the informal laws that come with membership. Of course the individual can look to friends and other local authority figures to inform himself on local rules and customs, specific to the groups to which he is beholden to.

But being a member of society means much more than to be a part of your local groups. It means being connected to a larger organism. To be up to date with what is aired in the mass-media means to be a part of the stream of information flowing through society.

In the constant stream of information that flows from the media, this information is disseminated to every „cell of society" (that is the individual).

Mass-media thus appears as a major factor of influence, for it connects the individual with the entire society, making him a part of a collective reality happening at hundreds of kilometers away from him, making him a vicarious experiencer of the lives of people he will probably never meet, but who nevertheless belong to the same collective unit he does.

2. MASS-MEDIA FACE TO FACE WITH FREEDOM

Why is the world today preoccupied more and more about the Media and its social impact?

Because Media influences public opinion, it forges attitudes; it outlines behaviors and induces reactions. It even modifies the style of political life.

Over the course of time, it has been said about the mass-media that it encourages individuals to adopt behaviors or to take on certain activities that they otherwise wouldn't. More than that, mass-media has been suspected it determines individuals to agree and take on as their own certain opinions, values, beliefs or ideas which, had they not taken contact with, they wouldn't have accepted.

Regarding this influence of the mass-media there have been many research done, investigating the ways in which human personality is

affected by the media. There have been studies focusing on effects of the media upon the individual such as: changing the image of the world (the cognitive dimension), changing the way people behave and act (the behavioral dimension), or the way in which people's attitudes and feelings regarding certain issues are altered (the affective dimension).
As a result of these studies, the effects mass-media engenders on the public appear in the following order[1]:

- Media attracts the attention of the public regarding a subject or topic (*sensitizing*);
- Media makes available a quantity of *information* regarding said subject / topic;
- The information offered by the mass-media leads to the *forming or changing of attitudes;*
- Attitudes formed thusly influence *behavior.*

Mass-media sells the individual the illusion he is making the choice all on his own, but in the end, the choice is dictated by the information that makes the person act. This idea is also supported by Bernard Cohen, which, regarding the press said: it is significantly more than a simple supplier of information and opinions. The press can be a simple equidistant tool for disseminating facts. But, using the mechanism of influence and public opinion, press goes from being a simple impartial informer of the individual to being a former of opinions, not for a single individual, but through the collective, informal and impersonal nature of the mass-media to masses of individuals.

Maybe mass-media „doesn't have a great deal of success most of the time in telling people what to think, but it has a stunning success in telling them what to think about. From this, it flows naturally that the world looks different to different people, according not only to their personal interests and preferences, but also to the mental maps that is drawn for them by the writers, editors and publicists of the papers they read"[2].

[1]Paul Dobrescu and Alina Bârgăoanu, *MASS-MEDIA și societatea,* (Bucharest: Comunicare.ro, 2003), 216
[2]Bernard Choen, *The Press and Foreign Policy,(* Princeton: NJ Princeton University Press, 1963), 13 *Apud*Simona Ștefănescu, *Sociologia Comunicării,* (Târgoviște: Cetatea de scaun, 2009), 216

The research of Bernard Cohen on mass-media have rise to the concept of „agenda-setting", a perspective confirmed later by the research done by Maxwell E. McCombs and Donald Shaw. They are the ones holding that it is the mass-media who contours the structure of the public agenda, interpreting that „Through the selection and presentation of news, the editors, staff from the News Department and the presenters play an important role in shaping public reality." Readers find out not only about a given subject, but also how much importance to attach / give to the subject from the quantity of information given to the subject in the news, as well as from his position in the structure of the news bulletin… Mass-media can very well outline the "important" subjects – that is to say mass-media can set the <<agenda>> of the campaign"[1].

Not only can mass-media outline what is important, it can determine what is important as well as legitimate. The effects of mass-media are not direct and immediate; they don't just consolidate, convert or activate opinions. They have the power to attract attention to particular themes and to decide on what is to be said or done in the public space. More and more often, mass-media has an influence on individuals, one which the individuals don't realize, and its effects are cumulative and can be observed only over the long term.

So how come the individuals are not aware of the influence mass-media has over them? "After paying attention to a media message, people go to a natural process of filtration, processing and interpretation, following which the original message may undergo a radical transformation. The media does not simply supply the message itself, but also its grid of interpretation. We live in a world where <<media sources are cumulative, consonant and omnipresent>>, people are not conscious anymore that they mix their own perception with that offered by the media. They come to adopt, unconsciously most of the time, the point of view offered by the media, and then interpret reality and act based on this point of view"[2].

The individual almost never suspects the role of mass-media in the way he thinks and takes decisions. In the end, he's always free to

[1]Maxwell E Mc Combs and Donald Shaw, *The Agenda-SettinFunction of Mass Media.(* Public OpinionQuarterly, 1972), 176 *Apud* Simona Ștefănescu, *Sociologia Comunicării,* (Târgoviște: Cetatea de scaun, 2009), 216

[2]Paul Dobrescu and Alina Bârgăoanu, *MASS-MEDIA și societatea,* (Bucharest: Comunicare.ro, 2003), 267

change the channel, to not read the newspaper. Only as long as the consumption of the mass-media is done with his accord, the current social representations become an integral part of the individual's own freedom. Although he is not the source of the social representations by virtue of which he will think and make decisions, the individual becomes their convert and spokesman, and mass-media is always doing its job of "keeping him in the know" with the dominant paradigm which, even though it does not originate from the individual, it is appropriated by him and becomes his credo, his model of thinking and making decisions.

Analyzing these aspects, it follows with certainty that nobody can hold a monopole on information or on producing the information without restricting other people's rights and freedoms, information being a product specific to human reason. As it is said, information produces information. Thus, for the individual to receive a greater freedom of speech, there should be a direct link of the individual to the mass-media, that is to say the individual should be able to intervene in the communicative process.

But let us not forget that mass-media is also a freedom of the individual, but in order to be free, mass-media has to generate freedom; it cannot position itself higher than the freedom of he whom the media addresses (the individual).

In order to respect the freedom of the individual, mass-media has to have a system of values which coordinates well with human values, that is to say, mass-media should:

- Ensure the individual's right to be informed
- Ensure the freedom of being informed
- Ensure free access to information

From this standpoint, mass-media should play a social role. It should be an educator of the free society and a fighter for that free society. Media can do all of this through seeking out, promoting, communicating and defending the truth.

If it uses its freedom in the benefit of society, as well as its own, mass-media can set for itself a set of goals, principles and functions which are both accepted and expected by the individuals. It can play the role of the most important educator, through non-formal education, modeling behaviors and knowledge.

A thing is certain: freedom must be a priority for the mass-media, and if the media is seen as the main source of information, it means also

it is the first responsible for the quality and the degree of the process of freedom.

As to the obligations of the individual as a media consumer, one is not forced to pay heed to the messages addressed to him. This being said, one can indeed support the media when he finds its contents useful. As with any free consumer, the individual can decide how often he will purchase a paper or push the remote control button, as well as when to execute these actions. His opinion is absolutely voluntary and is only conditioned by the degree to which the mass-media fulfills his demands.[1]

CONCLUSIONS

Having seen the arguments discussed, we can conclude that when looking at the relationship between the individual and the media, we understand that the individual delegates to the media a part of his own freedom, while at the same time the media remains completely free as long as it fulfills its obligations toward the individual.

With all of this though, as we have seen from various research, most of the time mass-media represents a danger for the freedom of opinion, of expression and of receiving objective information and ideas. This is due to the fact that mass-media contributes to the decrease of the role of inter-individual contacts, to the increasing of the information in a short time, to the increase of manipulation activities, but most of all, it offers a biased and distorted image of reality. We have to remember that the mass-media doesn't tell you what to think, but it tells you what to think about.

For the individual to enjoy a larger freedom of speech, there should be a direct link of the individual to the mass media, meaning the individual should be able to be a part of the communicative process. And let us not forget that mass-media is also a freedom of the individual, but in order to be free, mass-media has to generate freedom; it cannot position itself higher than the freedom of he whom the media addresses (the individual).

[1]Gheorghe Schwartz, *Politica și presa. Reprezintă mass-media a patra putere în stat?*, (Iași: Institutul european, 2001), 264

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THE EXECUTION OF OBLIGATIONS SUBJECT TO SANCTIONING PRIOR TO THE SANCTIONING ITSELF

Marta-Claudia CLIZA[1]

Abstract:

This article is analyzing the application of the principle of proportionality, considering that the obligation subject to sanctioning has been executed prior to the sanctioning itself. A sanction issued by a state body should not be an end in itself or a means to commit abuses, but a means of regulating social relations, therefore issuing records and applying sanctions for acts that do not exist is showing serious abuse from the competent state bodies.

Key words: *principle of proportionality, abuses, sanctions, competent state bodies, offender, execution.*

This paperwork aims to analyze the situation where the competent authorities of the Romanian state sanction a contravention after being executed in full by the offender. The issuance of such a record of penalties after paying the required fee is not legal. Therefore, as long as the toll for the vehicle in question was paid, we consider that the issuance of the record of findings and subsequent penalties in regards to contravention, without performing a minimum check of the database where the toll certainly appeared as paid, is abusive.

Therefore, the maintenance of the obligation to pay a fine which was established abusively would represent a violation of principle *ne bis in idem*, a principle guaranteed both by domestic law and European law, but also the principle of proportionality of application of a penalty.

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The bodies empowered to sanction the offenses provided by the law do not benefit any more from the possibility to punish an offender, as long as the alleged offense was paid and executed in full.

Therefore, a vehicle crossed Cernavodă-Fetești bridge, by paying subsequently the toll[1] for crossing the bridge in question. Although the toll was paid, the offender was sanctioned for using the respective infrastructure, on grounds that he failed to pay the related toll.

We should note that Government Ordinance no. 15/2002[2] establishes the fact that the failure to pay the toll, respectively traveling without paying the toll represents an offense and shall be punished according to the law[3]. More specifically, the value of the toll was paid, therefore Cernavodă-Fetești bridge was not used without paying the toll, therefore the offense provided by Government Ordinance no.15/2002 was not committed.

Furthermore, Government Ordinance no. 15/2002 does not provide any sanction if the toll is paid after crossing the bridge, the more so as the law allows this modality of fulfilling the obligation.

As long as the toll for crossing the bridge was paid for the respective vehicle, we consider that the issuance of the record of findings and subsequent penalties in regards to contravention, without performing a minimum check of the database where the toll certainly appeared as paid, is abusive.

No penalty being expressly provided by GO 15/2002, for the subsequent payment of the toll, we consider that the court should annul this record as unsubstantiated and unlawful.

According to art. 21 of GO no. 2/2001[4], the penalty shall be applied within the limits provided by the normative act and must be proportional[5] with the degree of social danger of the committed offense,

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[1] Art. 1 letter P of Government Ordinance no. 15/2002: „*the electronic registration of the toll*".

[2] on the application of fees for the use of road transport infrastructure, published in Official Journal no. 82 of February 1st, 2002, as further amended and supplemented.

[3] Art. 8 para. (1¹) of Government Ordinance no. 15/2002.

[4] on legal regime of contraventions, published in Official Journal of Romania no. 410 of July 25th, 2001, as further amended and supplemented.

[5] Adrian-Gabriel Dinescu, *Legislatia contraventiilor. Comentarii, doctrina si jurisprudenta (*Bucharest: Hamangiu , 2016), 43: "*The application of civil penalties, respectively the punishment of the law subject for the failure to comply with the rules of law, shall be performed according to certain principles, as in case of criminal law*

taking into account the circumstances in which the offense was committed, the manner and the means of committing it, the purpose, the results and the personal circumstances of the offender and the other data registered with the challenged record.

In this case, the finding bodies did not take into account the circumstances in which the alleged offense had been committed and did not perform investigations on the existence of the payment upon the issuance of the record.

Probably the most important notice is the one indicating the need for proportionality between the committed offense and the applied penalty, due to the fact the proportionality represents one of the requirements ordered by the case law of ECHR[1] in the application of any rights restricting measures[2].

The application of a penalty by a state body must not be an end in itself or a means to commit abuses, but a means of regulating social relations, of forming a spirit of responsibility, of preventing illegal acts, but the issuance of records and the application of civil penalties for offenses which were not committed, represent serious abuses of the state bodies and do not regulate any social relation.

Furthermore, the educational purpose[3] of the civil penalty requires the need to observe more closely the provisions of the law and the establishment of own behavior according to its requirements.

The condition of a damage occurrence is not part of the constitutive content of the contravention and has no relevance on the individualization[4] of the civil penalty.

In establishing the offenses and the applicable sanctions, the lawmaker is the one who performs a first assessment of the social danger,

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penalties (...) the principle of lawfulness of civil penalties, the proportionality principle and non bis in idem principle".

[1] ECHR, Decision Muller s.a. against Switzerland of May 24th, 1988, available on site www.echr.coe.int, accessed on April 3rd, 2017; Deciswion Handyside against United Kingdom of December 7th, 1976, available on site www.echr.coe.int, accessed on April 3rd, 2017.

[2] Ovidiu Podaru and Radu Chirita, *Regimul juridic al contraventiilor. O.G. nr. 2/2001 comentata, 2nd edition* (Bucharest: Hamangiu, 2011), 239.

[3] Andrei Pap, *Drept contraventional. Culegere de hotarari judecatoresti 2007-2014. Vol. I. Reflectarea jurisprudentei CEDO in procedura contraventionala nationala* (Bucharest: Hamangiu, 2015), 43.

[4] Andrei Pap, *Drept contraventional. Culegere de hotarari judecatoresti 2014. Vol. III. Raspunderea contraventionala in dreptul muncii* (Bucharest: Hamangiu, 2015), 129.

from an abstract perspective, by establishing main or additional civil penalties which are applied in case of committing the offense, and at the time of the ascertainment of such an offense, the officer who issued the fine and, subsequently, the court of law, upon the assessment of a civil complaint, are the bodies which assess specifically the social danger of an offense.

We believe that record of findings and subsequent penalties in regards to contravention was issued abusively and in bad-faith, in connection to the fact that, on the date of issuance of the report, the payment of June 6th, 2016, amounting to RON 26 was certainly recorded in the electronic system. As long as the non-fiscal receipt for the payment of Fetești toll includes the vehicle registration number and the vehicle identification number, we consider that it would be required at least the replacement of the fee by a warning.

Taking into account that we must observe the rule of proportionality[1] between the committed offenses and the applied penalties, this proportionality being one of the requirements ordered by the case law of the European Court of Human Rights in the application of any rights restricting measures (cases Handyside against Great Britain and Muller against Switzerland), we consider that the court of law vested with authority over the matter has all the grounds required in order to rule the annulment of the record of findings and subsequent penalties in regards to contravention or the replacement of the record with the warning as the scope of civil liability establishment and punishment can be achieved by applying the warning[2], according to art. 7 and art. 5 thesis 1 of GO. no. 2/2001.

The courts of law vested with authority over the settlement of civil claims based on similar legal situations have a uniform practice,

[1] Dinescu, *Legislatia contraventiilor*, 45: „*The proportionality principle (...) certifies that all main or additional penalties applied to a certain offender in a certain situation are dosed depending on the seriousness of the offense. The proportionality principle is close to the opportunity principle, which must be observed in all cases where competent officers who issued the fine notify the commission of an offense and when proceeding with the application of main or additional civil fines, they have to make sure that the application thereof is required and fulfills the repressive and preventive nature of the civil penalty* ".

[2] Nicoleta Cristus, *Circulatia rutiera. Contraventii la regimul circulatiei pe drumurile publice. Practica judiciara (*Bucharest: Hamangiu, 2015), 165: "*The warning fulfills the preventive and punitive scope of the civil penalty*".

meaning that they admit civil claims, in full or in part, and order the annulment of the records or the replacement of the fine by the warning even when there is a wrong payment, meaning that a wrong registration number is recorded on the receipt which proves the payment.

The good faith of the offender is obvious, a valid payment being recorded, therefore a penalty applied to the offender for an offense which was not committed would be illegal.

The claimant never intended to travel fraudulently, so that, when he realized that he used the bridge without paying the toll, he paid this toll correctly, hoping that the payment would be recorded and a record of findings and subsequent penalties in regards to contravention would not be issued.

Furthermore, we would like to ask the court to take into account the Ruling pronounced in case Salabiaku against France[1], where the European Court of Human Rights noted that the presumptions are allowed by the Constitution, but they shall not exceed reasonable limits taking into account the seriousness[2] of stake and preserving the rights of defense, therefore, neither the presumption of innocence nor the presumption of truthfulness of the record is absolute[3].

The presumption of truthfulness can operate only up to the limit where its application would lead to the situation where the person accused of committing the offense would find himself unable to prove the contrary of the facts of the record, although the court cannot be convinced by the guilt of the offender from the evidence adduced by the officer who issued the fine, beyond any reasonable doubt. The use of the presumptions of fact and of law is not contrary to the individual's right to a fair trial, provided that the right of an individual to be presumed innocent is not absolute, since the presumptions based on fact or on laws operate in all legal system and are not prohibited, provided that the state observes reasonable limits taking into account the importance of the scope and the observance of the right to defense[4].

[1] Material available on site www.coe.int, accessed on April 3rd, 2017.
[2] Laura-Cristiana Spataru-Negura, *Dreptul Uniunii Europene – o noua tipologie juridica* (Bucharest: Hamangiu , 2016), 206.
[3] Nicoleta Cristus, *Raspunderea contraventionala. Practica judiciara*, *2nd edition* (Bucharest: Hamangiu, 2011), 289.
[4] Cristus, *Raspunderea contraventionala*, 350.

We consider that the contrary of the facts of the penalty record was proved, therefore the presumption of truthfulness of the record was removed. In this respect, we believe that the state bodies should submit the spreadsheet related to the registration number of the vehicle, existent in the database, in order to prove their allegations. By seeing that the toll was paid, they wanted to hide the abuse committed by issuing a record of findings and subsequent penalties in regards to contravention.

CONCLUSIONS

Taking into account all the aforementioned, we can conclude that the obligation of the offender to pay a fine established abusively would represent a violation of principle *ne bis in idem*, principle guaranteed both by domestic law and European law. The court of law vested with authority over the matter should cancel the record of findings and subsequent penalties in regards to contravention and exempt the offender from the payment of the civil penalty, given that the toll was paid according to the limits established by GO no. 15/2002.

If the court considers that the toll was paid by exceeding the deadline provided by the law, in accordance with the proportionality principle, the court should order the replacement of the civil fee by the warning, especially that the offender proved good faith and paid in full the value of the toll, prior to the notification delivered by the competent bodies.

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THE PERFORMANCE OF THE RIGHT TO LEGISLATIVE INITIATIVE IN ROMANIA AND IN OTHER EUROPEAN STATES

Ramona DUMINICĂ [1]
Andreea TABACU[2]

Abstract:

The current paper brings to light the issue of performing the right to legislative initiative in Romania and starts from the ascertainment that our country, as well as in most democratic states, almost 90% of the legislative initiatives belonging to the Government, which has an apparatus of counselors and experts, as well as the possibility to conduct specialized studies which leads to an easiest way of complying with the conditions imposed by the legislative technique. The study also refers to aspects related with the compared law by the references made to the manner in which the right to legislative initiative is performed in France, Italy and Spain and concludes with proposals for the improvement of the quality of the legislative initiatives.

Key words: *legislative initiative, Parliament, Government, quality of the legislative initiatives, compared law.*

INTRODUCTION

Regardless of the statute to which we relate to, before being the expression of a will, every law representing the reflection of a thinking. Depending on the quality of this thinking, the law may generate, in the moment of its application, positive or negative consequences, the subsequent social practice being the one which shall (in) validate the solutions stated by that particular legal document. Based on these considerations, the stage of determining the solutions of the future regulation appears as extremely important in the normative

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construction. Thus, after the scientific knowledge of the realities which shall be the object of the regulation, after the prior documentation and substantiation of the bill or the legal proposal, shall be triggered the legislative procedure.

In our country, the legislative procedure is contradictory (because it is similar to the contentious debates) and repetitive (because the vote received in one of the Chambers requires the restart of the legislative process in the other Chamber). The adoption of a law has three different stages: the first stage – preliminary, the second stage – the debate and the third one – the decision of the parliamentary Chambers[1].

In the first stage, there are three different phases to be noticed: the legislative initiative, the approval of the legislative council and the debate of the project, in one or more parliamentary commissions.

Lato sensu, the legislative initiative refers to "the right to notify the Parliament about the examination of a draft bill or a legislative proposal, to which is correspondent the correlative obligation of the legislative authority to rule upon the legislative proposal or the draft bill"[2].

1. THE LEGISLATIVE INITIATIVE IN ROMANIA

According to Art 74 Para 1 of the Romanian Constitution, a legislative initiative shall lie, as the case may be, with the Government, Deputies, Senators, or a number of at least 100,000 citizens entitled to vote.

The legislative initiatives originating from the Government are the draft bills, and the ones originating from senators or deputies, or from the citizens are called legislative proposals.

Even if, traditionally, the legislative initiative belongs to the MPs, because those who have ability to adopt the law are also the ones with the ability to propose it, in Romania, as in most democratic states, almost 90% of the legislative initiatives belong to the Government. It has an apparatus of counselors and experts, as well as the possibility to

[1] Marius Andreescu and Andra Puran, *Drept constituţional. Teoria generală a statului* (Bucharest: C.H. Beck, 2017), 155.
[2] Ioan Vida, *Legistică formală. Introducere în tehnica şi procedura legislativă* (Bucharest: Lumina Lex, 2010), 193-194.

conduct specialized studies, which allows an easiest compliance of the requirements related to the legislative technique. Moreover, this preference is also based is based also on political aspects because the Government sends the draft bills in order to fulfil the governing program, the draft bill being, from a material perspective, a project originating from the priorities established by the legislative program[1]. Under these circumstances, the wording mentioned by the doctrine according to which "the primacy of the legislative initiative belongs to the Government"[2] is fully confirmed by practice.

The Government shall notify the Parliament with a draft bill by sending it to the Chamber of Deputies or to the Senate, in compliance with Art 75 of the Constitution.

Thus, in performing the right to legislative initiative, the Government shall introduce the bill first to the parliamentary Chamber with competence in adopting it as the first notified Chamber. Mainly, the bill initiated by the Government, accompanied by the recitals, shall be introduced to the notified Chamber together with its primary examination, being signed by the Prime Minister. The notification signed by the Prime Minister it is necessary to pinpoint the will of the Government in performing its right to legislative initiative by introducing the bill to the Chamber in charge. Simultaneously with the introduction in this Chamber of a new bill, it shall be sent for information to the other Chamber[3].

Also, according to the Constitution, the legislative initiative shall be performed also by MPs, senators or deputies who may perform it individually or collectively, through the parliamentary group in which they are members.

The senators and deputies performing their right to legislative initiative may present proposals only in the form required for bills in accordance with Art 74 Para 3 and 4 of the Constitution. For the registration of a legislative proposal in the competent Chamber it is sufficient the signature of a single MP. The legislative proposals shall

[1] Ramona Duminică, „The pre-parlamentary phase of the ordinary legislative procedure. Brief analysis", in *Valahia University Law Study Magazine*, Vol 24, No 2 (2014): 100-111.
[2] Ion Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat* (Bucharest: C.H. Beck, 2006), 586.
[3] Vida, *Legistică formală*, 200.

be submitted to the Government within 3 days from registration, in order to rule upon the application of Art 111 Para 1 of the Constitution.

Paradoxically, but justifiable, the parliamentary legislative proposal is very rare. This is understandable – according to the literature – "by that the governing parties usually act through the governmental apparatus, the ideas mentioned by the parties' programs being applied and delivered using the parliamentary power, which expresses the political position of that party or of those parties. Most often, the MPs belonging to the ruling coalition find their opinions and views on government projects so that only rarely they feel the need to own legislative initiatives. In exchange, the path of the legislative proposals is used by the opposition parties who, by promoting their programs feel the need to draft laws or to modify the existing ones precisely from the wish to see the transposition in life of their own ideas stated by their programs"[1].

Regarding the popular legislative proposal, the Constitution states certain conditions which must be fulfilled for the information of the Chambers. First of all, the legislative initiative must comply with the same legal technical requirements, namely the form requested for bills. Then, Art 74 Para 1 of the Constitution requires the fulfilment of the following conditions: the initiative shall belong exclusively to citizens entitled to vote; the initiative must originate from at least 100.000 citizens; the citizens who exercise their right to a legislative initiative must belong to at least one quarter of the country's counties, while, in each of those counties or the Municipality of Bucharest, at least 5,000 signatures should be registered in support of such initiative; the object of the initiative must not touch on matters concerning taxation, international affairs, amnesty or pardon, as stated by Art 74 Para 2 of the Constitution. The verification of the compliance with the conditions for the legislative initiative by citizens shall be performed by the Constitutional Court.

Beyond the constitutional provisions in this area, the means of performing the legislative initiative by citizens is detailed by the Law No 189/1999 concerning the exercise of legislative initiative by citizens (republished in the Official Gazette No 516 of 8 June 2004). Thus, the legislative proposal which is the object of the legislative

[1] Constanța Călinoiu and Victor Duculescu, *Drept parlamentar,* 2nd Edition (Bucharest: Lumina Lex, 2009), 211-212.

initiative shall be drafted by a committee of initiative in the form requested for bills and shall be accompanied by a recitals signed by all the committee's members. After the approval of the legislative proposal by the Legislative Council, it shall be published in the Official Gazette of Romania. Up next, the proposal shall be registered in the competent Chamber of the Parliament.

Not least, regarding the legislative proposal, either it originates from MPs, or from the citizens, it cannot refer to matters representing the exclusive object of the legislative initiative of the Government, namely the drafting by the Government and the approval from the Parliament of the state budget and of the state social security budget, according to Art 138 Para 2 of the Constitution, which also refers to the rectifying laws and the approval of the Parliament for the measures stated by Art 93 of the Constitution.

2. THE PERFORMANCE OF THE RIGHT TO LEGISLATIVE INITIATIVE IN OTHER EUROPEAN STATES

In France, similar to our legal system, the legislative prerogative shall be divided between the Parliament and the Government.

The first stage of the legislative procedure is represented by the legislative initiative, which belongs to the MPs and Government members. The Government has the possibility to introduce to any of the Chambers a bill. Also, the MPs, either individual, or in groups, representing a certain parliamentarian group, may introduce any bill.

Also in France, most bills are initiated by the Government, which has the possibility stated by Art 44 of the Constitution to oppose the introduction by the MPs of a legislative proposal or of certain amendments exceeding the area of the law established by Art 34 of the Constitution. If the Government would oppose a proposal initiated by the MPs, based on Art 34, and the President of the interested Chamber would challenge the Government's position, the Constitutional Council has the ability to rule upon the divergence.

Regarding the performance of the right to legislative initiative in Spain, we mention that a different chapter of the Spanish

Constitution (Art 81-92) is dedicated for the legislative procedure[1]. The Spanish doctrine[2] differentiates between the ordinary legislative procedure and the exceptional procedures, similar to our national law. Regarding the ordinary procedure, three phases have been identified: the legislative initiative, the debate and the adoption of the bill or the legislative proposal, the promulgation and the publication of the law.

According to Art 87 of the fundamental law, the legislative initiative belongs to the Government, the Congress and the Senate, in accordance with the Constitution and the Standing Orders of the Houses, Assemblies of Self-governing Communities.

The Assemblies of Self-governing Communities may request the Government to adopt a bill or may refer a non-governmental bill to the Bureau of Congress and delegate a maximum of three Assembly members to defend it.

Also, an organic act shall lay down the manner and the requirements of the popular initiative for submission of non-governmental bills. In any case, no less than 500.000 authenticated signatures shall be required. This initiative shall not be allowed on matters concerning organic acts, taxation, international affairs or the prerogative of pardon.

In Italy, the Parliament is formed by the Chamber of Deputies and the Senate of the Republic and has as main attributions, similar to the Romanian Parliament, the legislative function performed in common by both chambers and the control over the executive power.

The legislative procedure is initiated, according to Art 71 of the Constitution, by the performance of the right to legislative initiative which belongs to the Government, to each member of the Parliament and to those entities and organisms to which this prerogative was offered by a constitutional law. The people performs the legislative initiative by introducing a bill, drafted by sections and signed by at least 50.000 citizens[3].

The constitution does not establish an area of the law, which

[1] For an analysis of the concept, Maria Asunción García Martínez, *El procedimiento legislative* (Madrid: Publicaciones del Congreso de los Diputados, 1987), 17-22.
[2] Fernando Santaolalla López, *Derecho Constitucional* (Madrid: Dykinson S.L. 2004), 312.
[3] Ramona Duminică, *Activitatea de legiferare după integrarea în Uniunea Europeană. Analiză a tehnicii şi procedurii legislative* (Bucharest: University Press, 2015), 247-250.

means that the Parliament may adopt laws in every area of social life. Therefore, the Parliament adopts three types of laws: constitutional, organic and ordinary.

From Art 72 of the Constitution and the Parliamentary Regulations three types of legislative procedures are resulted[1]: a normal procedure, a simplified procedure and a joint simplified procedure.

CONCLUSIONS

From the comparison of the Romanian, Italian, Spanish and French legal systems, it results that the legislative initiatives introduced by MPs are in all the analyzed legislations analyzed are much smaller in number, but also qualitatively. Unlike the Parliament, the Government has counselors and experts, having the possibility to conduct specialized studies which allows an easiest fulfilment of the legislative technical requirements. Regarding this aspect, the doctrine[2] has stated that "(…) there is a constant concern, at the level of the European states for the improvement of the conditions referring to the performance of the right to the parliamentary legislative initiative", considering that generally the legislative function is seen as an expression, as a direct manifestation of the people's sovereignty and is particularized by the fact that the state establishes mandatory rules of general behavior which can be fulfilled, if necessary, using the coercive force and is primarily exercised by the Parliament. For instance, in France, with the opportunity of the constitutional revision in 2008, Art 48 regarding the establishment of the agenda was modified. Regarding this modification, it has been mentioned that "it is likely to automatically involve the growth of the percentage for legislative proposals turned into laws in the ensemble of the laws adopted by the Parliament"[3].

Regarding our state, currently, the preliminary evaluation is not mandatory for the legislative initiatives of the MPs and for those

[1] A. Varga, *Constituţionalitatea procesului legislativ* (Bucharest: Hamangiu, 2007), 133-134.

[2] Mihaela Ciochină, "Aspecte teoretice şi practice privind dreptul de iniţiativă legislativă al parlamentarilor", in *Buletin de informare legislativă*, No 1 (2012): 7.

[3] Xavier Vandendriessche, „Une revalorisation parlementaire à principes constitutionnels constants", *JCP, La semaine juridique* No 31-35 (2008): 41-42.

originating from the citizens, according to Art 7 Para 6 of the Law No 24/2000 on the legislative technique.

This is why we consider that such compulsoriness, doubled by a control of the compliance with the obligations for the initiators of such a bill shall ease the verification of the need to draft a new norm, in time being significantly reduced the number of changes which are not necessary within the context of the active legislation. The improvement of the quality of the bills and the legislative proposals through a serious substantiation obviously leads to a diminution of the normative instability. Given all these aspects, we propose the modification of Art 7 of the Law No 24/2000 in the meaning of stating the compulsoriness of the preliminary evaluation of the impact of the new provisions and for the legislative initiatives originating from MPs or from the citizens. In the same time, the impact study which is requested only for the bills with special importance and complexity and of the projects for the approval of governmental ordinances based on a law for their approval and of the bills for which the Government has taken responsibility should be performed regardless of the nature of the future regulation.

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SHORT CONSIDERATIONS REGARDING THE NECESSITY OF ADOPTING THE COUNCIL DIRECTIVE (EU) 2016/1164 LAYING DOWN RULES AGAINST TAX AVOIDANCE PRACTICES THAT DIRECTLY AFFECT THE FUNCTIONING OF THE INTERNAL MARKET

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Abstract:

The autonomy of the European Union member states in the fiscal field must observe the provisions of the article 110 TFUE, which provide the equality of treatment between the national goods and those from the others member states. With the declared aim to protect the environment, the Romanian state has adopted a series of regulations declared, one by one, incompatibles with the European law because, in an indirect manner, they were protecting the national production of vehicles and creating discriminations between the The guarantee that the taxes are paid where the profits is generated and the restauration of fiscal equity represent, at the moment, political priorities at the international level. Base erosion and profit shifting (BEPS) represent a concern for the Organization for Economic Cooperation and Development (OECD) has developed a plan of 15 actions, entitled Action Plan on Base Erosion and Profit Shifting. These actions include: neutralize the effects of hybrid mismatch arrangements, strengthen controlled foreign company rules; limit base erosion via interest deductions and other financial payments; counter harmful tax practices more effectively, taking into account transparency and substance. The Council Directive (EU)2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market has been adopted to implement these actions in order to improve the functioning of the internal market.

Key words: *tax avoidance, corporate tax, borrowing costs, exit taxation, anti-abuse rule*

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INTRODUCTION

The freedom of movement, the movement of the tax payers, as well as the existence of certain fiscal paradises has determined both internationally, as well as European, a justified concern for the reestablishment of the trust in the fairness of the fiscal systems.

Therefore, by the end of 2012, an action plan to strengthen the fight against tax fraud and tax evasion has been set by the European Commission, establishing measures for the improvement of the administrative cooperation and the support of the existing good policy of governance, aspects related to the interaction with fiscal paradises and combating the aggressive fiscal planning, as well as other aspects[1].

For combating the cross-border fiscal fraud it has been established the need of developing new instruments by the European Commission and its Member States, given the existent framework of administrative cooperation[2], emphasizing the need to intensify the exchange of information.

In the same document, for solving the general issue of the fiscal incomes of the Member States, the Commission recommends "the adoption by Member States of a set of criteria to identify third countries not meeting minimum standards of good governance in tax matters and a 'toolbox' of measures in regard to third countries according to whether or not they comply with those standards, or are committed to comply with them. Those measures comprise the possible blacklisting of non-compliant jurisdictions and the renegotiation, suspension or conclusion of Double Tax Conventions (DTCs)"[3].

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[1] Communication from the Commission to the European Parliament and the Council "An Action Plan to strengthen the fight against tax fraud and tax evasion", COM/2012/0722, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0722&from=EN accessed on 25 April 2017

[2] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax; Council Directive 2011/16/EC of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC; Council Regulation (EU) 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004.

[3] COM/2012/0722, 6,

Another recommendation of the Commission aimed the aggressive fiscal planning and the adoption of measures for the improvement of the internal market. The relocation of the quota for imposition in other European Member States or in other third countries, generated by the inconsistencies between the national legislations in the fiscal area, represents an aggressive fiscal planning, in contradiction with the concept of social responsibility of the enterprises[1]. In order to solve the issue of the double non-taxation it is recommended that in the conventions regarding this matter to be included a specific clause.

1. THE BEPS PROJECT (EROSION OF THE TAXATION BASE AND THE TRANSFER OF PROFITS)

For the same purpose of combating the aggressive fiscal planning, the Organisation for Economic Co-operation and Development (OECD) has developed the BEPS (Base Erosion and Profit Shifting)[2]. Thus, in February 2013, the OECD has presented the report "Addressing Base Erosion and Profit Shifting" analysing the aspects generating the erosion of the tax base erosion and profit sharing, and in July 2013 has drafted a plan titled "Action Plan on Base Erosion and Profit Shifting", comprising 15 actions:

- Action 1: *Address the tax challenges of the digital economy*

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http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52012DC0722&from=EN

[1] The social responsibility of the companies generates "the responsibility of the companies for their impact in society". The compliance with the legislation into force and the collective agreements concluded between different social partners represents an essential condition for the fulfillment of such responsibility. In order to fully comply with the social responsibilities, the companies must have a procedure integrating the social, ethical, environmental concerns, those related to human rights and consumer's protection in their business activities and strategy, in close collaboration with the interested parties, having as purpose: to stimulate the establishment of common values for the owners/shareholders, for other interested parties and for society; to identify, prevent and mitigate the possible negative effects they can have;
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A renewed EU strategy 2011-14 for Corporate Social Responsibility" – COM (2011) 681 final of 25 October 2011, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0681:FIN

[2] Romania joined the BEPS by sending its agreement to participate on 7th June 2016, see in this regard http://sgg.gov.ro/new/wp-content/uploads/2017/03/EM.pdf

- Action 2: *Neutralise the effects of hybrid mismatch arrangements*
- Action 3: *Strengthen the controlled foreign company rules* ("CFC")
- Action 4: *Limit base erosion via interest deductions and other financial payments*
- Action 5: *Counter harmful tax practices more effectively, taking into account transparency and substance*
- Action 6: *Prevent treaty abuse*
- Action 7: *Prevent the artificial avoidance of the Permanent Establishment status ("PE")*
- Action 8: *Assure that transfer pricing outcomes are in line with value creation: Intangibles*
- Action 9: *Risks and capital*
- Action 10: *Other high-risk transactions*
- Action 11: *Establish methodologies to collect and analyse data on BEPS and the actions to address it*
- Action 12: *Require taxpayers to disclose their aggressive tax planning arrangements*
- Action 13: *Re-examine transfer pricing documentation*
- Action 14: *Make dispute resolution mechanisms more effective*
- Action 15: *Develop a multilateral instrument*

For these 15 actions mentioned by the BEPS, final reports have been published in October 2015.

At the level of the European Union, it has been considered as necessary the application of the results of the actions performed by the OECD against the BEPS for combating tax evasion, the directive being considered as the best instrument for this purpose.

2. COUNCIL DIRECTIVE (EU) 2016/1164 LAYING DOWN RULES AGAINST TAX AVOIDANCE PRACTICES THAT DIRECTLY AFFECT THE FUNCTIONING OF THE INTERNAL MARKET

The Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market shall be applicable to all taxpayers that are subject to corporate tax in one or more Member State, including for the permanent

establishments from one or more Member States for the entities with fiscal residence in a third state.

The measures against the tax avoidance practices state limitations for the interest deductibility, provisions regarding the taxation at exit, a general anti-abuse provision[1], norms concerning the controlled foreign entities and norms concerning the combat of unequal treatment for hybrid elements.

The need to establish certain limitations for the interest deductibility has been determined by the practice of the entities which, for the purpose of eroding the taxation base, have gathered numerous debts and paid excessive interests. Thus, Art 4 of the Council Directive (EU) 2016/1164 states that "*exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA)*".

Shall be considered taxpayer:

a) an entity which is permitted or required to apply the rules on behalf of a group, as defined according to national tax law;

b) an entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes.

In such circumstances, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and comprise the results of all its members.

The EBITDA shall be calculated by adding back to the income subject to corporate tax in the Member State of the taxpayer the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortization. Tax exempt income shall be excluded from the EBITDA of a taxpayer.

By derogation from Art 4 Para 1, the taxpayer may be given the right either to deduct the exceeding borrowing costs up to EUR 3.000.000 or to fully deduct the exceeding borrowing costs if the taxpayer is a standalone entity[2]. It is allowed for the Member States to exclude certain costs from the application of the provisions on the

[1] Ioana-Maria Costea, *Fiscalitate europeană. Note de curs,* (Bucharest: Hamangiu, 2016), 170

[2] A standalone entity means a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment.

deductibility of the exceeding costs mentioned by Para 1. We are talking about loans concluded before 17 June 2016 (but the exclusion shall not extend to any subsequent modification of such loans) and loans used to fund a long-term public infrastructure project where the project operator, borrowing costs, assets and income are all in the Union.

Where the taxpayer is a member of a consolidated group for financial accounting purposes, the taxpayer may be given the right to either fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group and subject to certain conditions expressly stated or the right to deduct exceeding borrowing costs at an amount in excess of what it would be entitled to deduct under Para 1. This higher limit to the deductibility of exceeding borrowing costs shall refer to the consolidated group for financial accounting purposes[1], establishing also the means for its calculation.

Exit taxes have the function of ensuring that where a taxpayer moves assets or its tax residence out of the tax jurisdiction of a State, that State taxes the economic value of any capital gain created in its territory even though that gain has not yet been realized at the time of the exit. A taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances:

a) a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country in so far as the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;

b) a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer;

[1] The consolidated group for financial accounting purposes consists of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of a Member State. The taxpayer may be given the right to use consolidated financial statements prepared under other accounting standards.

c) a taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State;

d) a taxpayer transfers the business carried on by its permanent establishment from a Member State to another Member State or to a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer.

The general anti-abuse rule stated by the Directive refers to not-genuine agreements, concluded with the purpose of obtaining tax advantages. It shall not be taken into consideration by a Member State in the calculation of the tax obligations of the entities. Are regarded as non-genuine the agreements that are not put into place for valid commercial reasons which reflect economic reality.

Also, the Directive state rules regarding the controlled foreign companies. Justifying these norms reside in the fact that an attempt for preventing the companies to exempt from profit sharing by transferring the profits or interest capacity between entities within a group established in states with relaxed taxation system.

In accordance to Art 7 Para 1 of the Directive, the Member State of a taxpayer shall treat an entity, or a permanent establishment of which the profits are not subject to tax or are exempt from tax in that Member State, as a controlled foreign company where the following conditions are met:

a) in the case of an entity, the taxpayer by itself, or together with its associated enterprises holds a direct or indirect participation of more than 50 percent of the voting rights, or owns directly or indirectly more than 50 percent of capital or is entitled to receive more than 50 percent of the profits of that entity; and

b) the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the corporate tax that would have been charged on the entity or permanent establishment under the applicable corporate tax system in the Member State of the taxpayer and the actual corporate tax paid on its profits by the entity or permanent establishment. In this meaning, the permanent establishment of a controlled foreign company that is not subject to tax or is exempt from tax in the jurisdiction of the controlled foreign company shall not be taken into account. Furthermore the corporate tax that would have been charged in the Member State of the taxpayer means as computed according to the rules of the Member State of the taxpayer.

In this case, the Member State of the taxpayer shall include in the tax base the non-distributed income of the entity or the income of the permanent establishment which is derived from the interest or any other income generated by financial assets; royalties or any other income generated from intellectual property; dividends and income from the disposal of shares; income from financial leasing; income from insurance, banking and other financial activities; income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value or the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage[1].

If the controlled foreign company carries on a substantive economic activity, evidences by relevant facts and circumstances, shall not be applicable the provisions regarding the inclusion in the tax base of the first category of incomes. Also, a Member State may decide to refrain from applying for an entity or a permanent establishment of an entity the same treatment as to a controlled foreign company, if in this first category of incomes is registered a maximum of a third of the incomes registered by that entity or permanent establishment.

Even if it is obvious that the adoption of the Directive is determined by the need to reestablish the fiscal equity, its transposition into the domestic legislation must take into consideration the avoidance of situations like the one which generated the request for a preliminary ruling addressed to the Court of Justice of the European Communities by a Great Britain's court[2] on 29th April 2004. The legislation of Great

[1] An arrangement shall be regarded as non-genuine to the extent that the entity or permanent establishment would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income.

[2] C-196/04 – Cadbury Schweppes and Cadbury Schweppes Overseas Commissioners of Inland Revenue, available at
http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d662aa6371a77c41769f01de998845c551.e34KaxiLc3eQc40LaxqMbN4Pax4Me0?text=&docid=63874&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=238946
accesed on 24 April 2017, in this respect, Muscalu, Vasile, „Libertatea de stabilire a societăților. Încorporarea, în asieta impozabilă a unei societăți rezidente într-un stat membru al Uniunii Europene, a beneficiilor realizate de o societate străină controlată de

Britain stated the inclusion in the tax base of a company residing and of the profits registered by its permanent establishments located in other Member States when the profits registered by the controlled foreign company are subjected to a lower taxation. The decision of the Court was that "*Art 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that controlled foreign company…carries on genuine economic activities there*".

Regarding the unequal treatment of hybrid elements, the Directive states that when they have as result a double deduction, it shall be given only in the Member State where such payment has its source.

CONCLUSION

The Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, offers a framework for the implementation of Actions 2, 3 and 4, while for Action 5 - only the part related to the substance of the trades - stated by the BEPS Plan. The term for transposing it in their national legislations for the Member States is 31st of December 2018.

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THE QUESTIONNAIRE – INVESTIGATION TECHNIQUE FOR THE LEGAL PHENOMENON

Iulia BOGHIRNEA[1]

Abstract:

The method of the specific sociological research allows the performance of certain direct investigations using the sociological surveys (for instance: the observation, description, interview, survey and questionnaire) on issues related to legal phenomena.

In this study we shall aim to analyze the questionnaire as investigation technique for the legal phenomenon due to its advantage that all participants are placed in the same psychological position and by data processing the final results are easy to be reached, thus insuring their comparison.

Key words: *investigation technique, sociological survey, questionnaire*

The French Prof Maurice Hauriou noted the fact that "a little sociology pushes you away from the law, while more sociology brings you back closer".

The specific sociological research allows the performance of certain direct investigations using the social inquiries (for instance: the observation, description, interview, survey, questionnaire) conducted on matters related to judicial phenomena. For instance: documentation requested by the legislative organs, legal expertises, investigations related to the administration of justice, the area of investigating the specific causes for the violation of the law etc[2]. The results of these sociological investigations generate lead to information and conclusions regarding the social efficiency of the judicial institutions and of the norms existing or necessary, which may have an important role in the orientation of the activity of drafting and applying the legal provisions.

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[2] Nicolae Popa, *Teoria generală a dreptului*, 2nd Edition (Bucharest: All Beck, 2005): 26; Maria-Irina Grigore–Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2014), 22

The legislator and magistrate cannot ignore the facts occurring in the social life, by isolating themselves under the "shelter" of the judicial technique because the rules of law generate numerous legal consequences for each person. This is why they must extract conclusions from the social life (to offer high importance for the sociological aspects of the law), namely to legislate and interpret or apply the law in accordance with what is useful and necessary for the society.

Thus, the social life has a decisive influence over the activity to legislate of the public authorities summoned to regulate the social relations. Sociologist Dimitrie Gusti stated that "*the legislative work must be inspired from an exact and deep knowledge of the national and social uses and from a clear perspicacity of noticing the real damages and, only after the completion of these operations, to be built by the constructive imagination of the discovery the proper legal means*"[1].

"All researches start from a problem to be investigated"[2]. Thus, the first step of the socio-legal investigation is the establishment of its theme, which has a decisive importance in the success of the initiated sociological investigation. Then, it shall advance to the second step, the pre-investigation, namely a form of investigation conducted on the field by the researcher when he is unable, just based on the information he has, to state clear research hypotheses[3]. Rodica-Mihaela Stănoiu considers that "*most often, the research hypothesis is the fruit of previous theoretical experiences, of certain explicative theories or practical experiments. In such situations, the hypothesis is deducted from the known data, the purpose of their drafting being to confirm, develop or ascertain certain theories or interpretations regarding the studied phenomenon or processes*"[4].

It must be noted the fact that it is absolutely necessary and mandatory the explicit description of the hypothesis in a sociological investigation.

[1] Dimitrie Gusti, "Modele etice. Profiluri şi medalioane etice. Personalitatea social", in *Opere*, 3rd Volume (Bucharest: Romanian Academy Press, 1971), 368
[2] Anthony Giddens, *Sociologie* (Bucharest: All, 2001), 579
[3] Sofia Popescu, *Sociologie juridică* (Bucharest: Lumina Lex, 2000), 77
[4] Rodica-Mihaela Stănoiu, *Metode şi tehnici de cercetare în criminologie* (Bucharest: Romanian Academy Press, 1981), 29

The next steps are the determination of the "*investigation's area*", namely the *population which shall be under investigation*[1] and the establishment of the samples upon which the investigation shall be applied. The area of the investigation could be wider or narrower depending on the calendar period of the investigation, the available resources and the available workforce etc.

During the acknowledgement, the technique is the substance of the method; it refers to the *system of the methodological operations*, rigorously defined and used, susceptible of new applications under the same or different conditions; the adjustment of the studied social facts, relations and processes.

The investigation technique is "*an ensemble of methodological prescriptions (rules, procedures) for an efficient action*"[2].

Depending on the subject subjected to investigation, the technique must be appropriate, and its degree of suitability being reflected by the truth about the object under investigation.

The limits of each technique applied can be overpass by the correlation and use of multiple techniques for the research of a legal phenomenon.

In legal sociology are used the following *techniques for investigation of the legal phenomenon*: *the observation, the questionnaire* and *the interview*.

Formally, the questionnaire is a cascade of "*questions more or less rigorously arranged"*[3].

In general sociology literature, the questionnaire has been defined as being "*a logical and psychological succession of written questions or images as stimuli in relation to the hypotheses of the investigation, which by administration from the operators or by self-administration determine the investigated person to have a verbal or non-verbal behaviour, which shall be recorded into writing*"[4].

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[1] Nicolae Popa, Ioan Mihailescu and Mihail-Constantin Eremia, *Sociologie juridică* (Bucharest: University of Bucharest Press, 2000), 48

[2] Aculin Cazacu and Ilie Bădescu, *Metode şi tehnici de cercetare sociologică* (Bucharest: University of Bucharest Press, 1981), 10

[3] Popa et al., *Sociologie juridică*, 55

[4] Septimiu Chelcea, *Chestionarul în investigaţia sociologică* (Bucharest: Scientific and Encyclopaedic Press, 1975), 140; Septimiu Chelcea, "Chestionarul sociologic", in Septimiu Chelcea, Ioan Mărginean and Ion Cauc, *Cercetarea sociologică* (Deva:

The questionnaire, as research technique for the legal phenomenon, has a double advantage:

a) All participants are placed in the same psychological position;

b) By data management the final result is easily reachable, thus insuring a comparison.

The questions presented by the questionnaire must be clear, precise, direct, unequivocal and easy to be understood by everybody[1].

Generally, the time necessary for questioning the subject shall be of one hour.

It is recommended that the factual questions (marital status, age, residence) be placed at the end of the questionnaire to avoid the withdrawal of the subject.

Concerning the quality of the data received, it shall depend on:

- ✓ The quality of the questions and the means of establishing the questionnaire; thus, for the use of terms specific to legal terminology, to be used "explicative periphrases or descriptive examples"[2], for each word used to be understood by every subject, and all of them to understand the question in the same way. For instance: will, offence etc.;
- ✓ The quality of the questions shall not harm the interests of the subject, because this would lead to the distortion of the answers;
- ✓ The theme of the investigation shall not generate a possible feeling of incapacity or inefficiency of the knowledge necessary to answer all questions;
- ✓ The text of the questions, the accuracy of the legal language, the adjustment of the questions with the aimed purposes, the order of words and questions, the length and size of the questionnaire[3] etc.;
- ✓ The number of questions to be acceptable in order to maintain the focused attention of the subject and of the processor.

The literature has classified the questionnaire in:

a) ***Structural questionnaires –non-structural questionnaires***

Destin, 1988), 180 apud. Maria-Irina Grigore–Rădulescu, *Teoria generală a dreptului*, 22

[1] Ştefan Deaconu, *Sociologie juridică* (Bucharest: University of Bucharest Press, 1981), 65

[2] Nicolae Popa, *Prelegeri de sociologie juridică* (Bucharest: University of Bucharest Press, 2000), 226

[3] Popa et al., *Sociologie juridică, 57*

- *Structural questionnaire* refers to a succession of questions with fixed, pre-established answers;
- *Non-structural questionnaire* refers to free questions, with no fixed alternatives.

b) ***Special questionnaires – "omnibus"***[1]

- The *questionnaires are special* if they refer to a single theme, a special one;
- The *questionnaires are "omnibus"* if they refer to simultaneously investigate more themes, because it allows surprising "the interaction and complex conditioning of the phenomena".

c) ***Questionaires with closed questions – with open questions – with mixed questions***

- The questionnaires have *closed questions* if they limit the answers of the subject to a single proposal offered by the questionnaire and offers clear answers. These are easy to statistically interpret, but have a series of disadvantages: generate formal answers, do not leave room for interpretation and do not allow in-depth knowledge of the motivations;
- The questionnaires have *opened questions* if it is aimed a verification of the knowledge of the subjects, but have the disadvantage of easing the subjectivity and are less appropriate for the statistical approach;
- The questionnaires have *mixed questions* when the two types above mentioned are combined. These questions are mostly used in surveys.

The questionnaire, as main means for collecting information, has been applied during the sociological investigation held in Covasna County, titled "*Knowing the law – object for sociological investigation*", initiated by Prof PhD Ladislau Lorincz[2]. The research being experimental, it has been selected as theme for investigation the nature and ensemble of the legal consequences of the presumption of knowing the law, given the fact that the presumption of knowing the law has a

[1] Idem.
[2] Ladislau Lorincz, „Cunoașterea legii – obiect de investigație sociologică" in *Revista Studii şi Cercetări Juridice* 4 (1971): 609-612

special importance for the achievement of the specific functions of the state[1].

Prof PhD Lorincz states in his study that during the establishment of the questions important matters for the performance of the study have been clarified: "*First of all, it has been extremely difficult to select a number too large of questions from the main areas of the law, based on which to approximate the degree and level of knowledge of the law. Secondly, the questions had to be drafted in a language corresponding to a medium level of legal knowledge by the general population, to the legal culture and capacity of the people. A questionnaire above or below the general level could have not provided relevant results, useful for the interpretation*".

A total number of 61 questions have been selected, of which 8 questions were from the constitutional and administrative law, 6 from the family and civil law, 13 from the area of the criminal law, 10 from the area of labour relations. It was necessary for this number to not be that large in order to "*not cause a long effort generating fatigue or the rush of the subjects*".

For the easy fill up and during a reasonable period of time of the questionnaire by the subject, for each question were identified few possible answers, leaving the subject to underline the version he considered as correct.

The questionnaire did not indicate the name of the subjects in order to spread certain distrust for the investigation.

Headline with the institutions under whose auspices the investigation was conducted: the Romanian Academy for Socio-Political Education and the Legal Research Institute of Romanian Academy, being visible and having underlined the fact that the data are used only for scientific research.

For the use of the questionnaire, three means have been used, depending on the preferences of the sample group[2].

Thus, in the urban areas (factories) the investigation was conducted in groups, by the partial use of the interview. Each subject received a questionnaire, after which the investigator proceeded to the reading of each question, explaining and clarifying the meanings if he considered as necessary or if the subjects requested supplementary

[1] Lorincz, „Cunoaşterea legii – obiect de investigaţie sociologică", 607
[2] Lorincz, „Cunoaşterea legii – obiect de investigaţie sociologică", 609-612

clarifications in order to provide a more accurate answer for the questions. After that, each subject filled in the answer.

In the rural areas, a different method has been applied, in the meaning that the investigation was conducted individually, as a personal interview, the questionnaires being given to the subjects. They have listened to the questions, after that proceeding to underline the preferred answer or indicating it to the investigator, who proceeded to the underline.

For a group of intellectuals, technicians, employees of the cooperation, the questionnaires were delivered and filled up personally, by each of the subjects.

This investigation proved that combining the questionnaire with the interview proved beneficial for fulfilling the objectives.

CONCLUSIONS

In general, the legal methodology, and in particular the sociological method is "a science of the means for knowing the truth"[1].

The researcher must analyze and interpret the data/material gathered after the investigation of the legal phenomenon. After the analysis of the results and the statistical processing, the researchers must determine if the hypothesis from which they started is correct, namely if is confirmed by the data received, or, on the contrary, if it is infirmed.

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PUBLIC ADMINISTRATION'S ETHICS AND ITS MISSION IN TODAY'S EUROPE

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Abstract:

Today we are forced to see a special Europe, whom political interest and action start to change the long principles of law. In fact, we can observe somehow politicians acting in their own way, using all their powers, to create and enforce a position above any legal principle and legal norm. As always, public administration must implement the new laws adopted by politicians. In the same time, citizens are not satisfied with political actions and in the last few months they start to protest. In this context, where is the public administration's mission and its ethics? To these questions we try to find a brief answer.

Key words:

Public administration, ethics, mission, politicians, citizens, protests.

INTRODUCTION

This century is influenced by the latest technological developments, like in no other time of history. In this paradigm, there are a lot of new ideas, new styles of debating and for sure, new questions about the relation between human behavior and the standards of better life.

The standard for better life was more or less something national, without many influences from abroad. But the development of printing, televisions and finally internet helps normal people to discover more realities between the real life on other states and – as normal consequence – to compare their states with the ones which are more developed. Is a complex equation, where the economy is mixed with a good level of administration and with good practices on governance.

In this complete world transformation, we should accept that some old concepts will be replaced by some new ones and for sure some other

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will be modified. States institutions are also a part of this fundamental change, with ethics as one of the key-problems.

1. Ethics has been a very important topic for study on human behavior, since every other form of analysis of human action, whether economic, psychological, sociological, anthropological, or historical, can be subjected to an ethical analysis.

Ethics is the name now given to that most general study of the rightness and wrongness of human actions, including not only the determination of whether particular acts are morally permissible but also the derivation of those theories by which such a determination may be made, as well as an analysis of the meaning of the language that is peculiar to such determinations and derivations[1].

Modern ethics is divided into normative ethics, on one hand, which involves both standard ethical theory and its application to particular actions and classes of actions, and meta-ethics, on the other hand, which examines the meaning of ethical language. From its beginnings, ethics – the more general term – has concerned itself with the human "mechanism" of morality: the faculties of the human soul and the needs, passions, and desires of the human mind and body[2].

However, ethics is the subject of many books; a simple searching on this topic will offer to us more than 10,000 results. We can find books about every segment of ethics, from the business area to medical and sport domain too. There are several scholarly journals dedicated exclusively to the subject of business ethics, not to mention dozens of textbooks and a steady of flow of titles from both academic and popular presses.

2. Is just a normal line to discover that many books analyze the relation between politics, public administration, state institutions and ethics. It is also true that the main direction of analysis is from the political sciences, because the flexibility of political strategies opposes to the more standardized practices of the public administration.

If we can compare in metaphoric way, the politic is like poetry or gym, but the public administration is like a stone – is hard to change its face and is more complicate to move.

[1] John Roth, *Ethics*, (Pasadena: Salem Press, 2005), 474.
[2] Ibidem.

Inside this line: politics – public administration – state institutions – ethics we should also remarked that the strict relation between public administration and ethics is less developed than the relation between politics and ethics.

Compared to the field of business ethics, the field of "public administration ethics," or "ethics for public servants," is woefully undeveloped. The ethics of public administration attracts only a small fraction of this concern. While there is some very new literature on "public integrity" (and in the Eastern Europe this is a daily subject)[1], the discussion tends to focus on the behavior of politicians and elected officials, somehow forgetting behavior of the public servants. Some attempts have been made to develop a general framework for the "ethics of management" or "ethics of bureaucratic organizations" that would encompass both private and public sectors.

3. People are always interested in good governance – in fact, despite the migrations for a better job inside a country or inside a continent, a lot of people goes to vote when the elections has a clear subject. Despite the small participation for the European Parliament's elections, the local elections and national ones (parliament and for president) attract a lot of people, because citizens feel the real connection between politics and their live level. If the European Parliament cannot offer a real effectiveness, the national political institutions are very "real" and "effective" by their measures.

In this new style of "compare – politics", the main values appreciated by the citizens are the results in profession, economic efficiency and morality. Internet is offering today a great platform for those three characteristics, being opposed to the control offered by the television. On Internet almost every citizen is able to "find something" about politicians; before this incredible creation sponsors of politicians tried to control the access for information about their "product" and very often they was able to do that with very good results.

Citizens increasingly use the Internet and mobile phones to get information, to discuss, to organise themselves and, if necessary, to mobilise. Romanian protests on Rosia Montana case and for the corruption legislation of 2017 is a perfect example for that: televisions blocked the access, but internet broke the barriers, with important legal

[1] In some universities from Romania, there are now special study courses about the integrity of the public administration.

consequences. Today, almost all politicians have a web page, all of them use Facebook and YouTube, all of them write blogs. Also, governments provide information by the Internet. Some ministries had a lot of "likes" on their Facebook account and the posts are largely viewed. Public communication is not a theoretic concept, but a real fact, with many effects on real life, influencing the creation of the new laws.

4. What is good governance? The answer is easy: to rule a state in such a way that offers every day more economic progress and more rule of law to every citizen, no matter the position on the national and local political hierarchy.

Economic progress is related to first two characters of successful politician: efficient in his profession and good in economic administration of state institutions and state enterprises. But those criteria are much more flexible and measurable by statistics and economic history. To compare politicians is not so complicate, and the result of this analyze of comparing people makes a good part of the electoral option.

But the moral criteria is quite strict and without flexible paradigm. Morality and ethics refer to what is right or wrong, good or bad, and thus concern values and norms about which people feel strongly because they involve serious community interests.

Ethics, in general, concern (reflection on) the moral values and norms that matter, while integrity concerns the ethics of the governance process and refers to the quality of acting in accordance with relevant moral values, norms, and rules. On this situation, we should observe that society has its own moral and its own moral requests; to ignore them can be very dangerous, because the speed of protest sharing is higher related to moral topics.

5. The relation between ethics, politics and public administration was well synthesized by Leo Hubert in a clear table[1]:

"1 a. "Decision-making ethics" concerns the moral norms and values involved in the preparation and making of decisions: which values and norms are at stake in that process and how important are, for example, legitimacy, incorruptibility, accountability, and transparency?

Here, a distinction can also be made between "decision preparation" (by administrators and advisers) and "decision-taking" (by the political and administrative elite). In both types of ethics, values and

[1] Leo Hubert, *The Integrity of Governance***,** (London: Palgrave Macmillan, 2014), 75.

norms will be present that relate to the relationship of politicians and civil servants with the environment (citizens, interest groups, lobbyists).

1 b. "Elite integrity" refers to the actual behavior of the makers and takers of the decision (politicians and top civil servants). What moral values and norms were leading in these actions and do they correspond to the relevant ethics? Or did they violate the law, applicable codes of conduct, or more informal norms, comprising an integrity violation?

When decision-makers succeed in safeguarding moral values and norms while making crucial decisions, it can be termed "grand integrity," which stands in opposition to "grand corruption." Parallel to elite integrity is "administrative integrity," which relates only to the behavior of civil servants and others involved in policy preparation.

2 a. "Implementation ethics" refers to the relevant moral values, norms, rules, and procedures for the actions and behavior of people and organizations responsible for the implementation of policies.

Implementation ethics or street-level ethics in policing, for example, clarifies what is morally acceptable in activities such as interrogation, taking prisoners, intelligence gathering, handling arrests, or reacting to suspected violence.

2 b. "Street-level integrity," the only level not concerned with the policymakers themselves, is concerned with how implementers of the policy operate, what moral values and norms are involved in their behavior, and whether these coincide with the implementation ethics."

Where is the public administration's ethics?

Public administration ethics is separated in three parts: public servants ethics; the relation between politicians and public servants; public servants and their relation with the society.

In the first part, public servants are inside their own world, with special regulations. Here we find a lot of Codes for ethics and a good part of administrative law doctrine analyzes them. In the last years these codes increased their numbers, because it is almost a consensus about the efficiency of them. Many individuals, organizations, and countries have become involved in fighting corruption and safeguarding integrity, including governmental institutions at all geographic levels, business corporations, and integrity watchdogs. As a result, many policy instruments and institutions to promote integrity have been proposed and put in practice.

The big problems appear at the relations between politicians and public servants. There will be always a wish for politicians to control strongly the public servants, because a politician is weak without the professional help of public institutions. But this wish is mostly transformed as a step for dictatorship of politicians, and there is a difficult way for public servants to protect themselves: it is a continuous hidden conflict.

On this conflict ethics is the resistance-key for public servants; despite the professional behavior, legislation can be changed, but ethics and morality is stronger than any political actions. Is true, is not much for a single public servant; it is necessary that all of them to act in the perfect moral and professional way to save their position and to resist in a proper way against any political maneuver.

The relation between public servant and society is related not only to national politics, but also with continental and universal standards for public servants. Internet helps us to inform, it also helps public servants to watch best administrative practices from other countries and offers to them reasons to implement them too. Public administration is part of society and its public servants have not only a "public mind", but also a "private" one. In this paradigm, they should not be so strong influenced by the political news from other countries and to accept new ideas only after calm analyze of the context, the facts and the involved people motivation.

CONCLUSION

Since the early 1990s (after communism collapse) there has been a surge of international efforts to calculate the performance of states in terms of various activities. New internationalized statistical activities have been perhaps most apparent in the attempts at measuring economic performance and competitiveness of the state. Similarly, whereas before ethical standards of administration were largely set in national political contexts and analyzed by academics, we are now increasingly witnessing a new rise of international standards of administrative performance.

But the relation between ethics of the public servants, public administration related to politicians and national and universal human society is still not a very important topic for discussion. Despite the fact that today all those four parts are much more connected, the analyses are

more segmented than is necessary. We hope that our text will offer a better impulse to more complex research on this important relation.

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CONSTITUTIONAL SUPREMACY AND THE PRINCIPLE OF PROPRITY OF EUROPEAN UNION LAW

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Abstract:

The relation between constitutional rules and European Union Law is construed differently, as there are several doctrinaire concepts and different case-law solutions. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of national law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules of national law, including over constitutional rules.

There are European constitutional jurisdictions to have set out they have the legal power to conduct the review of constitutionality of European Union law, incorporated into national legal order, by virtue of the principle of the Basic Law's supremacy.

This study addresses the interferences between the principle of primacy of European Union law and the principle of Constitution's supremacy with regard to doctrine and case-law pertinent to the matter.

Key words: *Principle of primacy of European Union law/ principle of Constitution's supremacy/ binding nature of European Union's legal standards/review of constitutionality of European Union's legal acts incorporated into domestic law/ Conformity of domestic law with European Union law*

I. RELATIONSHIP BETWEEN NATIONAL LAW AND EUROPEAN UNION LAW

One of European Union's major hallmarks is the existence of a system of its own made up of principles, written rules and standards established by the case-law. Therefore, clarification of relations between

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European Union law and national law is important. This issue may be resolved by resorting to a set of rules that are not laid down explicitly by the Constitutional Treaties, but they have been developed by the Court of Justice via several decisions, some of which are controversial. The constitutions of the European Union Member States comprise principle-value rules as regards the relation between European Union law and national law.

In practical terms, the interference between European Union law and national law occurs especially when there are contradictions between legal standards belonging to systems of law. Surely, the issue of relation between the two categories of legal standards is of interest not only in such a case, but also in cases where a court of law may enforce a standard of European Union's law. One of the most important aspects of this issue is the relation between Constitution's supremacy and, on the other hand, the principle of primacy of European Union law, as well as constitutional jurisdiction's competences with regard to enforcement and interpretation of the rules comprised by the European Union's legal acts.

We believe this issue may be analysed on two directions: 1/ relation between the domestic law (other than the constitutional one) and European Union law; 2/ relation between constitutional rules of Member States and, on the other hand, European Union law.

One of the most interesting discussions, from a case-law and doctrinal sense, involving European Union Member States' constitutional courts refers to the cooperation mechanisms to the Court of Justice of the European Union, Court of Justice of the European Union's case-law, doctrine but also national legislation deals with the principle of primacy or supremacy, precedence, pre-eminence of the European Union law over national systems of law.

The relation between constitutional rules and European Union law is construed differently, as there are several doctrinaire concepts. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of domestic law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules in the domestic law, including over constitutional rules. Some old-established European constitutional jurisdictions have reached, in certain historic moments and contexts, to the conclusion that it falls within their competence to review

the constitutionality of European Union law, incorporated into domestic legal order, by virtue of the principle of the Basic Law's supremacy (for instance the Constitutional Court of Germany).

The Court of Justice has come to develop the principle of primacy of European Union law having regard to the rule of international public law, according to which "A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty". Another source was represented by the provisions of Art. 10 of the Treaty Establishing the European Community, as amended by the Treaty of Lisbon. The rule included in the provisions of Art. 10 is still unchanged to this date and it lays down the Member States' obligation to take any and all steps necessary in order to make sure the obligations arisen from the Community's treaties and acts are complied with. The same provisions impose the negative obligation of Member States to refrain from taking any measures which would jeopardize the attainment of the Treaty's objectives. These are not the only regulations from the European Union Treaties which underlie the principle of primacy of European Union law over national law: the provisions of Art. 3, par. a) of the Treaty on European Union.

The principle of primacy and binding nature of the European Union Law was mainly constructed by case-law basis. The historical case-law of the Court of Justice of the European Union is pertinent to the matter, marking a step towards asserting this principle in relation to national law.

A significant moment is represented by the case of Costa v. Enel[1]. The Italian court submitted two applications for interpretation: one to the Italian Constitutional Court and another to the Court of Justice of the European Union. The Constitutional Court held that T.C.E. may not have normative value, except in so far as it is incorporated into national law by way of a law. At the same time, it was acknowledged that a national law may derogate from the Treaty's provisions.

The Court of Justice had a different opinion, expressed in its ruling: "These considerations show that the legal system arisen from the Treaty, independent source of law, may not be due to its special and original nature, overtaken by the domestic legal standards irrespective of their legal force, without lacking its community law characteristic and without the Community's legal foundation itself be called in question".

[1] Cause 6/64 Costa v. Enel (1964) ECR 585.

Another moment of the Court of Justice case-law's progress in this matter is represented by the cases "International H[1]"; „Simmenthal I[2] and Simmenthal II[3]". The following considerations in the decision ruled to the case Simmenthal II are pertinent to our research theme: "as such it is incompatible with the requirements inherent to the community law's nature, any provision of national legal order or any practice – legislative, administrative or judicial, which would result in diminishing the community law's effectiveness in that denying the competent judge from enforcing it, the competency to do, at the precise moment of such enforcement, all that is necessary to remove the national legal provisions which, eventually would represent an obstacle to community rules' full effectiveness. Consequently, the answer to the first question is that the national judge in charge of, as per his/her competence, enforcing the provisions of community law, is obliged to ensure full effectiveness of such rules, declining to apply, ex officio if needed, any provision to the contrary of the national legislation, even subsequent, without seeking to or expecting its previous removal by law or by any other constitutional procedure" (considerations 22 and 24 of the decision).

Moreover, the Court found that national courts have the power to compel and even punish the legislative and executive power for the purposes of guaranteeing full effectiveness of the principle of primacy of European Union law over national law[4].

This principle should be understood in the light of the rule of Community acts binding nature as well. The *regulation* has general application and is compulsory in all its elements. Unlike it, a *directive* is addressed to all Member States and is compulsory with regard to the outcome to be reached leaving the national authorities competence with regard to form and means they resort to so as to achieve the objectives set out. *Decision* is compulsory in all its elements for addressees referred to.

Direct application rule characterizing some of the European Union's law legal acts concerns the manner of understanding and application of the principle of primacy of European Union law. Regulations are directly applied since they require no transposition into

[1] Cause 11/70, Internationale H., (1970) ECR 1125.
[2] Cause 35/76, Simmenthal SpA (1976) ECR 1871.
[3] Cause 106/77, Simmenthal (1978) ECR 629.
[4] For more information, see Tudorel Ştefan and Beatrice Andreşan-Grigoriu, *Drept comunitar* (Bucureşti: C. H. Beck, 2007), 196-202.

national law. As the Court held in its case-law, Member States must not adopt national legislation whereby to implement regulations. Their provisions may be invoked by natural persons or legal entities directly before national courts. Unlike it, directive has no direct enforceability. It must always be transposed into the system of law of every Member State it is addressed to. The domestic normative act for transposing the directive is that whereby directive's substance shall enter the national system of law.

The principle of primacy of European Union law over national law is to be understood by the criterion of the possibility to directly invoke community acts before national courts. The "direct effect" phrase designates the attribute of a community normative act of creating in natural persons and legal entities' patrimony rights they can invoke directly before national courts. Without entering into details, we highlight that regulations, directives and decisions may, under certain circumstances, have direct effect[1].

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II. NATIONAL COURTS' OBLIGATION TO CONSTRUE DOMESTIC LAW IN ACCORDANCE WITH EUROPEAN UNION LAW

One of the consequences of the principle of primacy of European Union law is also national courts' obligation to construe domestic law in accordance with European Union law. In trying to ensure European Union law's effectiveness and uniformity, the Court of Justice of the European Union has laid down several means as an incentive for the states to implement directives correctly and in a timely manner and in order to ensure their enforcement. One of these means is creating the doctrine of directives' direct vertical outcome.

In so far as the provisions of a non-implemented or inadequately implemented directive may not lead to a vertical direct effect since they do not comply with the requirement to be clear enough, accurate and unconditional, in order to infer the law, the citizen seeking justice wishes to exploit before national courts, the Court has instituted the obligation, devolving upon the national judge, to construe national legislation in relation to directive's substance.

[1] Ştefan and Andreşan-Grigoriu, *Drept comunitar*, 214-234.

One of the first cases to have had this obligation expressly formulated was the case of Van Colson. The Court held, in considerations of the decision ruled, that national legislation limits the right to legal redress of persons to have been discriminated against while exercising the right to work. Such an instance is not in line with the requirements of effective transposition of Directive 76/207. As a consequence, the court of Luxembourg ruled: "It follows that, in applying national law and especially provisions of a national law specifically adopted with a view to applying Directive 76/207, the national court called upon to interpret it is required to do so, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with paragraph 3) of Art. 189 of T.C.E. (*Treaty on the Establishment of European Community*). Consequently, the Court stated: "It is for the national court to pass laws adopted with a view to applying the directive, in so far as national law gives a margin of discretion, interpretation and application in agreement with the community law's requirements".

The judgment of the European Union's Court of Justice, ruled in the case of Seda Kücükdeveci v. Swedex GmbH & Co[1] is also enlightening. The Court reiterates the existence of the principle of non-discrimination on grounds of age, as well as the role of the national court in applying it. The German legislation providing that the period of employment completed before the employee reaches the age of 25 is not taken into account for calculating the notice period is contrary to the principle of non-discrimination on grounds of age, as laid down by Directive 2000/78. In this situation, the national court should disapply, if necessary, any contrary internal regulation, even in the case of legal proceedings between private individuals.

The considerations of this judgment show that Directive 200/78 gives expression to the principle of equal treatment in the field of employment and occupation. The principle of non-discrimination on grounds of age is a general principle of Union's law. It is therefore for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to

[1] Judgment in the case C-555/07.

ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

In accordance with these conclusions of the European Union's Court of Justice, Romanian courts also, where there are to apply the provisions of a national law for implementing a directive, shall interpret it in accordance with the directive's wording and purpose. The Court's case-law in the matter shows that national court is obliged, where it has to apply a law for implementing a directive, to take account not only of such law, but of the totality of rules of national law and to interpret them in accordance with the respective directives'requirements, in order to deliver a solution compliant to the purpose pursued by the community act.

Having regard to the fact that Romanian law consists of excessive procedural formalism and more particularly of significant inconsistencies and contradictions, national courts are going to have difficulties in fulfilling this obligation.

Furthermore, the European Union's Court of Justice considers, in its case-law, this obligation of national courts to be subject to limitations. The obligation to interpret the domestic law to take account of the directive's wording and purpose exists only in so far as national law gives the court a margin of discretion. Within this meaning, the Court held the following in the case of Papino: "The principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*"[1].

We believe that every time national law confers "related jurisdiction" on the court, which excludes the existence of a margin of discretion, the national judge does not have the above-stated obligation. By way of example, this category may include some of the procedural nature normative provisions. Also, national courts may not, in criminal matters, aggravate liability in criminal law of persons committing an act falling within the provisions of a directive, if it has not been implemented in the domestic law.

[1] Judgment C-105/03.

III. BRIEF CONSIDERATIONS ON THE PRINCIPLE OF CONSTITUTION'S SUPREMACY

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (…) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy.* However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may

amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy"[1].

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a country"[2]. Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1, paragraph 5), of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n,) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State"[3].

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[1] Ion Deleanu., *Instituţii şi proceduri constituţionale - în dreptul roman şi în dreptul comparat* (Bucureşti: C. H. Beck, 2006), 221-222.

[2] Ioan Muraru and Elena Simina Tănăsescu, *Constituţia României - Comentariu pe articole* (Bucureşti: C.H.Beck, 2009), 18.

[3] Cristian Ionescu, *Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii* (Bucureşti: C.H.Beck, 2015), 48.

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law"[1].

IV. RELATION BETWEEN EUROPEAN UNION LAW AND CONSTITUTIONAL RULES

The constitutional courts in some of the Member States – above all, Germany, Italy and France- have consistently considered that the principle of primacy of European Union law does not apply in relation to the regulations contained in a constitution, since a State's Basic Law expresses national sovereignty and identity. This solution was particularly concerned with regulations on fundamental human rights and freedoms. By 1 December 2009, date on which the Treaty of Lisbon and the European Union Charter of Fundamental Rights became effective, European Union law did not include a coherent normative system whereby fundamental human rights would be guaranteed. Therefore, the courts of Member States called upon internal constitutional regulations in such cases.

Furthermore, the practice of European Union Member States' courts does not offer much examples of conflict between the European Union law's regulations and constitutional regulations. This is explained by the fact that, in the course of accession to the European Union, Member States have adapted their constitutional regulations as a principle to the requirements specific to the European Union law and they have enshrined, in one way or another, the principle of primacy of this system of law over domestic law every time there is an inconsistency

[1] Ionescu, *Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii*, 48.

between the rules of the two categories of legal standards. Needless to say, this issue remains open and is far from being resolved. It should be noted that in recent years the Constitutional Council and the State Council of France have developed the concept of "*constitutional national identity*" in their case-law. According to this principle, national courts shall always enforce the internal constitutional regulations, but also the rules laid down by usual legislation each time they lack correspondence in the European Union law.

The Romanian Constitution makes the distinction between the principle of supremacy of the Basic Law and the principle of primacy of European Union law over national law. Thus, the provisions of Article 1, par. (5) of the Constitution enshrines the principle of supremacy of the Basic Law: "Compliance with the Constitution, its supremacy and with the laws is mandatory in Romania". This principle cannot be confused with that of primacy of the European Union law over regulations contrary to the domestic laws, enshrined in Article 148 par. 2 of the Constitution.
The Constitutional Court of Romania's case-law reflects this gap.
Our constitutional court clearly makes, by decision 148 dated 16 April 2003 on the constitutionality of the legislative proposal to review the Constitution of Romania[1], the distinction between Constitution's supremacy and the principle of primacy of European Union law, stating: "The consequence of accession starts from the fact that European Union Member States have understood to place the Community acquis, European Union constitutive treaties and regulations thereof on an intermediate position between the Constitution and the other laws when it comes to mandatory European legal acts". Referring to the provisions of Art. 148 of the Constitution and in accordance with decision no. 148 dated 16 April 2003, the academic legal literature stated: "Therefore, it could be affirmed that in the domestic legal order, the legal act whereby Romania accedes to the European Union has legal force lower than the Constitution and constitutional laws, but higher than the ordinary and organic laws"[2].

[1] That was published in the Official Journal no. 317 from12 May 2003.
[2] M. Constantinescu et al., *Constituţia României revizuită - comentarii şi explicaţii* (Bucureşti: All Beck, 2004), 331; Muraru and Tănăsescu, *Constituţia României. Comentariu pe articole*, 1432-1433.

The Constitutional Court seems, in its subsequent case-law, to have waived this distinction, basing decisions only on the principle of primacy of European Union law[1].

However, the Court found, by Decision no. 1258 delivered on 8 October 2009[2], that we believe it to be of historical significance in the subsequent constitutional case-law, that an internal law whereby a European Union directive is translated into domestic law is unconstitutional. In our opinion, such a solution enshrines the principle of Constitution supremacy and the requirement of compliance with it in relation to the principle of primacy of European Union law.

By the above-mentioned number decision, the constitutional court found that provisions of Act 298/2008[3] were unconstitutional. It follows from the decision's considerations that Act no. 298/2008 was passed so as to transpose Directive 2006/24/EC of the European Parliament and of the Council on 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks into the national legislation. The Court refers to the legal regime of such community acts, emphasizing that: "(...) imposes its obligation to the European Union Member States as regards the legal solution regulated, not with regard to specific means by which this result it achieved, states having a wide margin of discretion for the purposes of adapting them for the legislation's specificity and national realities". The Court found, after having examined the content of Act 298/2008, that this normative act is liable to affect the exercise of fundamental rights or freedoms, i.e. the right to privacy and family, right to secrecy of correspondence and freedom of speech. The constitutional court holds that restricting the exercise of such rights does not comply with the requirements set forth by Art. 53 of the Romanian Constitution. Similarly, also see decision no. 17 dated 21 January 2015[4], by which the

[1] See in this regard: Decision no. 308/2006 published in the Romanian Official Journal no. 390 of 5 May 2006; Decision no. 59/2007 published in the Romanian Official Journal no. 98 of 8 February 2007; Decision no. 1042/2007 published in the Romanian Official Journal no. 12 of 8 February 2008 and Decision no. 1172/2007 published in the Romanian Official Journal no. 54 of 23 January 2008.
[2] That was published in the Romanian Official Journal no. 798 of 23 November 2009.
[3] That was published in the Romanian Official Journal no. 780 of 21 November 2008.
[4] That was published in the Romanian Official Journal no. 79 of 30 January 2015.

law on Romania's cyber security was ruled unconstitutional by our constitutional court.

Decision no. 80 of 16 February 2014[1] on the legislative proposal as regards the review of the Constitution of Romania is relevant to our research theme. With regard to interpretation of the provisions of Art. 148 on integration with the European Union, the Court notes that: "constitutional provisions are not declarative in nature, but they are binding constitutional rules without which the rule of law's existence cannot be conceivable, as set forth by Art. 1 par. 3 of the Constitution. At the same time, Basic Law represents the framework and extent to which the legislator and the other authorities may act; thus, interpretations that may be made to the legal norm should take account of this constitutional requirement as well, contained precisely in Art. 1 par. 4 of the Basic law, according to which in Romania, the respect of the Constitution and its supremacy shall be mandatory".

It is the opinion of our constitutional court that to consider the European Union law applies with no differentiation within the national legal order, not making a distinction between the Constitution and the other domestic laws is to place the Basic Law at a second level in regard to the European Union's legal order. The legitimacy of the Constitution is the will of the people itself, meaning it cannot lose its binding force, even in the hypothesis that there would be disparities between its provisions and the European ones. Moreover, the fact that Romania's accession to the European Union cannot affect Constitution's supremacy over the entire domestic legal order was stressed.

The Constitutional Court has held that binding European Union acts are rules interposed between the constitutionality's control.[2] At the same time, lack of constitutional relevance of the European rule of law, interposed between reference constitutional rules within the constitutionality control was pointed out. In this instance, the referral of the Court based on non-compliance with the provisions of Art. 148 par. 4 of the Constitution was found to be inadmissible[3]. The Court ruled by the same decision that the legal standard of the European Union law needs to

[1] That was published in the Romanian Official Journal no. 246 of 7 April 2014.
[2] See decision no. 668 of 18 May 2011, published in the Romanian Official Journal no. 487 of 8 July 2011.
[3] See decision no. 157 of 19 March 2014, Romanian Official Journal no. 296 of 23 April 2014.

fall within a certain level of *constitutional relevance*, as such that its normative content could support the possible breach of the Constitution by the national law – "the sole direct reference rule within the control as to constitutionality". The constitutional court has enshrined, just like the French Constitutional Council, the concept of "national constitutional identity", whereby it understands the relevance of constitution's supremacy every time there is a question of compliance of domestic laws with European Union acts.[1]

Another issue examined by the constitutional case-law refers to the application, within the control as to constitutionality, of the European Union Charter of fundamental rights. Our constitutional court ruled that in principle it is applicable within the control as to constitutionality, "in so far as it safeguards, guarantees and develops the constitutional provisions in respect of fundamental rights; in other words, in so far as their protection level is at least at the level of the constitutional rules in the field of human rights".[2]

Also concerning the European Union rules 'enforcement with regard to human rights within the control as to constitutionality, it has been argued that the provisions contained in an act with legal force similar to the European Union's constitutive treaties should be referenced to the provisions of Art. 148 of the Constitution, not to those contained in Art. 20 of the Basic Law, which refer to the international treaties on human rights, other than those of the European Union.[3] Our constitutional court has ruled that provisions of Art. 41 of the European Union Charter of Fundamental Rights in regard to the right to good administration may be invoked via Art. 148, not Art. 20 of the Constitution[4].

Moreover, it has been established in constitutional case-law that analysis of compliance of a constitutional right provision with the Treaty's wording on the functioning of the European Union does not fall

[1] See in that respect, Decision no. 64 of 24 February 2015, Romanian Official Journal no.286 of 28 April 2015.
[2] Decision no. 871 of 25 June 2010, Romanian Official Journal no. 433 from 28 June 2010.
[3]See in that regard, Decision no. 967 of 20 November 2012, Romanian Official Journal no. 853 of 18 December 2012 and decision no. 206 of 6 March 2012, Romanian Official Journal no. 254 of 17 April 2012.
[4] See Decision no. 12 of 22 January 2013, published in Romanian Official Journal no. 114 of 28 February 2013.

on the competence of the Constitutional Court, in light of Art. 148 of the Constitution. Such jurisdiction, i.e. to determine whether there is any contradiction between national law and treaty, is vested exclusively on the court, which also has the possibility to ask a preliminary question to the Court of Justice of the European Union. It is interesting to note that the constitutional court considers it has no jurisdiction to verify compliance of a national law provision with the wording of European Union's constitutive treaties and, if it were to assign itself such a competence, a possible conflict of interests would arise between the Constitutional Court of Romania and the European Union Court of Justice, which, at that level, is deemed inadmissible[1].

With regard to the cooperation between the Constitutional Court and the European Union Court of Justice, our constitutional court stated that the manner of application, in the case of control as to constitutionality, of decisions made by the European Union Court of Justice or formulation of preliminary questions by the Court in order to establish the content of the European rule is left to its discretion. "Such attitude takes account of the cooperation between the national constitutional court and the European one, as well as of the judicial dialogue between them, without calling into question matters relating to setting a hierarchy between these courts"[2].

CONCLUSION

We believe that the principle of pre-eminence or primacy of the law is not equivalent to the principle of supremacy of a rule of law, since *supremacy* is a trait belonging to the domestic constitutional rules. For that purpose, provisions of Art. 148 par. 2 of the Constitution of Romania enshrines *primacy*, not supremacy of the European Union's constitutive treaties provisions, as well as the other community regulations that are binding towards the provisions to the contrary from the domestic legislation. Therefore, there is not only a difference as to terminology between the terms "primacy" or "pre-eminence" on the one hand, and

[1] See in that regard, Decision no. 1249 of 7 October 2010, Romanian Official Journal no. 764 of 16 November 20 10 and Decision no. 137 of 25 February 2010 Romanian Official Journal no. 182 of 22 March 2010.
[2] See Decision no. 668 of 18 May 2011, published in the Romanian Official Journal no. 487 of 8 July 2011.

"supremacy" on the other hand, but also one of legal nature, which could impact the relation between European Union law and national law.

We claim that there is a juridical type of difference between the principle of primacy of European Union law and the principle of Constitution's supremacy. The supremacy of a state's Basic Law essentially expresses its higher legal force over any legal act which produces effects and applies on the territory of the state. The outcome of the principle of supremacy of a constitution is the compliance of the whole domestic law with the Basic Law's rules. To consider that on the territory of a state, even one member of the European Union, a rule of law contrary to the domestic constitutional regulations could produce legal effects is to limit that State's sovereignty in an impermissible manner, leading to the system of law being jeopardized, which is built on constitutional rules and principles.

Some theoretical conclusions can be drawn from the case-law analysis of our constitutional court: a) there is a judicial nature difference between the principle of Constitution's supremacy and the principle of primacy of European Union law. The first draws its legitimacy from the sovereign will of the people itself, which also holds constituent power based upon which Constitution exercises its supreme force in the national rule of law. The principle of primacy of European Union law is enshrined by the international laws to which Romania has adhered based upon the principles of national sovereignty and constitutional rules. Therefore, this principle cannot be countered against the Basic law's supremacy; b) if provisions of Art. 148 of the Constitution are enforced, the control as to constitutionality takes account of domestic law's compliance with the Constitution's rules, not with the European Union law's rules. In this regard, the Constitutional Court argued and developed the concept of "national constitutional identity"; c) European Union acts may be invoked in the procedure of control as to constitutionality in so far as they have some degree of constitutional relevance; d) European Union Charter of Fundamental Rights can be applied within the control as to constitutionality, in reference, however, to Art. 148 of the Constitution, not to provisions of Art. 20 of the Basic Law, which refer to international treaties on human rights. Such a solution is just, having regard to the fact that the provisions of Art. 148 applicable to human rights are special in nature, in relation to provisions of Art. 20 which constitutes the general rule; e) the constitutional court established that it has the power to ask the

European Union Court of Justice preliminary questions with a view to setting the European rule's content without, however, such a procedure being compulsory for the Constitutional Court. At the same time, enforcement of judgments delivered by the European Union's Court of Justice is not binding by reference to the constitutional jurisdiction.

We believe the principle of primacy of European Union law cannot aim at the constitutional rules also. One of the arguments to support this allegation is derived from the provisions of Art. 148, par. 2 of the Constitution. The constitutional rule links the due regard for the principle of primacy of community law to the "compliance with the provisions of the Act of Accession". The Accession Treaty cannot be contrary to the constitutional rules, since it couldn't have been ratified by the Parliament. The provisions of Art. 11, par. (3), of the Constitution are enlightening in this regard: "if a Treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution".

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A FEW REFLECTIONS ON THE CONCEPT OF SOCIAL VALUE

Gabriel ICHIM-RADU [1]

Abstract:

The concept of "value" has a central place in the field of Law, given the fact that Law is a normative science. A variety of definitions and interpretations have been given to this concept of "value". In the socio-human field, "value" frequently means general and abstract principles, the goals of Law. A definition of "social values" and their dynamics in the contemporary world has been given at the end of the paper.

Key words: *value, social value, social value judgements, ideal and value, personality.*

The activity of establishing legal rules assumes and imposes mainly the research of the social values which the law field intends to deepen, to promote[2].

"Value" has been given a variety of definitions and interpretations, but in the socio-human studies, the most frequent sense is that of general and abstract principles, of purposes, of ways in which people must behave and judge the situations, the events, the persons, as well as the social subjects in terms of licit-illicit, lawful-unlawful, just-unjust terms .

Such principles are: the good, the truth, the fairness, the justice, the freedom of self-development etc. Such a definition has a guiding character, the analytical disclosure of the fundamental notes of the concept of value and the capture of the relation between related concepts being very important[3].

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[2] Stark B. and Roland R. and Boyer L., *Introducere în drept*. Ed. a 3-a. (Paris, 1991), 163-165.

[3] Moraru A. *Conceptul de "valoare". Dinamica relației dintre valori, atitudini și comportament*. http//psihohipnoza 40/conceptul-devaloare-dinamica-relația… (seen 13.02.2017)

We are referring to both the social values (as main elements of the socio-cultural context) and their internalized version at the personality level.

As a confirmation of the things presented about the human relationships with the world of values, the philosopher and the ideologist I. Craiovan mentions that this relationship is not just a simple "cultural exercise" more or less optional. The world of values is actually his world, the human is a being who chooses in an inherent way. He chooses not only because he prefers to choose, but also because he is permanently and effectively in all kinds of situations where he has to choose, he strongly feels the need of an appreciative guidance, of a valuable option[1].

The more or less systematic reflection on these issues gives rise to a series of questions, says Gh. Vladutescu, the author of many philosophical works, such as: if in fact "value" represents the criterion of choice or the result of the choice itself? Which is the relation between the value meaning and the value bearer? Which is the internal structure of the value, in general (simple, homogeneous, unidimensional, composed, heterogeneous, pluri-dimensional, rational or irrational)? Which is the ontic statute or the specific mode of the values' existence (is this real or unreal, immanent or transcendental, reducible or irreducible, absolute or relative, objective or subjective)? How does the value appear, which is its genesis? Where do values take their validity from and how much do they expand? If the values are known and how they are known (emotional or intellectual-intuitive)? How many kinds of values exist (or are possible)? Which are the relations between the value areas and how are these internally organized? and others[2].

To answer these questions, we should start with the etymology of the concept of "value". The concept of "value" comes from the Latin verb "*valeo, valere*" with the meaning of to be able to, to be capable of, to be strong, to have value. The Latin verb "valeo, valere" has three meanings : to have force, power, to be healthy, to be morally strong, to be a superior human. The Latin adjective "valens - velentis" with the meaning of "powerful" was used in the Roman languages with the meaning of "courage, bravery" and in the end, it gained the meaning of "value".

[1] Craiovan I., *Finalitățile dreptului*. (București: Ed. Continent XXI, 1995), 46.
[2] Vlăduțescu Gh *Lecții de filozofie*. (București: Humanitas, 1990), 144-145.

The term of "value" in prof. P. Ilut's opinion, has a strong polysemy with totally distinct meanings starting from the meaning of "value" in an economical sense to the "national values" referring both to a national specific and also to valuable personalities[1]. Even in this last meaning, the axiological meaning (and now established in the humanities sciences) is a sensibly different one, the values meaning general and abstract principles, which guide our attitudes and behaviour, as direct or indirect determinants. Value represents the embodiment of some purposes, projects, wishes, intentions, in other words, the objectification of the human essence in products of the creative activity specific for each type of human attitude.

"Value" as phenomenon, in I. Alexandrescu's opinion, presents a tripledetermination:

a) the capitalizing act takes place at the social knowledge level;

b) human appreciation, even if it is subjective, has objective premises;

c) the value is established on certain criteria historically and socially conditioned by praxis[2]

The fundamental notes of the "value" concept are: generality and centrality in the spiritually symbolical universe of the society and in the structure of human personality, the standards of human actions (evaluative criteria), the motivational vectors, which determine and guide the human action, their strong character, intended as a subscription to " *that which is desirable*"[3].

Without the ability to count on an unique starting point, an unconditionally privileged question, a mandatory inaugural problem, the same for all orientations and thinking systems, understanding issues, as I. Craiovan points out - the notions of value are inherent, because value is

a) the most directly lived fact, a private personal experience;

b) joins, however, subjects, realities, which thus have or are values;

c) however, it seems to be something came from afar, an intangible or unaccomplishable ideal, an order above reality, an insensible land, purely spiritual[4].

[1] Iluț P., „Valori, atitudini și comportamente sociale - între asimilare și practicare", *Preuniversitaria Symposium,* ed. a 23-a, 19.03.2011. 71.
[2] Alexandrescu I., *Persoană. Personalitate. Personaje* (Iași: Junimea, 1988). 316.
[3] Iluț, „Valori, atitudini și comportamente sociale - între asimilare și practicare", 72.
[4] Craiovan I., *Finalitățile dreptului*. 47.

It is not easy to decipher the proportion between ideal and value. For philosopher P. Andrei, the ideal would be an ideal value, which, the individual enunciates under the society's influence and to whose accomplishment he aspires with all his might, value which becomes an appreciation criterion to all the other values[1]. The philosopher refers here to the highly humanist ideals, assumed by exceptional personalities, which transgress everyday life. But, usually, life ideals become known to us as a web of aspirations and wishes of individuals with the assessment of personal abilities and social development tendencies, a web which evolves on the axiological canvas of each person[2]. The ideals appear more concentrated as values and they do not have criteria functions in evaluating our own or other people's actions.

The philosophical universe of value attracts, rejects or causes reluctance, but it is unavoidable by the human being in its perpetual attempt of self-definition and "*construction*"[3]. As the value belongs to the emotional sphere of the human spirit, this cannot be included in knowledge acts but in an improper, incomplete way. Values are felt, lived, values are not theorized. There can be an endless discussion on values, values can be described, explained in a rigorous way, however, "*living the value*" is what gives value to the value. The themes, which can be approached at the theoretical level concerning values can refer to the way in which value is awakened in humans, how value's hierarchies are built, which is the social origin of certain values etc. However, all these speeches lose sight of the value as value and also of the experience associated to it. The human has many moral, religious, legal experiences which sometimes get dramatic accents, but these do not fully explain the phenomenon of value.

In conclusion, thinking about the value's concept and essence, we mention that every discussion about values, as an ideal, can be presented in three parts:

- value as a subjective experience, specific to each individual (considering the psychological side of value)
- value-as a quality associated to things and phenomena (considering the cosmological side of value)

[1] Andrei P., *Filosofia valorii.* (București: Fundația "Regele Mihai-I"), 1945. 37.
[2] Ibidem.
[3] Craiovan, *Finalitățile dreptului.* 36.

- value as a concept of maximum generality (considering the rational side of value)

Previously, we mentioned the most important concepts which value intercrosses with.

In comparison to the social rules, which are in themselves standards of the conduct, values are more general prescriptions of behaviour, being, in the same time, purposes and unreachable private moods of our existence. Social rules, even owned and practiced by the individual, seem to him more exterior and impersonal, while the values are felt more intimately.

The value also intercrosses with attitude in the version that, values are owned by individuals, but even in this position there are differences between these two concepts. An attitude refers to a system of convictions referring to an object or a specific situation, while a value refers to an unique conviction, one of big generality. Values as fundamental principles of behaviour or purposes are at individual level tens, attitudes are hundreds or even thousands.

In the same order, the distinction between *value* and *interest* is interesting. Referring to this distinction, M. Rokeach records the distinction in the following terms: "…an interest is just one of the value's manifestations and therefore, it only has few of its attributes. An interest can (…) guide the action (…) can serve to adapting, defence, knowledge and update functions of the inner-self. But interest (…) cannot be classified as an ideal way of behaviour or the last stage of existence. It would be difficult to tell that an interest is a standard or that it has the "*must*" characteristic[1].

Trying to conclude referring to the aspects that were pointed out in this short incursion, in the world of values, also including some defining notes, without referring, however, to a exhaustive presentation, we synthesize the opinions of some authors, but we mainly refer to I. Craiovan[2]:

- for apprehending the social facts generally, the human has to have a technological knowledge, meaning a conscience of the purpose and of the value;
- the acquisition of existence by the human conscience is realized through a discursive approach, the result of the act of rational knowledge, which constitutes a cognitive disclosure attempt of the world's structures "as

[1] Rokeach M., *The Nature of Human Values*. Nev-Yorc: Free Press, 1973. p. 22.
[2] Craiovan, *Finalitățile dreptului*, 50.

such" but also through a valuable attitude by means of which the human establishes meanings, gives a preferential statute to the works and actions.
- a fact becomes a value once it enters in the dynamic field of our interestsandappreciations;
- value represents a relation between "something" dignified as valuable and "somebody" able to give value, a relation between the valued object and the subject who values it. This relation has a social character as the one who values gives importance to those objects, activities or creations which, through their objective characteristics, prove to be suitable to satisfy the human needs, necessities, aspirations and they are historically and socially conditioned by practice. Thus, there is an inalienable correspondence between the characteristics of a valuable act and the humanneedsandideals.
- the act of valuing, being constituted at a social knowledge level, has the priority over the preference acts, which happen at an individual conscience level even though it is only realized through this. In other words, the act of valuing is the validated preference of a human community;
- there is a value system for each human community, the historical and social changes causing changes referring to valuation criteria and either those based on consecution and hierarchy of values and an imprinting of acertainvaluedynamic;
- there can be pointed out the existence of few general-human values, values which respond to some universal necessities (needs and aspirations) of all people, these valued (prized and desired) them and capitalized on them regardless of the historical time.
- every value has an intrinsic finality, which equates with saying that values are irreducible, not being able to be referred to a wider category. About this, Kant shows that there are three manifestations of the human soul, culture producer- the truth, the good, the beautiful- which result out of three special energies of the human spirit: the truth- from what is called the pure rationality; the good- from the practical rationality and the beautiful from the feeling. Originality and irreducibility of the values lead to preventing the superiority of rank, to preventing some temporary priorities depending on the socio-human needs, which they correspond to. The axiological approach has to emphasize the specific irreducible

function of each value in social life and in individual's life[1].
- the human creates values and creates himself through values which become the human action's coordinates and ontological determinations of the human condition. Values motivate, give direction, offer appreciation criteria, reference models and systems, valuation principles for the human action. They suggest to the individual a complex group of code-solutions which record the collective experience of the group which he belongs in, anticipates and humanizes his creation.
- values contribute to individual's cooperation, having an integrative function in society, being at the same time "yeast" in social anticipation and creativity processes.

CONCLUSIONS

In conclusion, we try to define the social values as general and abstract principles, which, guiding the attitudes, interests, necessities, the person's behaviour, appear as direct or indirect determinants. Value represents the embodiment of some purposes, projects, wishes, intentions, well, objectifying human essence in products of the creative activity for each kind of human attitude.

About the social values dynamics in today's world, referring to Romania and the Republic of Moldova, we think that we should take into consideration the fact that these countries are found in a double transition: a deep and more lasting transition from traditional to modern, even with postmodern elements, and a faster and virulent one from what was before the 90s (socialism, communism) to what it is and what continues to be now (market economy, freedom, democracy, primitive capitalism, corruption). This situation also means a strong confusion and axiological ambivalence, the meaning of traditionalism with modernism, meaning a conjunction area, of harmony but also of confusion and contradiction, probably these socio-psychological phenomenon and mechanisms are more obvious with young people, overlapping what is classically called value's crisis

[1] Stroe C., „Despre ierarhia valorilor și criteriile sale", *Revista de filosofie* 1 (1993): 26.

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CONSIDERATIONS REGARDING THE OPENING OF THE INSOLVENCY PROCEDURE IN THE REGULATION OF LAW NO. 85/2014

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Abstract:

The new regulation of the insolvency procedure brought novelties in the field of professionals that failed in trading and has transposed the new challenges regarding the way in which the insolvency procedure is opened, conducted and closed.

As regards the opening of the insolvency procedure, some novelties may be noticed that affect the requisite conditions for the manifest insolvency, but also for the imminent insolvency, regarding the content of the debtor's application initiating the proceedings, the threshold value and so on.

Moreover, Law no. 85/2014 introduces the obligation of running the procedure prior to opening the insolvency procedure, and this stage is intended to mitigate the risk for the claims that the debtor owes to the state budget.

Key words: *insolvency, debtor, creditor, opening of the procedure, application initiating the proceedings.*

INTRODUCTION

In contemporary times, insolvency is an unquestionable reality, as many merchants/professionals are subject thereto either because they fail in business, or because they choose this method in an attempt of relief from debts accruing intentionally or as a consequence of bad management.

From this perspective, one may classify insolvency as premeditatedly fraudulent or insolvency due to economic circumstances, bad management, unforeseen situations, etc.

Insolvency, as a generic name, has been the subject of three regulations since 1989: Law no. 64/1995 regarding judicial reorganization and bankruptcy[2], Law no. 85/2006 regarding insolvency

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[2] This study considers the form of the law before being repealed.

proceedings[1] and Law no. 85/2014 regarding insolvency prevention and insolvency proceedings.

The new regulation of the insolvency procedure brought novelties in the field of professionals that failed in trading and has transposed the new challenges regarding the way in which the insolvency procedure is opened, conducted and closed.

As regards the opening of the insolvency procedure, some novelties may be noticed that affect the requisite conditions for the manifest insolvency, but also for the imminent insolvency, regarding the content of the debtor's application initiating the proceedings, the threshold value and so on.

Moreover, Law no. 85/2014 introduces the obligation of running procedure prior to opening the insolvency procedure, and this stage is intended to mitigate the risk for the claims which the debtor owes to the State budget, and the mention that its provisions shall also apply to the requests filed by the liquidator appointed in the liquidation procedure provided by Law no. 31/1990, for claims other than salaries.

ABOUT OPENING THE INSOLVENCY PROCEEDINGS

As regards Law no. 64/1995, art. 31 stipulated that the proceedings shall start based on an application filed with the tribunal by the debtor or by the creditors, given that the debtor in insolvency is legally required to refer to the tribunal with an application to be subject to the legal provisions, within maximum 30 days from occurrence of the insolvency situation, whereas in case of imminent insolvency, filing an application with the tribunal is optional, a nuance resulting from the wording of para. (2) of art. 31 of Law no. 64/1995: "may refer...".

As regards the creditor's application, it may request the opening of the insolvency proceedings if it had one or more certain, liquid and payable claims against a debtor presumed in insolvency due to cessation of payments to the creditor for at least 30 days and, if these claims arose from employment relationships or from civil obligational relationships, they had to be higher than the aggregate value of 6 average salaries, established under the law and calculated as at the date of filing the application initiating the proceedings and, in all other cases, the claims had to be higher than the Lei equivalent amount of Euro 3,000, calculated

[1] This study considers the form of the law before being repealed.

as at the date of filing the application initiating the proceedings. To the extent that a creditor held both categories of claims, the total value thereof had to be higher than the aggregate value of 6 average salaries, established under the law and calculated as at the date of filing the application initiating the proceedings.

According to the provisions of Law no. 85/2006, the insolvency proceedings were initiated, according to art. 26, based on an application filed with the tribunal by the debtor or by the creditors, as well as by any other persons or institutions expressly provided by law. Just like in Law no. 64/1995, the debtor had the obligation to refer to the tribunal with an application to be subject to the legal provisions, within maximum 30 days from occurrence of the insolvency situation, if they are in such situation and only the option to file such application in the case of imminent insolvency.

As regards the creditor's application, according to art. 31 of Law no. 85/2006, they may request the opening of proceedings against a debtor presumed to be in insolvency by way of an application initiating proceedings. Moreover, the creditor had to comply with the provisions of art. 3 pt. 1 letter a) as well, corroborated with art. 3 pt. 12 of Law no. 85/2006, according to which the creditor should have a certain, liquid and payable claim, which is older than 90 days since the due date and higher than Lei 45,000 or 6 gross average salaries in case of employees.

Analysis of the text of art. 31 shows that a creditor may file an application to open insolvency proceedings against the debtor only if it considers presumed insolvency, as the lawmaker excludes the possibility of accessing an application on imminent insolvency. As defined in art. 3 pt. 1 letter b) of Law no. 85/2006, insolvency was imminent when it was proved that the debtor was not able to pay the payable debts incurred on the due date, with the funds available on the due date.

From this perspective, it is doubtless that the debtor is the first one entitled to file an application for imminent insolvency, whereas it is the one who must know best its activity and prospects. Thus, if the debtor considers that its activity has no chance to succeed and cannot be maintained for the future, it shall file an application for imminent insolvency and justify in its content that it will not be able to fulfil the obligations undertaken on the due date.

On the other hand, there is no impediment that, based on information that can be proved in court, one or more creditors may file an

application for opening the imminent insolvency proceedings, to the extent that they consider that, on the due date, the debtor will not be able to fulfil its obligations. To prove the imminent insolvency situation, the creditor may use the possibility to require the debtor to submit accounting records, account statements, final or partial financial statements, balance sheets and any other documents that could prove such inability to pay.

Therefore, the apparent limitation that law would establish seems, on the one hand, unjustified, and on the other hand, inconsistent with art. 26 of the law, which acknowledges the capacity to file the application both for the creditors and for the debtor, without making any distinction according to the types of insolvency, namely imminent or presumed.

The new regulation, Law no. 85/2014, takes most of the provisions of the previous normative acts, and stipulates in art. 65 that the proceedings start based on an application filed with the tribunal by the debtor, by one or more creditors, or by the persons or institutions expressly provided by law.

It also maintains the debtor's obligation to file the application for insolvency within maximum 30 days from the occurrence of insolvency.

A new element contained in Law no. 85/2014 is the obligation to attach to the application submitted to the court the proof of notification to the competent tax authority of the intention to open insolvency proceedings. There is no mention of any penalty for failure to submit this prior notice and the court may not order any civil procedural penalty contained in art. 200 of the Civil Procedure Code, as art. 66 para. (10) of Law no. 85/2014 shows that the debtor's application shall be heard urgently, within 10 days, in the council chamber, without summoning the parties and, by exception from the provisions of art. 200 of the Civil Procedure Code, the insolvency judge shall set the judgment date in the council chamber, within 10 days from submission, even if the application does not meet all legal requirements and not all documents are filed.

Doctrine[1] proposes the penalty of rejecting the application initiating the proceedings or lapse of the right to propose a reorganization plan. As regards the penalty of lapse of the right to propose a reorganization plan if there is no proof of notification to the competent tax authority of the intention to open the insolvency proceedings, I consider this is not

[1] Stanciu D. Cărpenaru, Mihai Hotcă and Vasile Nemeș, *Codul insolvenței comentat* (Bucharest: Universul Juridic, 2014), 205.

necessary, as this omission has no influence on the possibility of reorganization.

As regards the penalty of rejecting the application, such penalty could be justified only to the extent that this notice to the competent tax authority would be considered a preliminary procedure and the provisions of art. 193 para. (1) of the Civil Procedure Code would apply. According to these provisions, the court may be seized only after fulfilling a preliminary procedure, if the law expressly provides it.

The civil procedural penalty imposed for filing an application that has not gone through a preliminary procedure required by law is prematurity or inadmissibility (the application is inadmissible not because the right procedural means was not selected, but because it cannot be examined in the absence of going through the mandatory preliminary procedure).

However, it should be discussed whether it is necessary to apply these penalties or to reject the application as inadmissible or premature for failure to submit all documents required by art. 67 of Law no. 85/2014. I believe that both penalties are much too dynamic related to the purpose of the insolvency proceedings - the purpose of the law regarding procedures to prevent insolvency and insolvency proceedings is to establish a collective procedure to cover the debtor's liabilities, by offering, where possible, the chance to restore its activity. Therefore, notification to the tax authority cannot be considered purpose of the insolvency proceedings.

On the other hand, it should be mentioned that this obligation incumbent upon the debtor is an advantage created by the State for itself to start a tax inspection at the insolvent debtor or to prepare for the mandatory tax inspection required by the new regulation.

Therefore, according to art. 102 para. (1) of Law no. 85/2014, within 60 days from publishing the notification on starting the proceedings in the Bulletin of Insolvency Proceedings, tax inspection authorities shall carry out the tax inspection and draw up the tax inspection report, according to the provisions of the Government Emergency Ordinance no. 92/2003 on the Tax Procedure Code, republished, as amended and supplemented.

This tax inspection is mandatory whereas, most of the times, there are major differences between statements recorded by the taxpayer debtor and the activity carried out by the same. These new provisions, which are

special and preferential for the State, are intended to ensure, to some extent, preservation of the State's possibilities of joining the list of creditors and recovering the amounts owed to the budget.

In this regard, the insolvency law mentions that, by the deadlines set by the insolvency judge, budgetary creditors shall join the list of creditors with the amounts resulting from the debtor's statements and, within 60 days from publishing the notification regarding opening of the insolvency proceedings in the Bulletin of Insolvency Proceedings, shall carry out a tax inspection to reveal the actual amounts owed to the budget, for recording them in the debt.

For this purpose, the law considers that the budgetary claims established by a tax inspection report drawn up after opening the proceedings, but which covers the debtor's previous activity, are also claims prior to opening the proceedings.

Therefore, budgetary creditors shall file the claim within the period provided by art. 100 para. (1) letter b), and, within 60 days from publishing the notification regarding opening of the insolvency proceedings in the Bulletin of Insolvency Proceedings, shall file a supplement to the initial claim, where applicable, to the extent that any differences have resulted from the inspection.

Considering all these arguments, a discussion on these privileges granted by the law to the State, in terms of the insolvency principles, would be necessary: the principle of equality of creditors of the same rank. It could be asserted that the law does not offer the other creditors as well the possibility that the State has, namely to record a claim provisionally and then change it according to an inspection report drawn up at the debtor, which might show differences.

The explanation would be that, usually, the claims of the other creditors have a much higher degree of certainty than budgetary claims that are established, in the first instance, based on the debtor's unilateral statements, statement that may not reflect reality. The reliability of its statements can only be established after carrying out an actual inspection at the debtor and checking its situation, otherwise it is completely justified to adjust budgetary claims according to findings.

Nevertheless, there are provisions that could be interpreted as preferential for the other creditors as well, such as claims not yet due or conditional which, according to art. 102 para. (4) of the law, will be admitted to the list of creditors and entitled to participate in distributions

of amounts. However, claims that are still conditional at the registration date of the final report shall not participate in the last distribution and the treatment is similar for claims not yet due.

Unfortunately, the current regulation takes over the defective wording of Law no. 85/2006 in that art. 70 shows that any creditor entitled to request the opening of insolvency proceedings may file an application to open proceedings against a debtor presumed to be insolvent. It should be noted that the wording "against a debtor presumed to be insolvent" leads us to a limitation of possibilities for the creditor, which would not have access to an application for opening the imminent insolvency proceedings as well.

As previously shown, I consider that the text should be interpreted extensively, thus enabling the possibility that a creditor could file a claim against a debtor on which it has information, which can be proved, that it could not pay the obligations incurred on the due date.

Another issue that may raise discussions is the general applicability of the threshold value provided by the new insolvency law.

According to the provisions of art. 5 para. (1) pt. 72 of Law no. 85/2014, the threshold value is the minimum amount of the claim, so that the application for opening the insolvency proceedings could be filed. The threshold value is Lei 40,000 both for creditors and for the debtor, including for applications filed by the liquidator appointed in the liquidation procedure provided by Law no. 31/1990, for claims other than salaries, whereas for employees, it shall be 6 average gross salaries/employee.

The insolvency proceedings may be initiated, as we have shown, either by application filed by the creditors, or by application filed by the debtor. In addition to these two main methods to initiate the insolvency proceedings, Law no. 31/1990 also provides for a third way, in subsidiary, as a result of judicial liquidation.

Thus, according to art. 237 of Law no. 31/1990, upon the request of any interested person, as well as of the National Trade Registry Office, the tribunal may order dissolution of the company if: the company no longer has statutory bodies or they can no longer meet; the shareholders have disappeared or have no known domicile or known residence; the requirements regarding the registered office are no longer met, including as a result of expiry of the document attesting the right to use the premises intended as registered office or transfer of the right of use or

ownership to the premises intended as registered office; the company's activity has ceased or the activity has not been resumed after the temporary inactivity period, notified to the tax authorities and registered with the Trade Register, a period that may not exceed 3 years from registration with the Trade Registry; the company has not supplemented its share capital, under the law; the company has not filed its annual financial statements and, as the case may be, the annual consolidated financial statements, as well as the accounting reports to the territorial units of the Ministry of Public Finance, within the period provided by law, if the delay exceeds 60 business days; the company has not filed with the territorial units of the Ministry of Public Finance, within the period provided by law, the statement that it has not carried out activity since incorporation, if the delay exceeds 60 business days.

Within 60 days from registration of the dissolution mention with the Trade Registry, the liquidators shall be appointed, under the conditions of art. 262, and art. 264 of Law no. 31/1990.

Also, within 60 days from appointment, the liquidator must file a report on the economic situation of the company with the Trade Registry Office, for mentioning in the Trade Registry. If, according to this report, the debtor meets the requirements to open the simplified insolvency proceedings, the liquidator is required to request the opening of such proceedings within 15 days from submission of the report.

The question that arises is how can the liquidator know that the debtor's total debts are above the threshold value if no accounting documents are delivered to them, if the administrator cannot be found or if the registered/professional office no longer exists or no longer corresponds to the address in the Trade Registry.

Of course, under these circumstances, the liquidator cannot possibly be aware of the situation of the debtor's assets and, therefore, cannot prove the existence of debts exceeding the threshold value of Lei 45,000.

As it is not possible to prove the existence of certain, liquid and payable debts, in excess of Lei 45,000 and older than 60 days, the liquidator's application shall be rejected by the court of law for the reason of not meeting the requirements under the law.

I consider that, taking into account the circumstances of company dissolution, most of the times as a result of inactivity, and the objective impossibility to prove strict fulfilment of the requirements under Law no.

85/2014, it is necessary to waive the application of the provisions of art. 5 para. (1) pt. 72 of the insolvency law as regards applications filed by the liquidator appointed in the liquidation procedure provided by Law no. 31/1990.

CONCLUSION

The new regulation of insolvency is an unquestionable progress as regards this sensitive area in the life of the merchant/professional. However, like any regulation, there are issues that can be improved following analysis of the practice in that matter, which can prove the effectiveness of certain legislative solutions.

At present, we are witnessing a slowdown in the momentum of free initiative, as the number of newly incorporated companies is decreasing, which will also determine decreased cases of insolvency of professionals in the near future.

Also, the analysis should not omit the possibility to restrict access to the trading sector for persons who either have proven incompetence in the management of entrepreneurship or bad faith in participating in the trading circuit.

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THE BLOCKING POWER AND EXERCISING THE LIEN ON THE INTANGIBLE ASSETS

Iulia Alexandra BOSNEANU[1]

Abstract:

The contemporary authors observed the necessity to redefine the concept of „ detention" wishing to enlarge the field of application regarding the lien right. The result of this trend resulted in the apparition of a theory in the French doctrine which promotes the dematerialisation of this guarantee by including the good holding in a more extended notion, namely "the blocking power". The purpose of the approach was to create the premises for the application of the lien right over the intangible assets in order to respond to the current society needs for which rights over such goods represent a higher part from the patrimony of the law subjects, considering the fact that these became the derived object of a multitude of legal relations. Within this article, we propose ourselves an analysis of the French authors' arguments which support such an approach over the good holding and the observance of the convenience to transplant this theory in the domestic law by reference to the provisions of The New Civil Code

Key words: *blocking power, guarantee, fictive detention , intangible asset, lien*

The real guarantees affect by their nature some assets which become their derived object. Even if things have for sure a material existence, that is not defining to characterize them as assets, but the value, not just the economic one, which they need to have incorporated, along with the aptitude to become the object of a patrimonial right. Defining the goods in this way for a particular long time, has been accepted the existence of intangible assets. From this consideration, as long as the legal system considers them as being goods, they may be encumbered for guarantee purposes.

The hereby work has as purpose the contemporary doctrine analysis regarding the field of application of the lien from the perspective of its object as a warranty. Given the fact that it's effects imposed a

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specific way of exercise within the traditional legal literature, unanimous conditioning the lien existing and exercising by the corporality of the good which serve as its object.

However, the actual trend is to waive the idea that the detention exercised by the retainer is basically indissoluble linked to a material ownership of the good. Therefore, the French authors developed a theory, according to which the main prerogative of the retainer represents the ability to exercise a blocking power which deprives the debtor from the use of the respective encumbered good. The apparition of this concept has allowed and explained the appliance of a warranty for which the ownership is essential over certain goods which cannot be perceived from our own senses.

Taking into account these aspects, we propose ourselves, firstly, to observe the role of the material ownership of the good within the guaranty mechanism and the evolution towards abstracting this notion promoted in the French doctrine, in order for us to see later to what extent considering the legal general regime elaborated by the lawmaker allows the appliance of this theory within the Romanian law.

THE ROLE OF THE ASSET DETENTION IN THE COMMON THEORY OF THE LIEN

A part of the classical and modern legal literature considered that the holding of a good represents the basis of the lien right, reason for which, traditionally, a such guarantee right appears only in connection with a good over which a material ownership may be exercised and which nature should allow exercising the retainer's main prerogative namely refusing to release or return the detained good for guarantee purposes.[1] Therefore, it is not hard to understand the doctrine reasoning for which it constantly insists upon the fact that the respective lien might be applied only over certain tangible goods.

[1] In this sense: Stelian Ioan Vidu, *Dreptul de retenţie în raporturile juridice civile* (Bucharest: Universul Juridic, 2010), 54; Liviu Pop and Ionuț Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligaţiile* (Bucharest : Universul Juridic, 2012), 854; Henri Leon and Jean Mazeaud and François Chabas. *Leçons de droit civil, t.III Sûretés., Publicité fonciére", Vol.1, 7e ed.:*par Y.PICOD (Paris : Montchrestin, 1999), 196.

Since the beginnings of crystalizing a general theory regarding the lien, the substantiation of generally applying this guarantee mean has been understood, firstly, by a material ownership of the good which enabled the creditor to do his own justice.[1] One of the most important research regarding the substantiation of the lien right, shows that "the role of the possession may be qualified literally in this matter as it's, substance ".[2]. In support of his opinion, Derrida resumes the words of Pierre Voirin however contradicting the idea that the possession in the meaning of a material ownership just gives the occasion of a lien and seeing as its very source[3].

Among the contemporary authors who overtook this opinion, there are Mestre, Putman and Biliau, who, beyond the justifying lien right on the equity imperative, find an explanation to its legitimacy both within the ownership which is actually the material ownership of the good awarded to the creditor.[4]Also on this subject matter, other French authors have made their arguments, amongst whom, Simler and Delebecque, and according to them, the lien is totally lacking of substantiation when the creditor voluntarily dismisses the good[5].

The role which the material ownership of the respective good has within the guarantee specific mechanism of the lien, is a major one, even if it was proved not to be a substantial one, while the comminatory effect of constraining the debtor is to reach the security purpose, through pressures due to the damage generated by the good not being used. Therefore, under the conditions in which the main prerogative of the retainer represents the right to suspend the performance of his obligation to release or return the good until the payment of the debt, the blocking is obvious in the hands of the creditor, and therefore the obstruction of the

[1] Fernand Derrida. "La ‹‹dématérialisation›› du droit de reténtion*", Mélanges P. Voirin* (1967): 178-209; where the lien is shown as a private legal mean which survived a long gone era where the force was the only rule which governed the social relations.

[2] Abraham Derrida, "Recherches sur le fondement du droit de retention" (PhD diss., Alger, 1940), 88.

[3] Derrida, "Recherches sur le fondement du droit de retention"

[4] Jaques Mestre, Emmanuel Putman and Marc Billiau, *Traité de droit civil. Droit commun des sûretés réelles, sous la direction de Jacques Ghestin (*Paris : L.G.D.J, 1996), 47.

[5] Philippe Simler and Philippe Delebeque, *Les sûretés. La publicité fonciére* (Paris : Dalloz, 2004), 400.

normal performance of the attributes enjoyed by the debtor, should naturally be the lien's right essence.

In the classical view, such a paralysis of the attributes regarding the property right, may be done only in an objective manner by a concrete and material control practiced directly or indirectly, by a retainer after his due obligation of restitution, when the debtor, as an owner of a right, mostly a real one over the good, might have been entitled o exercise it.

In other words, as Jean François Durand has shown that the lien consists in the power of one person to keep a good under one's care and of which restitution is rightfully requested, but either way the holder will be entitled to oppose to this act. Therefore, according to this author,"the prerogative to refuse dispossession belongs to the one who has the good in that particular time under his respective care and in this context, the possession may be widely seen only as a condition in which it is absolutely necessary to perform a such guarantee right with such object and functioning mechanism given by the legal institution upon which it is constituted"[1].

Therefore, it was normal that only the goods with a tangible existence should make the object of a material appropriation with the modern and classical doctrine and jurisprudence billeting the exercise of the lien right only in matters of these goods and consequently manifest regarding the intangible goods as object of the lien.

In the support of the major importance of the ownership within the described mechanism by this security, the argument related to the fact that the English low to possession holds similar role with the one from the continental systems for the recognition of a lien in the benefit of the creditor, may also be brought. Moreover, to accentuate this aspect, the liens derived from the Common law, are also recognised under the name of possessory liens.[2]

To a such conclusion we might reach even if we taking into account the definitions related to the lien which are found in the German Civil Codes as well.[3]

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[1] Jean –François Durand, "Le droit de rétention" (PhD diss Paris II,1979), 182.

[2] George Iorgu and D Popesco, *Le droit de rètention en droit anglais, avec des apreçus comparatifs en droit français, droit allemand et droit suisse* (Paris : Librerie Arthur Rousseu, 1930), 29.

[3] See: art.273 from the German Civil Code and art.895 from the Swiss Civil Code.

Yet the recent doctrine[1] still criticises vehemently the classical attachment towards the material ownership of the good in its role of conditioning for exercising a lien seeing it as an erroneous extrapolating deduced from the extensive interpretation of the hypothesis in which the lawmaker recognised expressly a lien to the creditor, as happened in the case of the depository. In this way it has been shown that there is an increased risk to create the general conditions from circumstances which are explained only by the particularity of the extensively interpreted initial hypothesis and that the holding of the good can be seen only as the specific form to block the its utility.

THE EVOLUTION TOVARDS ABSTRACTING THE NOTION OF DETENTION OF THE ASSET IN THE FRANCH LAW

Staggeringly the contemporary jurisprudence, especially the French one, became more permissive in what regards the admission of practicing the lien over some intangible goods, however they are incompatible with the idea of a material apprehension due to the non-materialization which characterize them.

The opening towards a wider vision over the lien object has been encouraged by the fact that the specialty literature[2] concludes that the essence of any guarantee which encumbers a good represents its value destined to warrant the debt, while the tangibility of the object which incorporates the value lacks relevance, although the fact that a material incorporation of the value remains necessary for its legal protection, is explainable[3].

A consequence of applying the lien over the intangible goods is represented by the increased diversification of its object due to the infinite number of this type of goods deriving from their movable character. Therefore, there is a large variety of such goods over which a

[1] Augustin Aynès, *Le droit de rétention. Unitè ou pluralitè* (Paris : Economica, 2005), 53.
[2] Chaterine Verbaere, "Essai d'une théorie générale de la notion de valeur, application au droit de reténtion", *RRJ* 3 (1993) : 685 apud Aynès, *Le droit de rétention,* 64
[3] In the sense that the notion of a good does not relate with the material existence, it's corporality, but with its value and interest of the law subject to exercise a right over it. See: Anne Pelissier, *Possession et meubles incorporels* (Paris : Dalloz, 2001), 109.

lien might be exercised as commerce funds, intellectual ownership rights, receivables or negotiable titles. Regarding the object of the intellectual property rights, it has been stated that they are applied over an intangible good even when the intellectual creation which is legally protected assimilates a material existence by the fact that it receives a tangible form[1]

However, the jurisprudential vision had a staggered evolution. Therefore, firstly and traditionally, tangible goods have assimilated with the negotiable value titles which incorporate a receivable right. The evidence of the fact that the stated receivable right receives tangibility in the representing document, cannot be denied, reason for which the Romanian authors position is the same.[2] This current of assimilating for such intangible goods with a representative tangible one, generated a rich jurisprudence which admits the practice of a lien right over a file printed on magnetic tape[3] or over a work of art[4] in order to obstruct the performance of patrimonial intellectual rights. Consequently, by retaining a tangible good, may often represent the obstruction of the exercised use over an intangible good. For example, the electronic file, when the object of the retention is constituted on the support of the file but in reality the use of the data stored in its contents is blocked and which content, obviously, fails to have a material existence and presents an interest for the debtor to determine a comminatory effect even in lack of an intrinsic value. In such cases, the recognition of a lien is without mistake the result, as shown in the doctrine,[5] which regards the attachment of the intangible good towards the tangible element able to make the object of a material ownership, reason for which this type of goods have been

[1] Valeriu Stoica, *Drept civil. Drepturi reale principale* (Bucharest: C.H. Beck, 2009), 40.

[2] Gabriel Boroi and Adrian Ilie, *Comentariile Codului civil - Garanţiile personale. Privilegiile si garanţiile reale (*Bucharest: Hamangiu, 2012), 474. Likewise, see: Stoica, *Drept civil. Drepturi reale principale,* 39, where it's shown that a complete incorporation of the intangible patrimonial rights are stated in the materiality of the titles which incorporates them.

[3] Manuella Bourassin and Vincent Brémont and Marie Nöelle Jobard-Bachellier, *Droit des sûrétes 4e* ed (Paris : Sirey, 2014), 410; Pelissier, *Possession et meubles incorporels*, 76.

[4] Christophe Albiges and Marie-Pierre Dumont-Lefrand, *Droit de sûretés 5e*ed. (Paris : Dalloz, 2015), 272.

[5] Aynés, *Le droit de rétention* , 67.

rightfully qualified as mixed[1]. Therefore, practicing the lien over intangible goods may be done with an exceptional character directly by holding over their material support.[2]

We will also make reference to the fact that although the Romanian doctrine[3] sustained the fact that the lien can't be exercised over the insurance indemnity which is subrogated to the perished good just due to the non-materializing of the receivable right upon which is constituted, the French authors[4] state that the real subrogation which operates in this case represents an intellectual operation which generates a legal fiction allowing the imagination that a retainer has never lost the ownership over the tangible asset which the indemnity replaces in the insured's patrimony.

Beyond trying to confer a materiality to some intangible goods by the fact that they can gain a concrete existence by considering them as indissolubly related to a tangible good which due to this relation incorporates them, the true vision changer refers to the so called "dematerialization" lien .[5]

We initially stated that in the French literature occurred also the notion of "fictive detention" which has at its basis the lien risen from the pledge without dispossession with still a legal regulation being necessary to provide this benefit for the creditor, as happened in the case of financial instruments,[6] or credit sold vehicles[7].

Regarding this concept, the same French authors show that the basis of the lien in terms of forfeit without dispossession is found in the will of the lawmaker to create a fiction with a general applicability in this matter. The presence of a fictional lien may find its exclusive source in the law such like the power of the retainer to constrain both his debtor and its creditors, without deriving from the material ownership of a good,

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[1] Aynés, *Le droit de rétention* , 67 and Albiges and Dumont-Lefrand, *Droit de sûretés*, 272.
[2] Cécil Lisanti-Kalczyinki, *Les sûretés conventionnelles sur meubles incorporels* (Paris : Litec, 2001), 168.
[3] Vidu, *Tratat elementar de drept civil. Obligaţiile* , 122.
[4] Pelissier, *Possession et meubles incorporels,* 77.
[5] François Alt-Maes, " Une évolution vers l'abstraction: nouvelle applications de la détention", *RTD civ.* (1987): 21-50; Dominique Legeais,, *Sûretés et garanties du crédit* 9eed. (Paris : LGDJ, 2013), 437.
[6] Pellisier, *Possession et meubles incorporels* , 45.
[7] Aynés, *Le droit de rétention* , 53; Pelissier, *Possession et meubles incorporels* , 75.

but only by an assimilation under legal grounds in what regards the fictive detention and the lien which becomes its consequence, allowing the retainer to block not the good itself but only its utility[1]

But we still appreciate that such a fiction cannot be overtaken by the Romanian law because it is a issuance of the French lawmaker which has its grounds in legal regulations with the purpose of protecting some categories of creditors exposed to a higher debtor insolvability risk.

The idea of a so called fictive detention which somewhat holds the existence of some special derogative regulations, is just a step of abstracting the notion of detention which had as result the appearance of a wider blocking power notion[2].

The diminishment of the detention role within the lien mechanism, according to which the contemporary doctrine represents the result of putting the accent over the debtor constraining effect, which can also be obtained in other ways outside the effective material ownership,[3]. Therefore, while essentially the lien right is a mean of guaranty for the resented pressure on the debtor by forbidding to use the good, the relevance of the concrete way disappears and realises by blocking its utility.

Consequently, as shown in the French doctrine,[4] what is imperiously necessary to exercise the lien consists in the "paralysis of using the good" through a blocking power exercised by the creditor by which effect obstructs the access of the debtor to the good, and which circumstance produces a discomfort in terms of constraining him to perform his obligation.

The acceptance of the idea that the efficiency of the lien resides in lack of the debtor to exercise the prerogatives which his right over the good is awarded, through the conduct of his creditor[5] had as rightful consequence the qualification of the ownership as a simple manifestation of the typical lien over the tangible goods. Therefore, the new

[1] Bourassin and Brémont and Jobard-Bachellier, *Droit des sûrétes,* 419.
[2] Aynés, *Le droit de rétention*, 51; Laetitia Bougerol-Prud' Homme, *Exclusivité et garanties de paiement* (Paris : LGDJ, 2012), 113.
[3] In the sense that the ownership exercised by the retainer over a good may take other forms outside the detention - Aynés, *Le droit de rétention* , 52.
[4] Aynés, *Le droit de rétention,* .56.
[5] Bourassin and Brémont and Jobard-Bachellier, *Droit des sûrétes,* 410.

qualification of the detention is that of a simple method of a blocking power between these two with a relation for a part to the whole.[1]

Dematerializing the lien right had as a starting point a abstracted conception over the detention called „ detention power" promoted by the French Fernand Derrida[2] according to which this represents „an abstract and specific detention which is exercised over a determined good. It translates by a legal ownership which often manifests through the possibility to invoke certain prerogatives over the good. The force of the detention power is justly manifested by the possibility to materialize the legal practiced ownership, meaning that by the faculty to use and transform the known rights over the detained good, fictively, in a direct material power." Likewise, the need to confer a new meaning to detention, comes from the fact that the same author recognises the basis of the lien right as a concrete ownership exercised by the creditor over the retained good, element without which this institution is lacked of contents.[3]

Consequently, the definition of detention as an abstract power, removes any impediment regarding the intangible goods as object of the lien. This guarantee is seen by contemporary authors as being born in the use of the creditor when he has means to block the utility of the good in case of the claim is not paid.[4] Another definition of the blocking power has been given in report with blocking the utility of the good which was also given by Laetitia Bougerol Proud'Homme who shows that it relates to „a factual power over it allowing the paralysis of one or more utilities of the respective good", so the efficiency of this warrantying mean requesting the total blocking of the utility of the respective good or at least of its main utilities[5].

Regarding the French jurisprudence, we can say that there are some solutions by which the retention right is recognised over a commerce fund[6]. Therefore, The Court of Appeal from Amians, recognised a lien to the buyer with a commerce fund over the intangible elements till the return of the paid price, namely being about the

[1] Aynés, *Le droit de rétention,* 57
[2] Derrida, "La ‹‹dématérialisation›› du droit de reténtion", 181.
[3] Derrida, "La ‹‹dématérialisation›› du droit de reténtion", 181.
[4] Pelissier, *Possession et meubles incorporels,* 77.
[5] Laetitia Bougerol-Prud' Homme, *Exclusivité et garanties de paiement,* 111.
[6] The Court of Appeal Amians 11 iunie 1964, D.1965 , note by Michel Cabrillac ,apud Aynés, *Le droit de rétention,* 65.

annihilation of a sales and purchase agreement regarding to a such good. Often, the doctrine addresses such decisions especially regarding a lien right of a bank over the balance of a current account to warrant its advanced bails[1]. In another similar case, the judicial administrator of a company under reorganization, requested the bank a current account balance of the company, but the bank invoked a unavailability due to his affection in order to reimburse the receivables which the bank holds due to the generated risk procedures by commercial effects which not reached the term. The recognition of a lien in the bank benefit was denied still on the basis that this has invoked just eventual claim without doubting the possibility of retaining the current account balance, while the crediting bank has at its disposal means to obstruct the account holder from the availability of the respective balance.[2]

Once the dematerialization process has been completed, the lien by reconsidering the role of the detention within this mechanism and its inclusion in a wider blocking power concept regarding any obstacle in the way of retaining some intangible goods, it disappears. The reason is that the blocking power manifests through obstructing the normal use of the good which does not necessarily require it, however it represents the most efficient way of the blocking power by the certainty conferred to the creditor, it is just for the tangible goods.[3]

Therefore, one of the followers of the blocking power concept tried to find ways of practicing it over some intangible goods according to their main utility and the way in which the debtor reaches the realisation of his rights over these goods[4]. Analysing the way in which the debtor benefits from his prerogatives over the good is very important as long as the comminatory effect of this warranty appears due to the patrimonial discomfort (damage) resent by the debtor after paralysing his exercising right.

Consequently, the intangible goods are distributed by Aynes in goods of which utility consists in their exploitation also as goods of which utility results from their realisation. In the first category, the

[1] The Court of Appeal Dijon, 3 septembrie 1986 apud Pelissier, *Possession et meubles incorporels* , 66.
[2] The Court of Appeal Versailles, 4 iun.1993 apud. Pelissier, *Possession et meubles incorporels,* 67.
[3] Aynés, *Le droit de rétention* , 68.
[4] Aynés, *Le droit de rétention* , 68

intellectual property rights and the commerce funds are included and in the second there are receivables and financial instruments [1].

For the first category, the lien is exercised through exploitation referring to the example of the editor which has as guaranty purpose the temporary stop the publishing of a literary work.[2] We still have reserves in what regards the possibility of applying the lien in order to guaranty an obligation appeared from the editing contract in the autochthonous law considering that through the effect of this editing contract, the rights regarding the distribution and reproduction of the respective work of art, are therefore waived to the editor [3]. The same such blocking power might also have been exercised as a lien right by the owner of the platform who is deactivating a website till the payment of his services counter value.[4]

In exchange, if we speak about the debts or financial instruments, the blocking power may take the shape of a prohibition for the debtor in what regards his possibility to obtain the payment or to dispose from these financial instruments.[5] In the same way we can say about the intangible goods as receivable sand movable values which are under the care of the one who holds the necessary means to request the payment or to allow realising a bank account of movable values[6]. In order to synthetize this point of view, we can say that the intangible goods are possessed by the person who has the power to block directly and undoubtedly their performance, and the consequence of this possession is the opening of the path towards exercising a lien [7].

Still, it must be stated that despite the abovementioned ones, there are voices that support the fact that an excessive dematerialization of the lien is not recommendable, while it does not correspond to its nature which presumes the legitimate refusal in terms of returning the good.[1]

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[1] Aynés, *Le droit de rétention* , 68

[2] Aynés, *Le droit de rétention* , 70.

[3] For the definition of the editing contract, please see: Gabriel Olteanu, *Dreptul proprietății intelectuale* (Bucharest: C.H. Beck, 2008), 118.

[4] Court of Appeal Toulouse 12. October 2010, source: http://www.lexisnexis.com/fr/droit/.

[5] Aynés, *Le droit de rétention* , 71.

[6] Christian Mouly, "Raport de synthèse" - Le gage commercial, *Colloque de Deauville 1994, Rj com special issue (nov.1994)* :p.161 *apud* Aynès, *Le droit de rétention*, 77.

[7] Mouly, "Raport de synthèse" - Le gage commercial, *Colloque de Deauville 1994, Rj com special issue (*1994*)* :p.161 *apud* Aynès, *Le droit de rétention*, 77

[1] Stéphane Piedeliévre, "Domaine et efficacité du droit de rétention en cas de procédure collective", *Recueil Dalloz* (2001), 465, https://www.lextenso.fr/ ; Catherine Malecki,

Likewise, the French authors themselves criticise the awarding of a fictive lien in all cases where the creditor is the beneficiary of a pledge without dispossession in accordance with the dispositions of art. 2.286 from the Civil Code, therefore showing that between them, such a lien does not prevent the debtor to use the good and nor to alienate it. In this case, the opposability of the guarantee towards the third buyer represents the result of the pledge and the right to pursuit the asset which accompanies a such guarantee, thus never being a lien effect.[1]

It is interesting to state that in the French courts as well they have a divergent practice in this matter, with the existence of a decision by which the recognition of a lien is refused over the intangible goods as commerce funds. The case of a decision from the Cassation Court in which the commercial chamber rejected the request of a bank to return the price of some commerce funds of a company under insolvency benefiting from pledge over the ones previously mentioned after their actual sale before the opening of the insolvency procedure motivating the attribution of a fictive lien. The solution was motivated by the court in the way that the invoked article is yet applicable only for the tangible goods while the pledge over the commerce funds is governed by special regulations[2]. In a comment of this decision, the solution of the court is accompanied by the art. 2.246 p. (4) introduced in the French civil code by the law no. 2008-776 from August 4th, 2008, regarding the reform of the real guarantees and modernising the economy, might have been interpretable in the way that the fictive lien right recognised in the benefit of the creditor would have recorded a pledge without dispossession, should have been applied only over the tangible goods while the existence of a lien without exercising a detention represents an absurdity and of which appliance still needs to be obligatory limited by logic reasons[3]. To the same conclusion, other French authors however reach by interpreting the stated legal text terms. The main argument is related to the use of the term „thing" which has a widely strict meaning than the one of a „good" and obviously induces the idea of some tangible

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L'exception d'inexécuton (Paris : LGDJ, 1999), 173; Pascal Ancel, *Droit des sûretés* 7ᵉed. (Paris : Lexis Nexis, 2014), 119.

[1] Malaurie, Aynès and Aynès Pierre, *Droit des sûretés* (Paris : Lgdj, 2015), 231-232.

[2] Cass. com., 26 November . 2013, source: https://www.lextenso.fr/ .

[3] Marc Mignot, "Rejet du droit de rétention sur meuble incorporel", *Essentiel Droit bancaire* 2 (2014), https://www.lextenso.fr/.

goods. Besides that, it draws attention over the legal reference to the remittance action of the respective good.[1]

In what regards the pledge without dispossession in the system of the New Civil Code, the Romanian lawmaker has chosen to waive a such qualification of the guarantee without dispossession having as objective the tangible goods and giving in exchange an efficiency to the mortgage. Therefore, within the Romanian law system, as mentioned, the problem of a fictive lien is not on question while the effects of the mortgage ensure the security of performing the obligation without being necessary to require to a fiction which should induce the appearance of ownership exercised over the good by the creditor.

We believe that this aspect constrains very much the area of the intangible goods over which the eventual lien may be exercised in our law system. This is because in the French law, on one part it is possible to exercise such a right over the intangible goods only if they can make the object of a dispossession, and on the other part, their intangible nature does not remove the qualification as a pledge of the warranty which encumbers them [2]. Otherwise, these supports enrich the belief that at least in what regards the non-materialized financial instruments, there is no reasoning for what might have been necessary to be the object of a detention in order to be encumbered for guaranty purposes, because the intangible goods in the New Code's light are the object of a mortgage for which exercise does not require a creditor dispossession.[3]

THE NEW CIVIL CODE AND THE LIEN ON INTANGIBLE ASSETS

Trough the codification, the lawmaker expressly confined the appliance of the lien from considerations regarding its object only regarding the goods which can't be aimed in a enforcement procedure. Or under the conditions of art. 2.495 p. (1), which pretends that it might

[1] Francine Macoring-Venier, "Pas de droit de rétention fictif sur les meubles incorporels", *Bulletin Joly Entreprises en difficulté* 3 (2014) , https://www.lextenso.fr/ and Dominique Legeais , *Sûretés et garanties du crédit,* 438.

[2]Bernard Oliver Becker, "Le droit de rétention dans le gage de compte d'instruments financiers", 13-14, disponible online on: www.freewebs.com/mja-paris2/.../becker.doc

[3] For a illustrative enumeration of the goods which can be encumbered by a movable mortgage, see art. 2389 from the Civil Code.

have been the lien definition, no reference is done as respects the goods over which this guaranty should be applied by interpreting the regulation by the rule „where the law fails to make a distinction, so do we fail to make a distinction" leads to the conclusion that this warranty may encumber as well tangible or intangible goods, movable or immovable.

We believe that an express limitation for the appliance of the lien just to the sphere of tangible goods, might have been lacking of legitimate interests and contrary to the contemporary conception over this mean of guaranty. In addition, we can say that the removal of intangible goods outside the field of appliance of the lien would be a disadvantage because these represent a value in the patrimony of the debtor enabling a constraint effect over him by some missing prerogatives to such goods.

Consequently, it is obvious that together with the acceptance of the idea that the holding of a good is not indispensable for the rising of the lien, no obstacle in the way of exercising such a right over the intangible goods, fail to exist. Therefore, considering the evolution of the specialty literature as shown above[1] and according to which the essence of this mean of private justice represents the paralysis of the good's utility by exercising a blocking power which might take diverse forms, fails to be an impossibility to imagine a retention for an intangible good.

We appreciate that the reconsidering process of the ownership concept from its material, concrete and specific form by the nature of the tangible goods to the abstract idea of a „blocking power" independent from the direct contact with the good aims to produce just the indispensable comminatory effect which is the result of percentage growth in intangible goods in civil circulation Therefore, the abstracting of the detention notion was undoubtedly and absolutely necessary to be replaced with a legal blocking power[2] in order to mention the efficiency of the retention right in the new economic context.

A part of the autochthonous doctrine[1] is still kept over this subject with a conservatory tone still relating indissolubly to the lien in

[1] See above § 2

[2] François Alt-Maes, "Une évolution vers l'abstraction: nouvelle applications de la détention" , *RTD Civ.* (1987), 21-50.

[1]Paul Vasilescu, *Drept civil. Obligații* (Bucharest : Hamangiu , 2012), 198; Alin Adrian Moise, « Dreptul de retenție » , ed. Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici and Ioan Macovei *Noul Cod civil. Comentariu pe articole. Art. 1-2664* (Bucharest: CH. Beck, 2012), 2.497; Pop, Popa and Vidu; *Tratat elementar de drept civil. Obligațiile,* 854.

terms of good tangibility which the creditor holds along with the effect of the right awarded only for the possibility to refuse legitimately the return or restitution by his debtor in what regards the specificity of the lien reflecting a such addition taken over from the French doctrine[1] according to which, in order to retain it, first you have to hold it.

Still, there is also the opinion[2], to which we refer in the way that the silence of the Code needs to be interpreted as a permissive attitude of the lawmaker regarding the intangible goods as object of the lien. This opinion needs to be considered more on the subject matter while the author definitely opposes within his PhD thesis to the idea that such goods are able to make the object of a lien.

Yet we still have to consider the fact that it would be hard to conceive exercising a such lien over an intangible good when the warranted receivable represents a veritable debitum cum re iunctum. The incompatibility of the lien grounded on material connection with intangible goods is more obvious than evident, while such a hypothesis gives birth to the guarantied claim with the occasion of detaining the respective good, existing a relation of determining between the two elements in way that the good generates the claim for which a previous concrete existence of it becomes necessary.[3] Only through a material existence of the good, the rising of a claim may be explained in terms of concretely profiting from it as in the classical hypothesis of the necessary and useful expenses being as well undeniable the fact that only a tangible good can cause a damage by its illicit action.

In exchange, under the hypothesis of intellectual connection, there is no impediment for exercising a lien over the intangible goods given the diversity of the contents in legal relation risen between the parts and the goods over which rights and obligation may be exercised while the only requirement is that of the two obligations having the same juridical source.

Continuously, for the backing of this perspective, the references of the lawmaker are shown at the detention of the good from within the

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[1] Gabriel Marty, Paul Raynaud and Philippe Jestaz, *Les sûretés. La publicité fonciére* (Paris : Sirey, 1987), 29.

[2]Stelian Ioan Vidu, "Condițiile nașterii dreptului de retenție, potrivit noului Cod civil" in *Liber Amicorum* - Liviu Pop, « Reforma dreptului privat roman in contextul federalismului juridic European » , coord Ionuț Florin Popa, Dan Andrei Popescu (Bucharest : Universul Juridic, 2015), 958.

[3] Vidu, "Condițiile nașterii dreptului de retenție, potrivit noului Cod civil", 959.

art. 2.496 and 2.499 which are not able to make ownership an indispensable condition for the rising of the lien and therefore they fail to be interpreted in the way of applying it over the intangible goods. Therefore, art.2.496 refers only to the detention as a means of exercising the retention over the tangible goods and to the legitimacy request as premises of invoking a lien. Likewise, art. 2.499 regulates the hypothesis in which the retainer of a tangible good is disposed involuntarily. Stating that such a dispossession does not extinguish the lien.[1]

Although we have to remark that these repeated references to the ownership exercised by the creditor over the good, together with the obligations which encumbers the retainer to release or return the object of the lien make hardly to be accepted the idea of such a lien over the intangible goods. Even in lack of an express legal ground, we appreciate that a must not be de plano overlooked such a possibility when there is another way to produce the comminatory essential effect of the lien as mean of guaranty, outside a material detention of the good.[2]

Therefore, we believe that in the Romanian law there are no impediments which should remove ab initio any possibility to retain intangible goods under the ground of a lien. As example, we don't reject the possibility to practice a blocking power over the balance of a current account, intellectual property rights or intangible elements of the commerce fund. As for the legal nature of the commerce fund, as the doctrine [3] state that the New Civil Code determined its qualification as an affectation patrimony and not as an intangible good.

The concrete blocking method over the debtor prerogatives upon the good remains to be seen and also the measure in which a debitum cum re iunctum could appear in order to be guaranteed. In addition, in the case of juridical connection, the only possible source of a such lien, the creditor might base as well his refusal to perform on exceptio non adimpleti contractus.

[1] Vidu, « Condițiile naşterii dreptului de retenție, potrivit noului Cod civil » , 959

[2] For an example offered in the doctrine about the exercise of a lien over some intangible goods by referring to the art. 144 from the Lawyer's Profession Status, see Vidu, « Condițiile naşterii dreptului de retenție, potrivit noului Cod civil » , 959

[3] See: Stanciu D. Cărpenaru, *Tratat de drept comercial român* (Bucharest : Universul Juridic, 2012), 95.

CONCLUSION

After initially observed, the reason for which the legal literature had an approach lately which made the tangible goods the only possible object of the lien ,we afterwards tried to analyse the trends of the contemporary doctrine and the French jurisprudence to make from the holding of the asset just a part from a wider concept named „the blocking power".

Surely, the apparition of a such theory is justified by the need to apply the lien right in the field and that it should also comprise the intangible goods, as well. As shown, aside the explicable trend to attach an intangible good to a material element which includes it, the French doctrine took the time to find a definition for an abstractly detention independent from the material character of the owned good. Likewise, the law provides the general awarding of a fictive lien right associated to the pledge without dispossession. Despite the legal framework which consecrates the new conception over the lien which allows the encumbering of an intangible good, this dematerialization is not unanimously accepted, there's to say that even jurisprudence in this respect is non-unitary.

In the last section we have tried to systematically and grammatically interpret the provisions of the Civil Code which regulates the lien right to see in what measure this guarantee should be applied to some intangible goods. The conclusion is that regarding this possibility should never be rejected ab initio while there are no express limitations and the creditor has a way to block the utility of the good. We still cannot deny the predilection of the lawmaker for the holding of the good as premises of the refusal to surrender or the fact that within the system of the New Code, the real movable guaranty without dispossession is qualified as mortgage. This new qualification lacks interest in the recognition for the creditor regarding a fictive lien right.

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THE PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW - A REVOLUTION IN THE INSURANCE SPHERE?

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Abstract:

The European Union, this vast surface situated in a continuous expansion and also subject to heavy trials, an example of cooperation between states and, at the same time, of fragile interrelations, has been conceived as a space of freedom, security and justice, respecting the fundamental rights and freedoms and the different legal systems and traditions of the Member States.

Covering as many business lines as possible and convincing the Member States to adopt new regulations or modify the already existing ones, in order to reach a European consensus, the European Union pays great attention to the insurance sector too.

In 2002, on a European level, a totally different project, of absolute novelty was launched, in this respect a specialized commission of studying and development being made up: we speak about the The Principles of European Insurance Contract Law (PEICL). The main purpose of this extensive document is to become a benchmark for insurers doing business in the European Union, relying on the European Union treaties on free movement of persons, goods, services and capital.

If approved, this project will establish a uniform insurance contract regime in the European Union, which is not yet clear whether it will be beneficial or not.

Key words: *insurance contract, european law, freedom of movement, human rights, public freedoms*

INTRODUCTION

The European Union, this vast area which is in constant expansion[1] and also subject to heavy tests[1], an example of collaboration between

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[1] In 2004, a total of ten countries joined the EU: Poland, Estonia, Latvia, Lithuania, Slovenia, Hungary, Malta, Cyprus, the Czech Republic and Slovakia. In 2007, other two countries joined: Romania and Bulgaria. Future extensions target countries such as Turkey, Serbia, Albania and Montenegro.

states and, at the same time, of fragile interrelations, was designed as an area of freedom, security and justice, with respect for fundamental rights and freedoms and for the Member States' different legal systems and customs. Therefore, it turns out that The European Union supports diversity, identity, without "smothering" the sovereignty of the Member States, each state being left to decide on its internal organization.

The European Union is focused on the concepts of *freedom* and *protection*. Regarding the first term (*freedom*), the Treaty on the Functioning of the European Union[2] enshrines the free movement of four elements:

a) *goods* [in this regard, art. 28 parag. 1) TFEU provides that "The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries]";

b) *persons* [in principle, the persons employed and those traveling for work purposes are taken into account - art. 45 parag. (2) and (3) TFEU];

c) *services* ["…restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" - art. 56 TFEU. Services shall in particular include activities of an industrial character, the ones with a commercial character, cele activities of craftsmen and activities of the professions - advocacy, architecture etc];

d) *capital* ["…all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited" - art. 63 TFEU].

As for the second term (*protection*), the protection of human rights and fundamental freedoms is taken into account. "Although The European Union has a highly economical character, the protection of

[1] In 2016, Britain held a referendum which resulted in nearly 52% of citizens voting to leave the EU. At the time of writing this article, the British Parliament passed the law that allows the government to initiate the output procedure from the European Union

[2] The Treaty on the Functioning of the European Union (TFEU) is the consolidated version of the Treaty of Rome from 1957, through which the European Economic Community was established.

fundamental human rights is one of the basic principles of the Community law."[1] "Human rights are not just abstract ideas, devoided of content, but they express the essence of some social options in order to maintain a balance between the interests of the individuals and those of the society."[2] In order to protect these values, the cornerstone is the European Convention on Human Rights, signed on November 4th, 1950 in Rome, and entered into force on September 3rd, 1953, which, in its preamble, states that the aim of the Council of Europe is "the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms."

Throughout its content, The European Convention on Human Rights regulates a multitude of rights and liberties, both civil and political, such as the right to life, the right to liberty and security, right to a fair trial, right to free elections, protection of property, right to respect for private and family life, tasking the Member States with two types of obligations: negative (to not prejudice, to refrain from any interference in the private sphere of individuals) and positive (to do everything possible to prevent and remove any state of danger).

Covering as many business lines as possible and forcing the Member States to adopt new rules or to modify the already existing ones, in order to reach a European consensus and to support democracy and its values, the European Union pays great attention to the insurance sphere also.

On a European level, this area has seen a constant evolution, although many differences in regulations, from state to state, are being sensed. The European insurance market has a key role worldwide, being characterized by a rapid growth, especially in the case of life insurance, and is the second largest after the United States'. At the moment of speaking, we are witnessing a maturation process of this insurance market, eliminating the gaps and removing the rigid nature of insurance contracts concluded in the European Union being put to the test.

[1] Mihail Udroiu and Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român* (Bucharest: C.H.Beck, 2008), 37.
[2] J. Weiler, „Fundamental Rights and Fundamental Boundaries: On standards and values in the Protection of Human Rights", in *The European Union and Human Rights*, ed. N. Neuwahl and A. Rosas (Martinus Nijhoff, 1995), 54 - 56.

Regarding the European regulations in the insurance field, I will mention, for example, Directive 2009/138/EC of 25th of November 2009 on the taking-up and pursuit of the business of insurance and reinsurance, Directive 2002/83 of 5th of November 2002 on life insurance, Directive 2009/103/EC of September 16th, 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability[1] etc.

In 2002, however, in Europe, a completely different and absolutely new project has been launched, a specialized study and elaboration commission being made up in this regard: we are talking about the Principles of the European Insurance Contract Law (hereinafter, PEICL[2], after it's English title). The main purpose of this extensive document is to become a benchmark for insurers operating, carrying out their work within the European Union, being based on the EU treaties on free movement of persons, goods, services and capital.

This project has been discussed and analyzed in each Member State, including Romania, but a conclusion in its implementation still has not emerged. Why this? Because the accession process to this document was left to the contracting parties, and it is still not knowin if it will enter or not in conflict with their national regulations.

If approved, the project will establish a uniform insurance contract in the European Union, which is not yet clear whether it will be beneficial or not. In the event that a "universal" insurance contract would arise, it is likely quite high that it would "come in conflict with the principle of national sovereignty and the principle of non-interference in the internal affairs of the Member States."[3]

The PEICL project is part of a much larger program regarding the establishment of a European Contract Law. Risky or not, at the moment of speaking it's implementation is cumbersome and it can only be analized as such.

Following up, I propose a brief analysis of this project, adding regulations from our state in order to establish a quick comparison, highlighting the main similarities and differences.

[1] Fl. A Baias et al. *Noul Cod civil. Comentariu pe articole* (Bucharest: C.H.Beck, 2012), 2168.
[2] *Principles of the European Insurance Contract Law.*
[3] Adrian Bogdan, *Drept internațional public* (Craiova: Universitaria, 2010), 8.

THE STRUCTURE OF THE PEICL

The Principles of the European Contract Law[1] is structured in six major parts, each one containing chapters and sections, as follows:

- Part One [*Provisions Common to All Contracts Included in the Principles of European Insurance Contract Law*], which includes provisions concerning the methods of application and interpretation of the project, definition of some terms, rules related to the conclusion and duration of the contract, pre-contractual obligations of the parties, unfair terms, insurance intermediaries, insured risk etc;
- Part Two [*Provisions Common to Indemnity Insurance*], which includes provisions regarding the sums to be paid by the insured, as well as the insurer, the right to insurance indemnity, the right of subrogation against a third party etc;
- Part Three [*Provisions Common to Insurance of Fixed Sums*: *accident, health, life, marriage, birth or other personal insurance*];
- Part Four [*Liability Insurance*], which includes provisions regarding the insured event, the protection of the victims, causation of loss, measures to be taken in this situation, the information duties etc;
- Part Five [*Life Insurance*], which includes provisions regarding life insurance on the life of a third party, other than the policyholder, the duration of the contract, changes during the contract period, aggravation of risk;
- Part Six [*Group Insurance*], which contains provisions regarding the group organiser - the person who has established a group - and his/her obligations.

GENERAL ASPECTS OF THE PEICL

According to art. 1:102, The PEICL shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them.

But once the agreement will has been concluded, these rules will come into being, so any call to the national (domestic) regulations in order to limit or to supplement the PEICL provisions will be denied. As

[1] *https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/sprachfassungen/peicl-en.pdf*, last time accessed 19.03.2017.

an exception, this last provision will not apply to the mandatory national laws specifically designed for those insurance branches which are not covered by the PEICL. Therefore, if the parties agree, the PEICL rules will apply. The situation is similar to the fact that, at the moment of speaking, the Romanian state, as a member of the European Union, is obliged to fulfill, precisely and in good faith, the obligations deriving from the treaties in which it figures as a party. The Romanian Constitution stipulates, in art. 11 para. (2), that ”Treaties ratified by Parliament, according to the law, are part of the national law.” Why would this project not apply in our internal law, if it is accepted and as long as it does not comply with the Romanian laws?

A surprising feature of the PEICL is it's flexibility, in this regard the contract being able to derogate from all other provisions as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary [art 1:103 parag. (2)].

It can be seen, therefore, that this project has a predominantly optional nature, which means that the parties can decide whether to benefit from it or not. Of course, if they decide to benefit from it, it will be applied as a priority, but it is good to know that, at least in the way it is written now, it does not have an aggressive, predatory or comprehensive nature.

DEFINITION OF THE INSURANCE CONTRACT

Art. 1:201 para. (1) from the PEICL defines the insurance contract as a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium.

”This definition is improvable, given the conditions in which the person protected through the contract cannot be only the one who contracts directly, but also a third party, as in credit insurance.”[1]

More detailed is the definition given to this contract by the Romanian Civil Code, in art. 2199, respectively ”a contract through whics the policyholder, or the insured, is obliged to pay a premium to the insurer, and the latter commits himself, in the event of the insured risk

[1] Andrei Duțu Buzura, *Simplificarea dreptului european al contractelor. Contractul de asigurare*, 114, sursa: *http://www.nos.iem.ro/bitstream/handle/123456789/123/* ; ultima dată accesat 20.03.2017.

taken place, to pay an allowance, where necesarry, to the insured, the insurance beneficiary or the injured third party." Alongside these definitions I will mention the opinion of Professor Francis Deak[1], in accordance to whom "through the insurance contract, one of the parties, called the insured (or contractor) undertakes to pay the other party, called the insurer, a determined certain amount of money (insurance premium) and the insurer obliges, in the event of an insured case occurrence, to pay the insurance indemnity, in accordance with the contract, to the insured (or contractor) or to the third-party beneficiary."

Traditionally, the insurance contract is concluded between two sides: I'm talking about *the insured* and *the insurer*. Among these, other parties may intervene, such as *the policyholder*, meaning the person who signs the contract and takes over the obligation to pay the premium, and who can either identify himself with the insured person or conclude the contract on behalf of the insured person, as well as *the beneficiary of insurance* - if the policyholder concludes the contract on behalf and in the interest of the insured, the latter becomes the beneficiary of the insurance. In the simplest (and common) way, the insured concludes the contract personally, cumulating the quality of both the contractor and the beneficiary.

The main difference between the two legal definitions is that while art. 1: 201 PEICL revolves around the risk insured through the contract, art. 2199 Romanian Civil Code focuses on the obligation to pay the sums of money (the insurance premium by the insured and the insurance indemnity by the insurer). In my opinion, highlighting the idea of risk is more relevant because the danger to which the property, life and health of the insured are exposed can produce serious consequences for him, if the risk occurs and the insurance regards these consequences precisely. In addition, the importance and uncertainty of risk is known since ancient times, "when the Babylonians would organize transports through caravans, traders jointly bearing the disappearance costs. That way, the owners of the ships used in the transport ensured to the owner who had lost his ship another ship in exchange."[1]

[1] Francisc Deak, *Drept civil. Teoria contractelor speciale* (Bucharest: Didactică şi Pedagogică, 1963), 289.
[1] Roberta Nițoiu, *Teoria generală a contractelor aleatorii* (Bucharest: All Beck, 2003), 325-326.

● **The language of the contract conclusion and the elimination of discrimination.** All documents provided by the insurer shall be plain and intelligible and in the language in which the contract is negotiated.

It follows that the parties are free to choose the language in which the contract will be perfected, and, given that the PEICL does not even list the main languages of international circulation (English, French, Spanish, Russian, Arabic, Chinese), we conclude that every language spoken on the international scene can be chosen.

When there is doubt about the meaning of the wording of any document or information provided by the insurer, the interpretation most favourable to the policyholder, insured or beneficiary, as appropriate, shall prevail.

Besides, gender, pregnancy, maternity, nationality and racial or ethnic origin shall not be factors resulting in differences in individuals' premiums and benefits. This is a transposition of the non-discrimination principle from the European Convention on Human Rights (art. 14 - ”The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”). As Frederic Sudre said, "the non-discrimination principle is a matrix principle of international protection of human rights which presumes that an equal treatment should be kept in store to the equal individuals be booked equal to equal treatment and implies the existence of a rule that prescribes equal treatment.”[1] Therefore, a provision on equal treatment of parties upon conclusing a contract is welcomed, especially upon the conclusion of an insurance contract, where the insured, most often, feels inferior to the insurer.

CONCLUSION OF THE CONTRACT. OBLIGATIONS OF THE PARTIES.

Regarding the conclusion of the insurance contract, art. 2:101 PEICL stipulates that upon concluding the contract, the applicant (basically, the insured) shall inform the insurer of circumstances of which he is or ought to be aware, and which are the subject of clear and precise

[1] Frederic Sudre, *Drept European și internațional al drepturilor omului* (Bucharest: Polirom, 2006), 202.

questions put to him by the insurer. The circumstances referred to just now include those of which the person to be insured was or should have been aware.

This article can be found, in a striking way, internally, in art. 2203 par. (1) Civil code, according to which "The person who contracts the insurance is required to respond, in writing, to the questions posed by the insurer and to declare, on the date of the contract conclusion, any information or circumstances that wehe knows and which are also essential for risk assessment." "These data concern the legal elements of the insurance policy, and also other adjacent aspects which confer the insurer the possibility to evaluate the risk."[1]

Therefore, the PEICL, as the Romanian Civil legislature, has established an informing precontractual procedure, whereby the information required in the risk assessment is provided to the insurer, this criterion being essential in determining the insurance premium. If the policyholder (or the insured) does not fulfill this obligation, the insurer bears the right to propose a reasonable modification of the contract or to terminate it.

A first obligation of the insurer is to provide the applicant with a copy of the proposed contract terms as well as a document which includes the following information:

a) the name and address of the contracting parties, in particular of the head office and the legal form of the insurer (corporation, limited liability company etc) and, where appropriate, of the branch concluding the contract or granting the cover;

b) the name and address of the insured and, in the case of life insurance, the beneficiary and the person at risk;

c) the name and address of the insurance agent;

d) the subject matter of the insurance and the risks covered;

e) the sum insured and any deductibles;

f) the amount of the premium and the method of calculating it;

g) when the premium falls due as well as the place and mode of payment;

h) the contract period, including the method of terminating the contract, and the liability period;

i) that the contract is subject to the PEICL;

[1] Baias et al., *Noul Cod civil...*, 2171.

j) the existence of an out-of-court complaint and redress mechanism for the applicant and the methods of having access to it;

k) the existence of guarantee funds or other compensation arrangements.

If possible, this information shall be provided in sufficient time to enable the applicant to consider whether or not to conclude the contract.

Thusly, the above elements form the insurance policy, also provided by our civil legislature, but in a much restricted way: "The insurance policy must include, at least:

a) the name or business name, the domicile or residence of the contracting parties, as well as the name of the insurance beneficiary, if he is not a party to the contract;

b) the insurance object;

c) the insured risks;

d) the moment of the contract commencement and that of the insurer's responsibility;

e) the insurance premiums;

f) the insured sums [art. 2201 para. (1) Covil code]."

Another obligation of the insurer, provided by the PEICL, is that of warning the applicant of any inconsistencies between the cover offered and the applicant's requirements. In other words, if the risk cannot be found in the list of covers, the policyholder must be informed as soon as possible.

Finally, If the applicant reasonably but mistakenly believes that the cover commences at the time the application is submitted, and the insurer is or ought to be aware of this belief, the insurer shall warn the applicant immediately that cover will not begin until the contract is concluded and, if applicable, the first premium is paid, unless preliminary cover is granted (art. 2:203 PEICL).

Violating any of these obligations concludes in the following way:

a) the insurer shall indemnify the policyholder against all losses resulting from the breach of this duty to warn unless the insurer acted without fault;

b) the policyholder shall be entitled to terminate the contract by written notice given within two months after the breach becomes known to the policyholder.

FORM AND PROOF OF THE CONTRACT.

The conclusion of the contract in writing is not mandatory, just like in the Romanian law, where the insurance contract is a consensual contract (although art. 2200 Civil code. mentions that this contract must be concluded in a written way, this is only necessary for its evidence, not for its validity). Unlike the internal provisions, however, according to which the insurance contract cannot be proved by witnesses, even when there is a beginning of a written proof, the PEICL specifies, in a slightly bizarre manner, that this contract may be proved by any means, including oral testimony. We say "strangely" because this is the rule, an exception not being provided. The Romanian law also provides proof of this contract by any means, but only exceptionally, if the insurance documents disappeared by force majeure or unforeseeable circumstances and there is not possibility of obtaining a duplicate.

ABUSIVE CLAUSES.

According to art. 2.304 PEICL, a term which has not been individually negotiated shall not be binding on the policyholder, the insured or the beneficiary if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in his rights and obligations arising under the contract to his detriment. So, if there is no imbalance, and the other party agrees to these terms, we are in the presence of *standard clauses*. *Per a contrario*, the unsupported terms, who create tensions between the parties, become *unfair terms (abusive clauses)*. The latter are laid down in Directive 93/13 / EEC of the Council of Europe[1] : "A contractual term which has not been individually negotiated shall be regarded as *unfair* if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." [art. 3 para. (1) from this normative document].

In addition, Directive 93/13/EEC shows us the meaning of the clause has which has not been individually negotiated, namely that clause which has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

[1] Adopted in Luxembourg, on the 5th of april, 1993.

DURATION OF THE INSURANCE CONTRACT.

Except for personal insurance, art. 2: 601 provides a fixed term of the insurance contract, namely a year. The parties, however, may agree on a different period if indicated by the nature of the risk.

After the one - year period has expired, the contract shall be prolonged unless:

a) the insurer has given written notice to the contrary at least one month before the expiry of the contract period stating the reasons for its decision;

b) the policyholder has given written notice to the contrary at the latest by the day the contract period expires or within one month after having received the insurer's premium invoice whichever date is later. In the latter case, the one month period shall only start to run if it has been clearly stated on the invoice in bold print (art. 2:602 PEICL).

INFORMATIONS REGARDING THE INSURANCE PREMIUM.

The insurance premium is defined as "the amount of money that the insured or the contractor must pay to the insurer for the insured risk, under insurance contract obligations."[1] "This obligation is correlative to the insurer's obligation to pay the indemnity due to the insured event occuring, but earlier than the second, derogatory specific aspect toward the simultaneity of mutual obligations in bilateral contracts."[2]

PEICL operates with two concepts: *first or single premium* and *subsequent premium*.

In this way, regarding the first notion, when the insurer makes payment of the first or single premium a condition of formation of the contract or of the beginning of cover, that condition shall be without effect unless:

a) the condition is communicated to the applicant in writing using clear language and warning the applicant that he lacks cover until the premium is paid;

[1] C. Macovei, *Contracte civile* (Bucharest: Hamangiu, 2006), 339.
[2] Macovei, *Contracte civile,* 339.

b) a period of two weeks has expired after receipt of an invoice which complies with requirement (a) without payment having been made.

Regarding the subsequent premium, art. 5:102 of the PEICL specifies the fact that a clause, providing for the insurer to be relieved of its obligation to cover the risk in the event of non-payment of a subsequent premium, shall be without effect unless:

a) the policyholder receives an invoice stating the precise amount of premium due as well as the date of payment;

b) after the premium falls due, the insurer sends a reminder to the policyholder of the precise amount of premium due, granting an additional period of payment of at least two weeks, and warning the policyholder of the imminent suspension of cover if payment is not made;

c) the additional period in requirement (b) has expired without payment having been made.

CONCLUSIONS

It is not yet known whether the Principles of European Insurance Contract Law is a real breakthrough in the field of insurance or not - therefore, it is still in progress. The fact is that in the way it is drawn up, assigns a *strong, liberal character* to the European insurance contract, both in terms of the form it may be concluded and in terms of the probation method - "The insurance contract shall not be required to be concluded or evidenced in writing nor subject to any other requirement as to form" (art. 2.301 PEICL). Within the same article, it is further specified that the contract may be proved by any means, including oral testimony. In the Romanian law, as it is well known, the insurance contract is a consensual contract, but to be proven, art. 2200 of the Civil Code provides that it must be concluded in writing.

Moreover, the Romanian Civil Code still contains a traditional view of the insurance contract, even if upon its entry into force, the transfer of this contract has been performed from the former Commercial Code. If the Principles of European Insurance Contract Law will take place, of course a wave of changes in the Civil Code articles related to this contract will follow.

Is this new European approach an evolution in the domain? It is certainly a simplification, which is not yet reflected in the Romanian law, but the fact is that the evolution of this project should be further scrutinised. "At least in terms of private law, this simplification current still waits for an acknowledgment in an official form; beyond the member states' theoretical approaches or unitary regulation efforts, the European law simplification project necessarily implies a slow and multidirectional evolution."[1]

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THE FUNDAMENT OF THE NOTION OF CONTRACT IN THE ROMANIAN LAW BEFORE AND AFTER THE RETURN TO THE LIBERAL MARKET ECONOMY

Dumitru VĂDUVA [1]

Abstract:

The principle of the freedom of action has no legislative mention, being more like an explicative theory. The wording „freedom of action" is explicative by its semantics. "Autonomy" represents the existence in and for itself, resulting that the freedom of action reveals the fundamental principle of the contract: it is created by the will, which is free, namely is independent from the law, being the one that generate rights and obligations, the law having the role to protect it.

Having the position as founder of the contract, it is understood that the free will explains the other rules which organize the establishment and effects of the contract: the mutual consent, the suppletive feature of the civil legal norms, the interpretation of the will according to the inner will of the parties, resulted from their common intentions; the mandatory force and relativity of the effects of the contracts.

The principle of the freedom of will has been re-brought to debate starting with the second decade of the 20th century, considering that its application created the environment for exploitation based on the contract from the person found in an economic superiority in relation to the one found in inferiority. This theory was in conformity with the new social philosophy of the mentioned era, when the ideas of socialism were increasingly influent including among lawyers. The first legislative measures which seemed, at that time, a serious violation of the fundamental principles of the contract: the freedom of will and its corollary, the principles of the freedom of contract, but were in consensus with the legal principles of contractual justice, acclaimed also by the social theorists, for the protection of the weak, were: redefining the employment contracts, this rethinking leading to the composition of a new branch of law, labor law; and the imposition of a protective legislation for tenants, under the conditions in which because of the lack of housing, the owners had their own law of lease contracts, thus breaking the contractual balance.

Today, in our national legislation, under the influence of the European Community and then of the European Union, the legislation in the area of the private law expands towards the area of the norms of public order and morals, existing in the legislation prior to 1990, but which was limited to a classic public area of good morals, the one of the imperative rules of organization for family and state.

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Under these new circumstances of the proliferation of the area of the public and good morals norms, we consider that the principle of the freedom of will is fundamental in explaining the foundation of the contract.

Key words: *freedom of will, contract, market economy, legislation*

THE LAIC FUNDAMENT OF THE CONTRACT, THE PRINCIPLE OF THE FREEDOM OF WILL AND THE PRINCIPLE OF THE FREEDOM OF CONTRACT

Dominated by the rules imposed by religious precepts, during the 13th century, the social conscience has created the rule, from the canonic law of the compulsoriness of the promise given, under the sanction of the penalty for the sin of violating the promise. This rule has begun in the early middle Ages, after that being secularized and taken by the civil law, changing its fundaments. The will has legal force by itself without grounding the force of the promise given by will based on a moral or religious substrate. It has come to that during the Enlightenment the principle of the will creating its own law, expressed in the canonic law by the wording: *pacta sunt servanda*, which translated the compulsoriness of the promise, to be recognized as a principle generally accepted, reaching the legal consciousness of the old Romanian law[1].

It could find justification in the change occurred in the philosophical consciousness through the humanistic theorists, who stated equal rights for all humans and their freedom of thinking and action. In the Enlightenment law of the Western, then Eastern Europe was registered in the general consciousness the philosophical principle of the freedom of will. According to it, the person is free in his nature, him alone being able to limit his freedom using judicial engagements.

During the boom of the new social classes created by the premodern ages, the bourgeoisie stated the liberal theory of commerce. According to this theory, the economic development can only occur through the contractual freedom: *les passé les faire*. This theory is, along the principle of freedom proclaimed by the philosophers, the environment in which it has been crystallized and consolidated in the law

[1] Ioan Albu, "Principiul libertății contractuale", *Dreptul Magazine* 3 (1993): 29-37

the principle of the freedom of will and the principle of the contractual freedom. The will of the person must be the only source of the obligations during the economic trades, the law having a secondary role, easing the access to the instruments favoring the conclusion of contracts through suppletive rules and to protect the performance of the obligations. The fairest contract is the one decided by one person because he is the only one who knows his interests the best[1].

Also, the philosophical principles of individuality, equality, the principle of voluntarism from the canonic law, which dominated the 19th and 20th centuries[2], have created the spiritual environment for the European bourgeois revolutions. In fact, these principles have been reflected by the modern civil codes. The representatives of the new social classes have founded their legal policy on the above mentioned philosophical principles which overturned the old ones in which not equal and free people were the deciders of the social, economic and legal organization, but just one all mighty person, who rules in a discretionary manner, the lord.

The legalists of the modern age used the canonic law *pacta sunt servanta*, secularized from the Enlightenment, thus attaching to the contract the mandatory force of the will, and not the fear for punishment of the sin.

As reflex of the repulsion towards the discretionary power which imposed the laws according to its own interests, the modern legalists have stated that the people should be its own legislator.

In law, the above mentioned principles were reflected in the principle of the contractual freedom and its corollary, the principle of the sovereignty of the will, simply called the freedom of will.

The text of the old Civil Code organizes the notion of contract based on will as being the source of its own law, issued by a specific procedure: the agreement of will between equal subjects. The agreement is mandatory, because it represents the law of the parties.

On this ground becomes logic the fact that the will is the one which forms the contract and rules upon its effects and content.

Also, due to that the humans are equal and sovereign, the perfect conditions for a fair and just contract are met, because each one must

[1] Ioan Adam, *Dreptul civil. Obligațiile* (Bucharest: C.H. Beck, 2011), 19-24
[2] P.C. Vlachide, *Repetiția principiilor de drept civil*, 2nd Volume (Bucharest : Europa Nova, 1994), 13

decide upon the economic trades through his own will. Who said contract, said just, according to a French economist.

The two principles, the freedom of will and the contractual freedom merge, because according to the Civil Code the freedom of will is not complete if it does not have the freedom to establish the content of the contract and the person with whom it shall be concluded[1].

The principles of the freedom of will and the contractual freedom from the modern law (1) have suffered limitations as result of the expansion of the norms of public order from the civil law which have re-debated the freedom of will as fundament of the contract (2).

1. THE FREEDOM OF WILL SINCE THE EMERGENCE OF THE OLD CIVIL CODE UNTIL THE MID-20TH CENTURY

Without being expressly stated, the principle of the freedom of will has dictated the essential principles of the theory of contract, shaping its entire configuration.

The principle of the freedom of will has two consequences: the sovereignty of the will, namely the freedom of the will to decide whether to conclude a contract or not, which is its content and the person with whom it shall be concluded[2]; and the mandatory force of the contract between the parties, including its relativity towards the parties.

From these other principles of the contract are resulted: the principle of consensualism, the principle of the mandatory force of the contract's relativity, the principle of the suppletive rules for the rules of the civil law, the principle of the interpretation of the contracts in consensus with the internal will.

A. The principle of the contractual freedom

It is precedent to the theory of the freedom of will[3].

The principle of the freedom of contract has been absorbed by the theory of the freedom of will, being considered as one of its consequences. The contractual freedom refers to the fact that the will of

[1] Liviu Pop and Ionuț-Florin Popa and Stelian Ioan Vidu, *Curs de drept civil, Obligații*, (Bucharest: Universul Juridic, 2015): 12
[2] Constantin Stătescu and Corneliu Bârsan, *Drept civil, Teoria generală a obilgațiilor* (Bucharest: Hamangiu, 2008): 16
[3] Matei B. Cantacuzino, *Elementele dreptului civil* (Bucharest: All, 1998): 58-59

the person is the only decider upon the conclusion of a contract, also choosing the person with whom it shall be concluded and its content.

B. The theory of the vices of consent

It is a rule correlated with the principle of the freedom of will, creating rights and obligations. The will being their source, they could achieve this role only if are expressed freely and in a reflective manner.

The will being enough to legally bind the person, it is necessary to exist and have quality, namely to be real, being expressed by a person with discernment, to be free and reflected, namely to not be harmed by vices of consent. The apparent will resulted from the deformation of the will by physical or psychical constraints or by the absence of thinking cannot justify a contract.

C. The principle of consensualism

It is a principle grounding the principle of the freedom of will. According to the principle of consensualism, the will of the person is enough to engage the person, thus another formality becomes unnecessary. The writing is necessary only to prove the existence of the contract.

D. The principle of the suppletive norms

It is a principle in correlation with the principle of the freedom of will. According to the principle of the suppletive norms, the will being sovereign in creating obligations with mandatory force, the law has the role of supplementing possible gaps in conventions. This is why the law must state only suppletive norms.

E. The principle of interpreting contractual clauses according to the inner will, and not the expressed one

It is a principle correlated with the freedom of will. According to the principle of interpreting the contract, only the doubtful clauses can be subjected to an interpretation. In the case of unclear clauses that have multiple meanings, they will be interpreted according to the internal will of the parties resulting from the intrinsic or extrinsic elements of the contract.

F. The principle of the mandatory force of the contract

It is a principle logically imposed by the freedom of will and the contractual freedom. According to the principle of the mandatory force of the contract, being decided by the will of the person who had the freedom to conclude an agreement and to choose its content and the co-contractor, if the person decided to conclude it, it shall have mandatory force

because it is the free manifestation of the parties. This consequence of the two principles (the principle of the contractual freedom and the sovereignty of the will) has been transposed in the rules of the Civil Code of 1864 (Art 969) and today the rule of Art 1270 Para 1 of the new Civil Code: "The contract (…) is law between the parties", translating the principle of the canonic law: *pacta sunt servanda*.

From the corroboration of the contractual freedom with the freedom of will it results that the engagement of the debtor shall be imposed to him with the same mandatory force as it would originate from the law.

G. The principle of the relativity of the contractual effects

The will of the person generates obligations which bind the contractual parties. The third party cannot be compelled by the legal engagement assumed by other persons.

2. THE DECLINE OF THE FREEDOM OF WILL STARTING WITH THE 20TH CENTURY[1]

In time, it has been ascertained that the principle of contractual freedom as environment in which the freedom of will is manifested, does not reflect the specific reality and that several circumstances place the contractors in an unequal position thus resulting that the two principles cannot ground the conclusion of a just contract. In the beginning of the 20th century the conclusion that the contract is a means of exploitation of a co-contractor by the other has been reached.

On the other hand, the social philosophy has conquered more ground to the detriment of the individualism and liberalism. The economic theories issued by liberalism were contradicted by the theories of the policy of social and economic protection. The suppletive rules have been replaced by the mandatory ones. This change has been radical in the socialist legal systems, of which our country was also part of the decades 6-9 of the 20th century.

In the last decade of the 20th century, after the abandonment of the planned economy and unique property systems, the one of the provident state, has been reaffirmed in law the principle of the contractual freedom, without applicability during the socialist period. In the first years of this resettlement on different fundamental principles of law and economics,

[1] Adam, *Dreptul civil. Obligațiile*, 25-28

our private law has returned to the rules of the civil law shaped before the Second World War. These rules no longer corresponded to the social and economic evolution of the end of 20th century, all the more since the liberalization of the international trade in our state and the privatization of the ex-socialist state enterprises for production, trade and services represented the environment for unfair competition of customers' exploitation.

The establishment of the norms for protection of competition and consumers was one of the legislative priorities of that period. Thus, the imperative rules imposed by the above mentioned national system have been replaced by imperative norms of public order and morals with an economic nature. These norms are referred to by the doctrine as norms of economic and social directions.

Under the influence of the European Communities to which our country aspired, and then of the European Union, progressively the area of the norms of public order and morals has constantly been enlarged and reshaped, proliferating the norms for social and economic protection in the transfer from the planned economy to the market economy and to bring it closer to the European model in which the tendency of the state to impose a certain public order for the economic and social protection was present.

It has come to the debate of the actuality of the theory of grounding the contract on the will, by invoking other fundaments: the law, the principle of the fairness and utility of the contract, the social solidarity.

After 1990 the norms of public order have flooded the private relations of trade by a wide legislative work in the economic and social areas.

Specifically, an economic legislation had to be established in which, among others, the loyal competition had to be protected and to combat the monopoly existing at that time until the establishment of new competitive market.

Thus, it has been developed a legislation of public order in the area of protecting the competition. In the areas in which there was no competition because of the absence of other economic agents, the legal norms have limited the state or the particular monopoly, including by establishing the prices for the products of the economic agent having the monopoly. Currently, there are few situations in which the legal norms state the price for the existing products, their existence being established

only for the protection of the competition and of consumers (for instance, the price of the electric energy, of gas etc).

For currency and economic circuit's protection by a series of legal norms, have been established the rules for adjustment of debts depending on the inflation rate, sometimes being established a limitation for the adjustment of the debt.

The new Civil Code leaves room for the intervention of the judge in revising the contract under certain conditions, thus leaving the principle stated by the old Civil Code which did not allowed the revision of the contract. An application of this rule was Art 1578 of the Civil Code of 1864, the monetary nominalism, according to which regardless of the enhancement or diminution of the monetary value the debtor is compelled to pay the nominal amount registered in his debt. This rule shall be applied as principle also by the new Civil Code, which stated the respect of the contract regardless of the changes occurring within the contractual balance after its conclusion (Art 1271 Para 1 of the new Civil Code). The new Civil Code stated that, under certain circumstances, if the contractual balance is seriously harmed, the judge is entitled to a revision of the contractual obligations and restore the contractual balance or dissolve the contract (Art 1271 Para 2 of the new Civil Code).

Also, through the rules of contract, the new Civil Code, as well as the legislation in the society law and in the law of the protection of the national cultural patrimony, limits the transactions performed by certain persons who are found in the above mentioned cases, or limits the identity of the co-contractor, or imposes the obligation for the sale of certain assets. The obligation to comply with the right to preemption of the preemptor is an application of the limitation regarding the buyer.

Also, it had been performed the adoption of a large legislative work for social protection. Thus, in the area of housing were adopted certain laws regarding the transaction of dwellings owned by the state or by national economic units or laws for the protection of tenants in contracts of tenancy, including by offering them a right to preemption.

The norms for the protection of consumers which have imposed a set of rules of public order are synthesized by G.O No 21/1992 on consumer's protection, which mentioned almost all the subsequent normative acts for consumer's protection, such as the Law No 296/2000, the Consumer's Code, the Law No 193/2000 on abusive clauses etc. Mainly, these rules protect the consumers in their relations with

professionals who, experienced in their trades, through the contracts for adhesion make the conditions for the economic trade with the consumers, by disadvantaging them. Thus, being found in a position of disadvantage in relation with the professionals, because of the absence of information and economic inferiority, the consumers are reasonably entitled to a protective legislation. This is the reason for the establishment of the mechanism which stated the abusive clauses of the contracts for adhesion, whose effects are considered as unwritten by the law. This is why the professional has the obligation to inform and counsel the consumer, as well as the consumer's right to reflection and denunciation of certain contracts (contracts at distance, contracts outside the trading areas etc).

Also, the contracts established in the area of mandatory insurances represent rules limiting the contractual freedom, this type of contract being required, with a predefined content, justified by the social protection.

CONCLUSIONS. THE CONSEQUENCES OF THE LEGISLATION FOR THE PROTECTION OF THE PUBLIC ORDER AND THE ONE ESTABLISHING THE ECONOMIC DIRECTION

The above mentioned rules of public order occupies a wider field in the civil law, replacing the suppletive rules which left room for the person's will in deciding about the establishment of the co-contractor and the content of the legal engagement.

Under these conditions we must decide which is the role of the will in the foundation of the contract?

The public order for protection of the provident state and the public order for economic direction generate consequences only for certain applications of the freedom of will: the contractual freedom and the consensualism. None of these limitations are new for our national law, they existing at the moment of the adoption of the Civil Code of 1864 when the freedom of will was an unchallenged principle.

The limitation of the contractual freedom and thus the narrowing of the area of application of the freedom of will as fundament of the contract is no novelty for the legislation of the past years. The old Civil Code has stated limitations for the contractual will. Art 969 of the Civil

Code only stated that the agreements legally concluded have the same power as the law for the parties. The legal conditions included, among others, the rules for public order and morals (Art 4 of the Civil Code of 1864), a moral and legal object and a legal cause in accordance with the morals (Art 966 and 968) etc. Also, the Code stated a series of exceptions from the rule of consensualism, which required the solemn form of the contract, for instance for the contract of mortgage. Finally, the Code stated exceptions from the mandatory force of the contract, Art 92 Para 2 stating that the contract cannot be unilaterally revoked, except for cases mentioned by the law; for instance, the revoking of the contract for location with indefinite duration (Art 1452). These rules are also mentioned by the new Civil Code (Art 11, 1276 Para 2 etc).

Currently, the area of the formalization of the contract has been expanded, either by the multiplication of the solemn contracts, or by the formality of publicity etc. The limitation of the principle for consensualism is no novelty, solemn contracts being concluded throughout the period in which the old Civil Code has been applied.

The fact that nowadays the area of public order has been expanded in private relations of trade, does not have the nature to alter the theory of founding the contract on the parties' will. These limitations for the freedom of contract are merely exceptions if we see the wide area left outside these limitations. The freedom of will remains the principle of founding the contracts.

The expansion of the imperative norms and of those of public order has the effect of limiting the area of application for the role of the will in founding the contract. Also in the case in which the law stated the content or the obligation to choose a certain co-contractor, the will of the person decided about the legal engagement. The only case in which the role of the will is removed for this prerogative, to decide upon the conclusion of the agreement, is the one in which the contract is imposed. These contracts are exceptional.

The theories trying to deliver an alternative to the role of the will as foundation of the contract are not convincing. They do not justify the foundation of the contract, just invoking grounds or principles applied to the law in its ensemble, not to the contracts in particular. Thus, the law invoked as foundation of the contract by positivists is the source of every subjective law, therefore of the obligation generated by the contract. This theory makes difficult the differentiation between the normative act and

the legal action, because in both cases the law represents the foundation of the obligation.

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NEW ASPECTS REGARDING THE EXCHANGE CONTRACT

Ariadna Iustina Venera GRIGORE [1]

Abstract:

In the present study I have focused my attention upon analyzing the new aspects regarding the exchange contract, especially upon underlining the differences between the old regulation (The Civil code in 1864) and the new one (The Civil code in 2009). I took into consideration the differences concerning the juridical nature of the contract in the sense of enlarging the domain of equivalent obligations. I have also analyzed the changing of the special rules concerning the exchange contract: the identic nature of the counterperformances, the contract expensses, the contract interpretation, as well as the guarantee assurance. A totally new aspect depicted in the present paper is that I consider that the exchange of the asset of another party can be validly concluded according to the new regulations referring to selling the asset of another party, as I will further on prove.

Key words: *exchange contract, the identic nature of counter-performances, balancing payment, exchanging the asset of another party, exchange parties.*

INTRODUCTION
THE JURIDICAL NATURE OF CONTRACT

Art. 1763[2] defines the exchange contract underlining that the parties of this contract are the exchange parties who transmit or oblige themselves to transmit an asset in exchange for receiving another one.

The Civil Code also presents the juridical features of this contract. Thus, the exchange is a synallagmatic, onerous and consensual contract.

Because the dispositions referring to selling are also in force for the exchange contract, it can be presumed the similitude concerning the object of the obligation of the seller, respectively its similitude with the

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[2] Art. 1763 Civil Code stipulates that the exchange is the contract in which each part, named co-exchanger, transmits, or obliges to transmit an asset in order to receive another one.

object of the mutual obligations of the exchange parties. Thus, it might result that other real or debt rights[1] can be also transmitted by means of the exchange contract, with the exception of the ownership title.

Under the regulation of the Civil Code in 1864, if the equivalent was an obligation to act or not to act, the contract was considered not to be nominated[2]. According to the contemporary regulation, art. 1763 stipulates the transmission or the obligation of transmitting an asset. So, the exchange contract stipulates (according to the actual regulation) the obligation to give an asset (to transmit) or to act (the exchange party oblige himself to do all his best in order to guarantee the transmission of the asset).

The equivalent of transmitting an asset cannot be a money debt or a sum of money because, under such circumstances, it might be considered to be a payment. It is known that payment made in exchange of either transmitting an asset, or the obligation of asset transmitting, belongs to selling. The contract whose object is represented by two financial performances is considered to be an exchange contract.

Although the object of the equivalent performance is represented by another asset, and not a price, the value of the exchanged assets may differ. Under such circumstances, the value of an asset will be compensated by a sum of money able to cover the value of the exchanged asset. This sum of money is called balancing payment. Its value may determine the nature of the contract.

If the value of the balancing payment exceeds the value of the exchanged asset, the juridical operation is a selling. On the other hand, according to art. 1650[3] Civil Code, it results that the price is main defining element of selling. So, if the price of selling is established partially in money, and partially in exchanging another asset, The Court

[1]Francisc Deak, *Tratat de drept civil. Contracte speciale*, ediția a 4-a, actualizată de Lucian Mihai, Romeo Popescu (București: Universul Juridic, 2006), 150.
[2] Deak, *Tratat de drept civil. Contracte speciale*, 152.
[3] Art. 1650 Civil Code stipulates that :
(1) Selling is the contract in which the seller transmits or obliges himself to transmit to the buyer the property upon an asset in exchange for a price, about which the buyer obliges himself to pay.
(2) A dismemberment or any other right can be sold.

will decide whether it is a selling or an exchange contract[1], as an extra-payment[2].

From the juridical point of view, the exchange cannot be considered to be a variety of selling, or a double selling performed by compensating the prices, as there is no price in exchange.[3] The alienation of an asset is done in the exchange of another asset, and not for a price. As a consequence , the validity or non-validity of exchange will produce effects upon both alienations.

The nullity of a selling will not determine the nullity of the other one, unless one party had the impression he concluded an exchange contract (and not a selling one); it is thus emphasized the error as a fraudulent misrepresentation [4].

Although art. 1764[5] Civil Code stipulates that regulations referring to selling will be also applicable to exchange, because the exchange contract is a special, unique contract, several own characteristics are to be noticed.

SPECIAL RULES REGARDING THE EXCHANGE CONTRACT

A. THE IDENTIC NATURE OF COUNTER-PERFORMANCES

Although the exchange contract is an onerous contract, the equivalent of counter-performances cannot be a sum of money, but another asset. As I have mentioned above, the difference of value between the two exchanged assets may be equaled by means of a balancing payment. This compensation should not exceed the value of

[1]Veronica Stoica, *Drept civil. Contracte speciale*, vol.l (București: Universul Juridic, 2008), 52.

[2] Deak, *Tratat de drept civil. Contracte speciale*, 53.

[3] For a situation in which there was operated a delomotation between the exchange contract and a double mutual selling, see Cout of Sappeal Suceava, civil sentence, decision number 80/2000, quoted (with an affirmative note) by P.Perju, „Sintezăteoretică a jurisprudențeiCurții de ApelSuceavaîndomeniuldreptului civil șiprocesual civil (semestrul l/2000)", in *Dreptul* 12 (2000), 84-85.

[4]A. Benabent, *Droit civil. Les contracts speciaux* (Paris: PUF, 1995), 157.

[5]Art. 1764 Civil Code stipulates that : (1) the dispositions refering to selling are correspondingly applying to exchange.

(2) Each of the parties is considered to be a seller – regarding the asset he alienates, and is also considered to be a buyer – regarding the asset he obtains.

the exchanged asset, in order to preserve the identity of the exchange contract. In case the value of the balancing payment exceeds the value of the exchanged asset, a disequilibrum might appear regarding the identic nature of the counter-performances as an asset would be transmitted in exchange of a price which might be completed by transmitting a/some rights upon another asset as payment. Under such circumstances, the qualification of the exchange contract would be transformed into a purchase agreement.

B. REGARDING COUNTER-PERFORMANCES

The aplicability of art. 1765[1] Civil Code is proved by thwe fact that regarding exchange, each exchange party is seller and buyer at the same time.

This is the reason why the contract expenses will be equally assumed by parties, unless they stipulated otherwise.

Unlike the exchange contract, the purchase agreement expenses will be assumed by the buyer, unless the contrary is stipulated[2].

The Civil Code in 2009 specifically stipulates the distribution of the exchange contract expenses, as this aspect was not stipulated in the Civil Code in 1864.

C. REGARDING CONTRACT INTERPRETATION

Art. 1269[3] Civil Code stipulates that in case the contract remains unclear under certain clauses, they will be interpreted in favor of the bound party. In the case of the exchange contract, the parties are both seller for the asset they transmit, and buyer for the asset they receive, so that, regarding exchange, it should not be applied the selling interpretation rule according to which the unclear stipulations will be interpreted in favor of the seller.

[1]Art. 1765 Civil Code stipulates that in case there is no contrary stipulation, the parts will equally support the expenses made for concluding the exchange contract.

[2] Dumitru C. Florescu, *Contractele civile. În Noul Cod civil*, ediția a V-a revăzută și adăugită (București: Universul Juridic, 2015), 118.

[3] Art. 1269 Civil Code stipulates that:

(1) If, after applying the rules of contract interpretation, the contract stays still unclear, it will be interpreted in favor of the party who obliges himself.

(2) The stipulations registered in a joining contract are to be interpreted against the party who has stated them.

Thus, art. 1263 (2)[1] Civil Codefinds its applicability in the sense that the contract parties must understand the nature of the contract and take it into consideration when interpreting the unclear clause.

D. REGARDING GUARANTEE OBLIGATION

Under the regulation of the Civil Code in 1864, art. 1408[2] in this code was stipulating the possibility of the exchange party under eviction for choosing between asking for damage-interests or asking for his asset return. This procedure was imposing the rescission of the contract, fact which was protecting the exchange party under eviction against the risk of his co-contracting party insolvency.

Nowadays, taking into consideration the silence imposed by the Civil Code in 2009 regarding the difference between the exchange contract and the purchase agreement under eviction, it may be concluded that art. 1764 [3]Civil Code will also prove to be applicable. Thus, all the dispositions referring to eviction in case of the purchase agreement will be applicable to exchange, too.

Referring to the guarantee for the hidden defects, the old regulation is still valid, as the dispositions regarding the guarantee for hidden defects in case of the purchase agreement are in force.[4]

The guarantee for the exchanged asset eviction is applicable not only in case eviction is effectively produced, but also in case eviction is on the point of being produced[1].

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[1] Art. 1263 (2) Civil Code stipulates that: the person who is able to invoke the nullity, can also confirm the contract only in case he knows the cause of nullity, and, in case of violence, only after it is stopped.

[2]Art. 1408 Civil Code1864 stipulates that: Theevicted co-changer can claim interest-damages or the returning back of his asset.

[3] Art. 1764 Civil Code stipulates that: :

(1) the dispositions refering to selling are correspondingly applying to exchange.

(2) Each of the parties is considered to be a seller – regarding the asset he alienates, and is also considered to be a buyer – regarding the asset he obtains.

[4] The hidden vices are qualitative defects of the sold or exchanged asset, which, existing when it was transmitted, they were not known by the person who got it, neither could they have been discovered by usual means of checking. Thus the asset under consideration cannot be used according to its destination; its usage is also so much diminished that it is presumed that the person who got the asset would not have made any contract for it in case he had known all these vices. Under all these circumstances, the hidden vices should have existed in the moment of making the contract.

But no matter whether it is about the guarantee against eviction or against hidden defects, it is a mutual obligation for the both exchange parties.

EXCHANGING THE ASSET OF ANOTHER PERSON

Taking into account art. 1764 Civil Code[2] which stipulates the applicability of the selling and exchange contracts dispositions and correlates them with art. 1683 Civil Code[3], it would result that the

[1] It is not necessary to decide the resolution of the convention, but it is sufficient to claim for the restitution of the assets given in exchange. In the case under consideration, an exchange assets convention was concluded between parts, but because some of the respective goods were the result of a theft, the police decided to confiscate them. The court of first instance, admitting the claimant complaint, obliged the accused to give back the assets received in exchange or their value in money. The accused declared recourse, which was rejected by the court as unfounded - T.M.București, dec.nr.487/1991, in *Culegere de jurisprudență* pe anul 1991, 78.

[2]Art. 1764 Civil Code stipulates that: :

(1) the dispositions refering to selling are correspondingly applying to exchange.

(2) Each of the parties is considered to be a seller – regarding the asset he alienates, and is also considered to be a buyer – regarding the asset he obtains.

[3] Art. 1683 Civil Code stipulates that:

(1) If, on the data of concluding the contract upon an individually determined asset, the respective asset is in the property of a third party, the contract is valid, and the seller is obliged to guarantee the transmission of the right of property from its bearer to the buyer.

(2) The obligation of the seller is considered to be carried out either by ratifying the selling by the owner, or by any other direct or indirect means, able to provide the buyer with the property upon the asset.

(3) Of by law or out of the will of the parties the contrary does not result, the property is legally transferred to the buyer from the moment the seller obtains the asset, or from the moment of the selling contract ratification by the owner.

(4) in case the seller does not offer the transmission of the right of property to the buyer, the latter may ask for the rescission of the contract, price restitution, and if it is the case, damage-interests.

(5) When a co-owner sold the common property asset and does not offer the transmision of the property upon the whole asset later on to the buyer , the latter may ask for, besides damage-interests, at his choice, either the price reduction upon the share which he did not obtain, or the rescission of the contract in case he would not have bought the asset unless he had known that he would not obtain the property upon the whole asset.

(6) In the cases stipulated in (4) and (5) the value of the damage-interests will be determined according to art. 1702 and art, 1703. But, the buyer who knew, at the moment of the concludeing of the contract that the seller is not the owner of rhe entire

exchange the asset of another person does not trigger the nullity of contract. Under the regulation of the Civil Code in 1864, the exchange of the asset of another person was revoked by absolute nullity, as well as the selling of the asset of another person was[1].

The selling the asset of another person was not penalized by the Civil Code in 1864 either. Yet there were expressed several specialized opinions, among which the most important ones referred either to the absolute nullity of the contract as a result of cause absence, or the relative nullity of contract as a result of the lack of property quality of the seller; the latter was unanimously accepted later on by the Supreme Court[2].

We may draw the conclusion that the exchange of asset of another person will not be penalized with nullity. I should furthermore continue the demonstration taking into consideration art. 1764 Civil Code, fact which might trigger the applicability of the dispositions referring to selling the asset of another person to exchanging the asset of another person, too.

Thus, the exchange contract upon the asset of another person will be effectively concluded and the exchange non-owner party – as a seller for the asset he will transmit to the other contract party- is obliged to guarantee the transmission of the right of property upon the exchanged asset, as art. 1763 Civil Code stipulates.

The obligation of the exchange non-owner party should be considered to be fulfilled if he gets the asset for his contract party, or if obtains, for the latter, the right of property upon the asset.

The issue of the contract ratifying is out of question because, under such circumstances, a multilateral exchange might be triggered (the real owner would be a third party in the exchange contract, which means that all the parties should affirm their will regarding the exchange, and should be also interested in obtaining an asset in exchange for their own.

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asset, does not have the right to claim damage-interests for the expenses made with works commanded out of his free desire and taste.

[1]See Court Suceava, s.civ. şi de cont.adm., dec.nr.346/1993, in *Dreptul* 10-11 (1993), 111-112; P.Perju, „Sinteză teoretică a jurisprudenței instanțelor in circumscripția Curții de Apel Suceava, în materia civilă", in *Dreptul 5 (1995*), 48-49.

[2] See CSJ, S.civ., dec.2467/1992 in *Dreptul 10-11 (1993),* 113 şi dec. Nr. 132/94, in *Dreptul, 5 (1995),* 77.

Under the hypothesis of ratifying the exchange, it might be presumed that the real owner of the asset should receive an asset in exchange for his own.

This is why I consider that the obligation of the exchange non-owner party cannot be performed by the real owner ratifying the contract[1].

I consider that the non-performance of the obligation of transmitting the property upon the exchanged asset triggers resolution, restitution of the asset received in exchange and damage-interests (if proved).

The restitution of price is out of question as exchange is not performed for a price, but for another asset, so that the received asset will be restituted and, if it is requested, the balancing payment.

I also consider that in case the exchange party knew that his contract party was not the owner of the asset he would receive in exchange, he cannot claim damage-interests for the expenses made with works commanded out of his free desire and taste.

All these do not exclude the possibility of pleading for the exception of non-concluding the contract, the co-exchange party having the right to refuse the transmission of the promised asset in exchange, in case his co-contract party does not perform his obligation, or does not offer its performance according to art. 1556 Civil Code[2].

CONCLUSION

According to the contemporary regulation, art. 1763 stipulates the transmission or the obligation of transmitting an asset. So, the exchange contract stipulates (according to the actual regulation) the obligation to give an asset (to transmit) or to act (the exchange party oblige himself to

[1] See Deak, *Tratat de drept civil. Contracte speciale*, 151.

[2] Art. 1556 Civil Code stipulates that:

(1) When the obligations raised from a synalagmatic contract arepayable, and one party does not carry out his obligation, or does not offer his obligation carring out, the other party may correspondingly refuse his obligation carrying out, with the exception that out of law, out of he will of the parties, or out of usage it results that the other party is obliged to carry out his obligation priorly.

(2) The carring out of the contract can not be refused unless the refuse would deny the good faith according to the citcumstances and taking into account the minor value of the performance.

do all his best in order to guarantee the transmission of the asset).The equivalent of transmitting an asset cannot be a money debt or a sum of money because, under such circumstances, it might be considered to be a payment, therefore, a selling contract.

The Civil Code in 2009 specifically stipulates the distribution of the exchange contract expenses, as this aspect was not stipulated in the Civil Code in 1864. All the dispositions referring to eviction in case of the purchase agreement will be applicable to exchange, too.

Art. 1764 of the Civil Code would not find its reason from the eangle of art. 1268 of the Civil Code regarding the legal effects if it would not be interpreted in the sense that exchanging the asset of another person can be performed under the same conditions as the selling the asset of another person.

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DIFFERENCES BETWEEN"DISABILITY" AND"HANDICAP". THE EVOLUTION OF THE TWO CONCEPTS IN THE EUROPEAN SPACE

Adelina MIHAI [1]

Abstract:

Despite the fact that there have been many positive changes in international and national legislation regarding persons with disabilities, there are still unresolved issues concerning the definition of the term 'disability'. Due to the fact that it is an 'evolving' concept, as it is stipulated in the Convention on the Rights of Persons with Disabilities, it can't be given an exact definition; instead, the elements that form the definition should be explained. In order to understand the term 'disability' and why the State Parties preferred to replace it with the term 'handicap' in international law, it is necessary to identify the differences between the terms 'handicap', 'disability' and 'special needs'.

Key words: *disability, handicap, special needs, discrimination, social model.*

INTRODUCTION

Throughout history, people with disabilities have been regarded as individuals who need social protection and support in order to make up for their lack of abilities. The legal answers regarding the protection of persons with disabilities have rather centered on a policy that includes 'charitable activities, paternalism and social needs', than on viewing them as individuals with rights. The fact that persons with disabilities were in the past and still are nowadays placed in a special education system that is differentfromthe mainstream school system, reflects the way human differences are perceived. Human rights principles apply universally, however various reports backed up by UNESCO revealed the fact that the rights that form the basis of the Convention on Human Rightsdon't meet all the needs ofpeople with disabilities. The same occurs nationally, and the conclusions and observations from the institutions that are

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responsible for protecting persons with disabilities often remain 'unspoken'[1]. From the specialists' point of view, the term 'handicap' wasn't adequate, due to the fact that the meaning of the term was not in accordance with the new judicial sources that defended the rights of persons with disabilities, so they attempted to replace the concept with the syntagma 'persons with special needs'. However, it was concluded that this term wasn't appropriate either, because it has 'a stable and differential semantic structure, and on the other hand, the syntagma suggests a passive, purely claiming position, of lacking active involvement of the person concerned'[2]. Although the term 'special needs' wasn't accepted as a substitute for disability, this concept is used in the field of special Psychopedagogy, as well as in legislative sources within the special education system. Although it shares common aspects with the definition of 'disability', the syntagma 'special needs', better known in the field of education as 'special educational needs', has a more complex significance, and even includes the concept of disability. Due to the fact that there are two separate education systems, the mainstream education system and the special education system, the legislation relating tothe latter gives the disabled people the status of 'persons with special educational needs'. Thus, in legislative sources both nationally and internationally, the concept of 'disability', as well as that of 'handicap' (this is because some states haven't changed the term), appear in all fields of Law, except for Education Law, where the expression 'persons with special educational needs' is used.

DEFINING THE CONCEPT OF 'HANDICAP'

The term 'handicap' has its origins in English language and it was first documented in 1963. Before the term came to have the meaning it has nowadays, it was written 'hand in cap'. 'Hand in cap' was the name of a technique used by individuals to trade different objects of equivalent value imposed by an 'umpire'. Later on, the term appeared written in its

[1]Quinlivan S.,„The United Nations Convention on the Rights of Persons with Disabilities: an introduction", *ERA Forum*, 2012.
[2]Rusu C., *Deficiency, disability, disabled. Fundamental guide for protection, special education, rehabilitation and socio-profesionmala to people in need* (Bucharest: Pro Human, 1997), 2.

modern form, yet it was used to refer to an additional weight or distance that was given to equalize chances of winning in horse racing. Due to the fact that the term means a 'condition to equalize something', itfinds its analogy in 'lack of abilities of persons with disabilities'. Consequently, the meaning of the term evolved from 'limitation of horses capacity to limitation of people capacity and finally, to the consequences of this limitation'[1].

Later on, the word 'handicap' appeared in specialized literature as a medical term. In this context the medical model of disability comes into use, which is also known as 'individual model of disability'. In thismodel, the problems associated with disability are seen as lying solely within the individual and his or her medical condition or impairment. The desired solution to these problems is often the cure or rehabilitation of the individual, in order to fix the 'defect', so that the individual become closer to 'normal'. Under this model it is thus easy for people with disabilities to be viewed as weak and defective, needy and dependent (since they are assumed to require the aid of medical professionals) and generally, incapable of finding a job and living on their own or participating fully in society. When people with disabilities are seen as sick, as the medical model suggests, they may tend to be exempt from social obligations and are isolated from the rest of the population. These low expectations are damaging, both to the disabled and to the society, as a whole. The medical model became the dominant view of disability, which triggered the following consequences: negative perceptions of society and exclusion. In 1970, as a consequence of the Civil Rights Movement in the United States, people with disabilities fought to achieve equal rights and to access and adopted a new 'social model of disability'. The social model rejected the idea of disability as a medical condition. According to this new model, people with disabilities are not perceived as being 'different' or defective individuals, but as valued members of society, who have the right to full participation in society. The perception of people with disabilities as inferior human beings or as individuals who need special treatment in order to become 'normal' is rejected. The solution for 'curing' the disabilitywithin the individual is replaced by the solution toestablish a society that enables access and fights against negative attitudes, in order to allow its citizens the possibility to participate fully in the society. The social model states that removing

[1]Idem 3, 23, 26.

these social and environmental barriers makes the disability 'non-existent'[1]. As for the definition of handicap in the Romanian legal system, it has also undergone modifications, especially following the changes in perception regarding handicap worldwide. The first definition of handicap appears in the Law no. 53/1992, which states that 'people with disabilities are people who, due to sensory, physical or mental impairment, cannot integrate fully or partially, temporary or permanently, and on their own, into social and professional life, as they require special measures for protection'[2]. It can be observed that the definition derives its ideas from the medical model. 'Sensory, physical or mental impairment' hinder the participation to 'social and professional life' of people with disabilities. Society is not to be held responsible for these persons' incapacity to adapt, as the social model of disability claims. It's interesting that the term 'due to' is used instead of'as a result of' in the definition.By using the term 'due to', the blame for the individual's inadaptation falls on his deficiencies rather than on him.However, judging from a grammatical point of view, in Romanian language the preposition 'due to 'is synonymous with 'thanks to/ owing to'. Consequently, it is recommended that the preposition 'as a result of' be used instead. This definition was modified by Law no. 102/1999[3], which offers an entirely different interpretation of handicapped persons. Thus, according to Article 1 (1), handicapped persons are 'those persons who have a disadvantage as a result of a physical, sensorial, psychic or mental deficiency, whichprevent or restrict normal or equal access to social life, according to age, sex, material and cultural factors, requiring special protection measures for the purpose of their social integration'. The use of the term 'disadvantage' places persons with disabilities on a lower rank than normal people. Later on, Law 102/1999 was modified and the modification was made in accordance with the definition offered by the World Health Organization. The new definition for handicap is this time in agreement with the social model, because the factor that hindersaccess to social life for the individuals is the 'unadapted environment', as is stated in the modified definition of Law 102/1999, Article 1 (1).

[1]Sullivan K., „The Prevalence of the Medical Model of Disability", in *Society,,Olin College of Engineering,* AHS Capstone Projects. Paper 13 (2011).
[2]Law no. 53/1992, alin .1.
[3]Law no.102 / 1999 on special protection and employment of persons with disabilities, published in M.of.P.I, No. 310 / 30.06.1999, Article 1 (1).

Handicapped persons are 'those persons living in a social environmentwhich fails to adapt to their physical, sensorial, psychic or mental deficiencies and prevents complete access or restricts normal or equalaccess to social life, according to age, sex, and to their own material, social and cultural factors, requiring special protection measures for the purpose of their social and professional integration'.
This law, which addresses handicapped persons, states that aperson may have a handicap which doesn't necessarily hinder his participation in social life. Although it is implied from the definition that this law applies solely to persons with disabilities who, facing certain barriers, can't fully participate in society, it is necessary to specify the level of severity, due to the fact that misunderstandings may arise as a result of subjective perception of each individual regarding persons protected by this law.

According to Order no. 725/12709[1], the identification and estimation of the level of disability are established by referring to the International Classification of Functioning, Disability and Health, developed by the World Health Organization. According to this order, 'the presence of a health condition is a premise, though it doesn't necessarily include a handicap/ disability. The medical diagnosis in itself is not thus sufficient in order to establish the category of handicap, it has to be corroboratedbya psychosocial evaluation'. This order adds that'it must be taken into account the fact that the illness in itself doesn't determine the severity of handicap, but the degree of functional disorders determined by it, together with the evolution stage, the complications that may occur in the activity and social participation, personal factors, etc. '
If we take into account the contents of the present order, especially the fact that 'the illness in itself doesn't determine the severity of disability, but the degree of functional disorders determined by it, then the definitions of the term handicap must make reference to the 'level of severity' of the types of impairments, due to the fact that not all individuals with physical and mental impairment, sensory deprivation or psychological disorders have 'limited access' 'to social and professional life' or need 'special protection measures'. To sum up, regardless of the fact that a person does or does not have a handicap which limits his activities, he is still regarded asdisabled; thereforethe law may or may not

[1]Order no. 725/12709 from October 1, 2002 on the criteria used to establish the degree of disability for children and apply them special protection measures, published in the Official Gazette. R. 781 of October 28, 200.

protect him, depending on the context. The modified Law no. 102/1999 which offers a definition of the term 'handicap' comes very close to the definition provided by The Convention on the Rights of Persons with Disabilities, however the term 'handicap' is still used and the specialists consider that a *lexferenda* should be enforced in order to redefine the notion in accordance with the definitions that were accepted internationally[1]. In the judicial sources that make a reference to the special education system there is no definition of the concept 'handicap', on the contrary, this term is avoided. Consequently, the legislator modifies several times the term used to describe people with disabilities. For instance, before 1990, 'the Law of State Elementary Education and Normal Elementary Education'[2] talks about 'abnormally trainable, debilitated children', as per Art. 1, p. 4. According to the Romanian dictionary, the term, 'disabled' has two meanings. The first meaning of the term is 'lacking resistance to physical effort and illnesses; frail, feeble, weak', whereas the second meaning makes a reference to the syntagma 'mentally ill', which means 'person who suffers from a mental disability'. Therefore, the meaning of the term 'debilitated' chosen by the legislator was debatable. The use of the term 'abnormal' is inadequate, considering the complex meaning of the term. Although 'abnormal' means 'against rules', when used in a context it raises a lot of questions. The meaning of the term 'abnormal' can have a positive connotation, when we refer to exceptionally gifted people, who belong to a category of people who are considered 'atypical' or a negative connotation if we refer to the unevenly gifted people. In addition, the concept 'abnormal' is an abstract one. The definition of normality found in Larousse dictionary offered by Sillamy is the one that best emphasizes the complexity and abstraction of the term: 'normality is a relative notion, which varies from a social milieu to another and over time; it is what is often observed in a certain society, at a certain date'[3]. In other words, what seems normal in a certain context, we can find abnormal in another one and vice versa. In conclusion, to be 'abnormally trainable' is based upon an incorrect perception under a certain aspect, if one fails to answer the following

[1]Stoenescu C., Teodorescu L. and Mihaescu O., *The special protection of persons with disabilities in Romania* (Bucharest: All Beck, 2003), 7.
[2] Primary Education Act of the State and normal primary education, adopted on July 24, 1924, Bucharest.
[3]Sillamy N., *Dictionary of Psychology* (Bucharest: Juridical Universe, 2000).

question: which is the limit between normality and abnormality and based on what criteria can we tell the difference? After 1990, the status of 'debilitated children and abnormally trainable' disappeared completely from Education legislation. Thus the concept 'special education' came into use and according to Article 41, Paragraph 1, persons with disabilities are defined as 'pupils with mental and physical impairment, sensory deprivation, language, socioaffective and behavioraldisorders or with associated disabilities, with the aim of instructing, educating, rehabilitating and integrating them in society'. Nowadays the judicial basis for the Romanian education system rests on the Law of National Education 1/2011[1], where 'special education' becomes 'special education and special integrated education' and persons with disabilities are persons 'with special educational needs'. The new law is in accordance with the requirements of international Law; however it doesn't offer a definition for persons with special educational needs. Regardless of these linguistic barriers, Romanian legislation is currently in accordance with European Union legislation, though new strategies are required in order to view persons with disabilities as 'normal'[2] people, especially in concrete cases when the law must apply.

DEFINING THE CONCEPT OF 'DISABILITY'.

Legal definitions regarding the concept of disability have constituted a debate topic not only in Europe, but also worldwide. Despite efforts made by World Health Organization, there is no legal definition of disability. A recent study on defining disability in various EU countries has showed that definitions vary from one country to another[3]. Shifting from the medical model to the social model, in other words, from the idea that handicap is the criterion that limits persons to participate actively in society, to the idea that social barriers hinder persons with disabilities from achieving the conditions imposed by the community, there has also been a change of the concept that defines persons with sensory, intellectual and physical impairment, etc., that is of the term 'disability'. More precisely, the use of the term 'disability' instead

[1]National Education Law 1/2011.
[2]Idem 1.
[3] Degener T., *Definition of disability*, This study has been produced under the European Community Action Programme to combat discrimination (2001-2006).

of 'handicap' produced not only a change in social perception, but also a change of judicial nature that can be noticed in the principles of Law. The Convention on the Rights of Persons with Disabilities, as established by Article 1, defines persons with disabilities as 'those persons who have long-term physical, mental, or sensory impairment, whichin interaction with various barriers may hinder their full and effective participation in societyon an equal basis with other workers'. The CRPD's approach reflects the social model of disability and supports the idea that persons with disabilities are under 'social oppression', more precisely they come across barriers when exercising their rights and freedoms because of the environment and social perception. The elimination of attitudinal, political, physical barriersmay reduce social and economic exclusion and may improve the well-being of society. One of the purposes of the Convention on the Rights of Persons with Disabilities is to try to change the way society perceives disability based on stereotypes and preconceptions, making sure that states recognize and protect the rights of all their citizens without discrimination. Furthermore, Article 8 of the same Convention includes an addition to the first article, emphasizing even more the social model, thus forcing states to adopt measures which would raise societies' awareness in the fight against 'stereotypes, preconceptions and damaging practices'[1].Article 1 of the Convention on the Rights of Persons with Disabilities has two different elements: the first establishes the purpose of the Convention, whereas the latter gives a definition of persons with disabilities. The purpose of the Convention on the Rights of Persons with Disabilities is to 'promote, protect and guarantee people with disabilities that they can exercise fully and on even ground all the fundamental human rights and freedoms and to promote respect for their intrinsic dignity'. The terms 'promote, protect and guarantee' are not new in the discourses on human rights.According to Hendricks (2007)[2], 'the duty to protect and guarantee refer to the 'justicial' rights, because traditionally, the duty to promote can only apply in certain circumstances'. In fact, the duty to promote refers to the concept of 'the progressive achievement of the purpose', in other words the state 'heads towards' a purpose, and it doesn't rely on 'achieving' the purpose instantaneously. The duty to promote is not trivial and this idea

[1]McCallum R., *The UN Convention on Rights of persons with disabilities*, 2012.
[2]Hendriks, A., „Selected legislation and jurisprudence: UN Convention on the Rights of Persons with Disabilities", *Eur. J. Health Law 14 (2007)*, 273–298.

is emphasized in the case 'Autism-Europe v. France'[1]. Article 4 (2) of CRPD defines the term 'progressive achievement' and demands that State Parties take measures in order to achieve these rights, to their full capacity, according to the available resources'. The reference to the three terms points out the fact that this Convention makes a reference both to traditional civil and political rights and to social, economic and cultural rights, which are achieved progressively. Although the second element of Article 1 'announces' the definition of 'disability', there are certain points of viewin specialized literature which state that there is a guide rather than a definition, which contains defining elements for those persons who are referred to and protected by the Convention. Therefore, Article 1 should be read in accordance with Paragraph (e) of the Convention which states that disability is an evolving concept, in other words it is not possible to find a precise definition on disability, as long as the definition itself can suffer changes. The stipulations in Article 1 of the Convention borrow elements from the social model. The definition focuses on the barriers and obstacles that hinder the full participation in society. There is no doubt that this definition will determinemore states to revise their definition regarding disability and persons with disabilities. Eventhe Court of Justice of the European Union (CJEU) defined the concept of disability according to the medical model, in the ChacónNavas case. The Court used the medical model of disability focusing on individual degradation. The definition given by the Court must be reassessed with every new case, due to the fact that it was not in accordance with the purpose of the CRPD, namely to include a base of rights when approaching disability, whose objective is to eliminate physical and social barriers that hinder participation. Therefore, EU has the obligation to apply the social model of disability to all EU institutions, including the CJEU, which in turn has to apply EU legislation according to the Convention[2].

In order to fully understand the definition of disability as stated in the Convention, a more elaborate analysis on its content should be performed. The medical point of view of the concepts of 'sensory deprivation, mental and physical impairment and intellectual disorder' will offer a broader perspective on the concept of disability. Consequently, as per the International Classification of Functioning,

[1] http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf.
[2]Idem 2.

Disability and Health, disabilities represent 'certain insufficiencies in body function or structure'. Considering the fact that impairments can be temporary or permanent, progressive, regressive or static, the definition given by the Convention demands that these disabilities be 'long-term'disabilities. Impairments are not conditioned by etiology and by the way they are developed. For instance, sight loss can be caused by a genetic anomaly or a wound. Suffering impairments doesn't necessarily meanthe person is suffering from an illness. For example, losing a leg affects body structure, that is a deficiency or disability and it doesn't mean that losing a leg can be considered an illness. There are persons who suffer from minor sensory deprivation, such as shortsightedness. Does this mean that these persons can be included in the category of persons with disabilities that are covered by Article 1 of the Convention? The functioning of an individual in a specific area is a complex interaction between the state of health and contextual factors (environmental or personal). The connection between the state of health and the contextual factors is the individual's capacity to function (eg: Disfigurement). A person may have limited capacity when interacting with contextual factors without having an obvious deficiency (reduced performance in daily activities associated with variousillnesses). There is also a possibility that the individual may facedifficulties when interacting with contextual factors, without suffering deficiencies or capacity limitations (HIV-positive people) and also have limitations of functional capacity unless he is offered assistance and not have problems when performing an activity in the current environment. From a medical point of view, persons with disabilities suffer to a greater or lesser extent depending on the severity level of deficiency. This could create a lot of social disadvantages, so it is necessary that the definition offered by the Convention explain and exemplify the specific deficiencies that it refers to exactly and which should be their level of severity, although the definition says that these deficiencies , 'when interacting with other barriers, may hinder a full and effective participation in society'. Examples should be brought in order to support this idea, due to the fact that some disorders may hinder a full participation in society and it is also difficult to differentiate between 'illness' and 'deficiency', because deficiencies can cause illnesses in various circumstances.

Consequently, a distinction must be established between illness, which is a possible cause of deficiency and deficiency, which is the result

of illness. For instance, in the ChacónNavascase, the Referring Court demands that it must be established whether a disorder caused by a disease which was diagnosed as incurable or temporarily incurable can be considered a handicap/ disability. Neither the definition given by the Court's decision in the ChacónNavas case, nor the one included in the UNO Convention offers, in itself, an answer to the questions addressed by the Referring Court. Thus, apart from the requirement that for any limitation to be regarded as a 'disability', it must be probable that it will last for a long time, neither of these definitions contains an explicit criterion which helps distinguish handicap from disease[1]. For this reason, in the Navas v. EurestColectividades S.A. case, the Employment Directive appealed to the European Court of Justice in order to determine if the illness Mrs. Navas suffered from falls within the concept of 'disability'. The dispute arose between Mrs. ChacónNavas, who following illness was unable to keep working for her Spanish employer,EurestColectividades S.A. Navas was dismissed because she didn't conform with the Employment Directive. In response, the Court developed a definition of disability for the purposes of the Directive, with the aim to prevent discrimination from the employer. Thus, the Court ruled that disability means a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. In order for any limitation to fall within the concept of disability, 'it must be probable that it will last for a long time'. The Court held that 'disability is different from sickness' and that there was nothing in the Directive 'to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness'. It added that its definition of disability was 'autonomous and uniform'. First of all, it can be observed that the definition of disability that was developed in this case was based on the medical model. The cause of the disadvantage (or the 'limitation') is the 'impairment' which an individual has, and it is the impairment which hinders participation in professional life. Therefore, the problem rests within the individual, and not in the attitude of society towards impairment[1]. This definition is surprising due to various aspects.

[1]Advocate General Juliane Kokott findings, presented at the December 6, 2012.

[1] Waddington L. and Lawson A., *Disability and Non-discrimination in the European Union, An analysis of disability discrimination law within and beyond the employment*

First of all, the definition bears some similarity to the medical model that the Community explicitly rejected in 1996. Surprisingly, academics reacted to the narrow definition of handicap given by the Court. Scientists pointed out that the definition developed by the Court is the same as the individual/ medical model of handicap, and some of them went even further to argue that according to this special definition, the community legislation is inconsistent with the Community's commitment as a signatory to the UNO Convention regarding handicapped people[1].

The Disability Rights Movement immediately reacted to the definition given by the Court to disability. Immediately after the Navas case was announced, the European Disability Forum required that a new directive be adopted which should offer more details on the definition of disability developed by the Court, moreoverit 'has to be explicit, to offer guidance and be based on the social model of disability'. Secondly, the definition given by the Court doesn't illustrate the differences between the different types of medical impairments. Although the Court rejects the arguments of the Directive 'to protect an employee once he is diagnosed with any kind of sickness', it doesn't take into account the fact that there are certain medical conditions of different nature, such as transitory or minor conditions, cancer or depression and medical conditions that can turn into long-term diseases. In addition, some diseases such as cardiovascular diseases, diabetes, asthma or depression have long-term effects.As the deficiency in itself is different depending on each disease, this clearly has certain social disadvantages. Apparently, the Court made a mistake when it failed to offer examples to the concept of 'impairment'. Eventually, the Court lacked sufficient evidence in order to conclude if Navas's sickness was a minor condition or not[2].

The Court alleged that 'disability and sickness are different terms' and didn't take into account the 'Advocate General's' argument that a sickness which causes long-term disability is not the same thing as disability and yet there is an exception when the disease causes long-term or permanent limitations, because it can be perceived as disability. Dueto

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field, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, 2009.

[1]Perju V., „Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States", in *Cornell International Law Journal Vol. 44, (2011).*

[2]Idem 22.

the fact that the Court's definition is 'autonomous and uniform', it means that it doesn't depend on the definitions found in international Law, but comes as a separate definition. This doesn't mean however that it doesn't apply in EU. The consequences of the above mentioned situation refer to the fact thatthe persons covered by the legislative framework of the Directive are persons with disabilities that are in accordance with the definition offered by the Court. This means that the Member States are not compelled to adopt this definition; however certain countries such as Great Britain and Holland decided to adopt it, protecting mainly those persons suffering from chronic diseases[1].

CRPD doesn't offer any explanation regarding 'barriers' suggested by the stipulations in Article 1, due to the fact that according to Paragraph (e) in the Preamble to the Convention, State Parties admit that 'disability is an 'evolving concept and it is the result of the interaction between persons with impairments and attitudinal and environmental barriers thatprevent [...]'. The articles of the Convention on the Rights of Persons with Disabilities neither provide a definition, nor refer to 'barriers' that hinder participation of persons with disabilities in society. According to Order 725/12709[2] in the Romanian legislation, it can be interpreted that barriers depend on the capacity of the individual to fulfill various activities, imposed by the commission that includes the persons concerned in a certain degree of impairment. In order for them to be regarded as persons with disabilities, they should, to a certain extent, be incapable of: learning and applying knowledge, fulfilling certain tasks, having communication impairments when it comes to receiving and producing messages, having a conversation and using communication devices and techniques. Also, mobility related problems, self-sufficiency, domestic life, socioaffective interpersonal relationships, problems in social and community life and learning difficulties could be considered barriers. It is considered that these barriers are the consequence of the inability of the individual to face the factors that determine his inclusion in certain a degree of impairment. The International Classification of Functioning, Disability and Health contains a classification of environmental factors which describe the world in which people with

[1] European Disabilities Forum, Edf Analysis of the first decision of the European Court of Justice in the disability provisions of the framework Employement Directive Case C-13/05 Chacon Navas v Eurest Colectividades SA, 11 July, 2006.
[2]Idem 7.

different levels of functioning must live and act. These factors can be either facilitators or barriers. Environmental factors include: products and technologies; natural and built environment; support and relationships; attitudes; services, systems and policies. The International Classification of Functioning, Disability and Health (ICF) also recognizes personal factors, such as motivation and self esteem, which can influence how much a person participates in society. Nevertheless, these factors haven't been yet conceptualized or classified. ICF further distinguishes between a person's capacities to perform actions and the actual performance of these actions in real life, a subtle difference that helps illuminate the effect of environment and how performance might be improved by modifying the environment. However, by elaboration policies and providing services could impose certain thresholds which would help to determine the depreciation in the severity of the degree of impairment, the limitations of activities or participating restrictions[1].

If the definitions of other categories of concepts such as 'sex', 'culture', 'ethny', 'sexual orientation' are difficult to explain and raise democratic questions, 'disability' can be considered a much broader concept with a more difficult level of interpretation due to the numerous conditions imposed by 'body' and 'psyche' and also by the limits between 'capacity' and 'incapacity', which are included in the same category of concepts of abstract comprehension. In addition, the definitions of disability change with the evolution of medical science. The legal definitions of disability also vary depending on the legal purposes. Consequently, a law on social assistance can target a certain group of persons with disabilities, as opposed to a law that centers on discrimination. From a theoretical perspective, the definitions of disability focus on identifying the factors that cause the disability: medical conditions, environmental factors, social and attitudinal structures and behaviors. The debate between the medical model and the social model of disability had a major impact on European policies regarding disability, which determined a shift from the paradigm based on 'incapacity' to the paradigm based on 'rights and policies'. This change allowed viewing disability as a social construct. Only ten countries among the Member States in the European Union have laws regarding disability in the workplace, but only Germany, Ireland, Sweden and the

[1]World Health Organization, *World report in Disabilities* (Geneva: WHO Press, 2011).

United Kingdom adopted disability discrimination laws, which offer an explicit definition of the term disability.

In Germany, for instance, according to the 'Nine Book of the Social Law, code 2 SGB IX', 'a person is disabled if her physical functions, mental capacities or psychological health deviate for more than six months from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted'.

In Ireland, the Employment Equality Act of 1998, Section 2(1) of the Act defines 'disability' as:

(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body;
(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;
(c) the malfunction, malformation or disfigurement of a part of a person's body;
(d) a condition or malfunction which results in a person learning differently from other persons without the condition or malfunction;
(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behavior,

and shall be taken into account in order to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person'.

In Sweden, according to 'The Prohibition of Discrimination in Working Life in people with Disability Act (Lag 1999:132), disability means 'every physical, mental or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth arose thereafter or may be expected to arise'.

In the United Kingdom, as per the Disability Discrimination Act 1995, Section 1, disability is defined as a 'physical or mental impairment which has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities'[1].

CONCLUSIONS

It should be pointed out that there are differences between these definitions and the definition presented by the Convention on the Rights

[1]Idem 16.

of Persons with Disabilities. Thus, the definition found in the German legislation makes an exact reference to the period that a person must exceed in order for her to be protected by law. The definition of disability that the Irish legislation presents is different from the one that the Convention offers, as disability means'the total or partial absence of a person's bodily or mental functions'. It can be noticed that the definition given by Ireland has a broader area of protection for persons with disabilities, including people with 'disfigurement of a body part'. This 'disfigurement' doesn't necessarily prevent the full participation of the persons in society and yet it is included in the category of protection of people with disabilities. In addition, there is a reference to the fact that 'illness' can be considered a disability. On the contrary, the definition found in the Swedish judicial source distinguishes between disability and illness, stating that disability is a consequence of illness.

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FROM "EU 28" TO "EU 27". "THE ACTIVATION" OF ARTICLE 50 OF THE LISBON REFORM TREATY

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Abstract:

This paper analyzes a unique situation that the European Union is currently facing, generated by the process practically called "Brexit". This entails the United Kingdom of Great Britain and Ireland North leaving the European Union, a process determined by the popular will expressed in the referendum held on 23 June 2016. The outcome of the British referendum has made Brexit one of the main points of discussion on European Council agenda.

Great Britain activated on 29 March 2017, for the first time, Article 50 of the Lisbon Reform Treaty, which is the legal provision allowing a Member State to voluntarily withdraw from the EU. The negotiations, scheduled to last for two years, have begun with Britain's formal notification to the European Council.

Key words: *Brexit, voluntary withdrawal, negotiation, notification of the intention, membership*

INTRODUCTION

A novel situation that the European Union is currently experiencing has been generated by the process practically called "Brexit": from the English term *Brexit*: "Britain" and "exit". It designates the United Kingdom of Great Britain and Northern Ireland exiting the European Union, a process determined by the popular will expressed at the referendum held on June 23rd, 2016.

The organization of a referendum on Great Britain's withdrawal from the European Union was one of the electoral promises made in early 2013 by the conservative leader David Cameron, who became prime minister. At that time, most of the British were in favor of remaining in the Union, so the outcome of the referendum was not a cause of concern for European leaders.

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At the European Summit in Brussels in June 2015[1], the British Prime Minister David Cameron discussed about the conditions in which Great Britain was willing to remain in the European Union. Subsequently, in January and February 2016, an agreement was reached with other EU leaders in order to change the membership of Great Britain, an agreement that would have come into force immediately, if the votes within UK had been for the remain in EU.

The main points of the February agreement set by the Prime Minister David Cameron and the EU leaders are the following: the allowances for the migrants' children; the social allowances for immigrant workers; keeping the national currency (the pound sterling); the autonomy for managing national issues (for the first time, there would be a clear commitment by which Great Britain would not be part of the movement encouraging a "more consolidated union" with the other Member States, one of the basic principles of the European Union).

By this agreement, Great Britain would have acquired a "special" status within the 28-nation union, a status that would have allowed the British to even make some appreciations on the EU, for example, on the high level of immigration and the abandonment of the ability to run their own businesses. The talks have also taken into account the situation in which Great Britain would leave the EU, mentioning that in the minimum two-year period after the vote, it will continue to observe the EU treaties and laws, without taking part in any decision-making.

On the other hand, the United Kingdom's claims seemed unclear, as well as the date on which the referendum was to be held. A claim was related to Britain's veto right over the decisions of the Euro Zone and the ECB, which could have affected the English banks. In very vague terms, the UK talked about four sectors of negotiation: sovereignty, competitiveness, equity and prosperity.

The unfavorable context of the events could be summarized as follows: while Greece was struggling to remain in the EU, Great Britain was threatening to leave the Union if the EU did not follow the demands of the London government. This is also the reason why Brexit[1] has

[1] Discussions at the European Council meeting (25-26 June, 2015) focused on Greece, migration, the upcoming referendum in the UK, security and defense, and economic issues.

[1] Ioana Covei, *Brexit, un nume nou pentru o problemă veche* (Euro Qvorum Institute: 2016), 2.

become one of the main points of discussion on the agenda of the European Council[1].

THE REFERENDUM OF 23 JUNE 2016

The UK referendum held on 23 June 2016 had only one question: "Should the United Kingdom remain a member of the European Union or leave the European Union?" If the option was to leave the European Union, the word "Brexit" would be used, an abbreviation of the two phrases merging together: Great Britain and exiting the UE. It is similar to Greece's leaving the EU in the past, when it was called Grexit.

At the referendum, the right to vote belonged to British citizens living in the country and in the member states of the Community of Nations (where there are independent states, former British colonies), of 18 years of age and over, and also British citizens living abroad, who appeared in the UK electoral register in the past 15 years. The citizens of EU countries with a residence permit in the UK - apart from Ireland, Malta and Cyprus - did not have the right to vote.

In order to vote, firstly, British citizens had to register their participation, after which the polling station where they could express their opinion was indicated (there were 382 local polling stations in the UK). There was no voting limit on the basis of which the referendum could be valid, although 46 million people were expected to vote.

In the referendum, 51.9% of the British voted for their country to leave the Union (17.410.742 million), while 48.1% voted to remain in the community block. The voting rate was 72.2%.[2]

The outcome of the referendum had an advisory role, the final decision being that of the Parliament, which could admit or reject the result. From a technical point of view, the British Parliament could have blocked the exit from the EU, but this would have meant a decision against the will of the people expressed in a referendum.

The European Parliament has taken note of the will of British citizens to leave the European Union, considering that the popular will expressed in the UK must be fully respected by immediately activating

[1] *Conclusions of the European Council*, Brussels, 25 and 26 June 2015.
[2] "Britain's EU referendum", in *The Economist*, June 23rd 2016.

Article 50 of the Treaty of Lisbon[1], which provides for the triggering of the negotiation procedures for the United Kingdom to leave the European Union.

THE REACTIONS OF THE EU INSTITUTIONS AFTER THE REFERENDUM

Following the result of the referendum on 23 June 2016, the European Parliament considered that the popular will expressed in the UK must be fully respected by the immediate activation of Article 50 of the Treaty of the European Union, which stipulated the triggering of the negotiation procedures for the United Kingdom to exit the European Union.

The European Legislative issued, in this respect, a motion for resolution[2] on 24 June 2016, which was voted in an extraordinary session with a large majority. The resolution officially presented the key principles and key conditions of the European legislature to approve the withdrawal agreement with the UK, which at the end of the negotiations will require the approval of the European Parliament.

The Euro-deputies have asked the British Prime Minister, David Cameron, to give notice of the result of the referendum before the European Council on 28-29 June, in order to initiate the exit procedure, and any new UK-EU relations will no longer be agreed before the finalization of the withdrawal agreement of the United Kingdom.

A further consequence of the outcome of the referendum is the EP's request to the Commission President Jean-Claude Juncker to relocate the portfolio of the British European Commissioner Jonathan Hill, EU Commissioner for Financial Services and Capital Market Union.

In this context, the European Parliament called on the EU Council to designate the European Commission as the negotiator in these withdrawal procedures of the UK from the EU. The European Commission's Brexit negotiator, Michel Barnier, stated that Great Britain

[1] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007, Official Journal of the European Union, 17.12.2007 , (2007/C 306/01).

[2] *Motion for a Resolution pursuant to Rule 123(2) of the Rules of Procedure and the Framework Agreement on relations between the European Parliament and the Commission on the consequences from the result of the UK referendum to leave the EU*, (UK Resolution, June 24, 2016).

could leave the EU only after "having paid its bills and secured the rights of the European citizens". According to the information circulated in the European press, the money that the UK should give to the Union, which represents London's financial contribution to the EU budget, amounts to 60 billion euros.

WHAT DOES THE ACTIVATION OF ARTICLE 50 MEAN?

The complexity of the process of Britain's exit from the EU is given by the negotiation of two agreements, the withdrawal agreement and the one on the future relations between the European Union and the UK, the latter being dependent on the completion of the exit agreement. At the same time, three issues are considered delicate and need to be debated as quickly as possible in the negotiation process: the situation of the British in the EU and that of European citizens in the UK, the European budget and the border issue between Ireland and the UK.

The draft law authorizing the government to activate Article 50 of the EU Treaty has been entitled *"Draft Law regarding the European Union (notification of withdrawal)" Act 2017*[1]. With its extremely succinct content, the British members of the Parliament were asked to "give the Prime Minister the power to notify, under Article 50 of the Treaty on European Union, the UK's intention to withdraw from the EU". Following the resignation of David Cameron from the executive, the new British Prime Minister has pledged to initiate the withdrawal from the EU by the end of March 2017 and to stand by this calendar[2].

The bill was approved by the House of Commons on 9 February, with 494 votes in favor and 122 against, and then it was discussed by the other Chamber, which could not have blocked the text, but would have disrupted the government's schedule. In the House of Lords, where the conservatives are in minority, the debates had three readings, the last one taking place on 7 March 2017.

[1] The Act's long title is *To confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU*. The Act confers on the Prime Minister the power to give the notice required under the Treaty when a member state decides to withdraw.

[2] Robert Lupitu, "Cum relatează presa europeană activarea articolului 50 privind Brexit", in *Calea europeană*, March 30, 2017,1-2.

The aim pursued by the British Government was that the Lords would validate the text without making any changes in order to avoid a return of the project to the House of Commons, and Prime Minister Theresa May could trigger Article 50 of the Treaty of Lisbon as soon as possible, during the forthcoming European Council scheduled for 9 and 10 March in Brussels.

Apart from the case when the British Parliament would not have adopted the law on the notification of withdrawal[1] (and this would have meant "political suicide", to go against the will of the people expressed in the referendum), another solution that could have stopped the withdrawal of the United Kingdom from the EU would have been the exercise of the veto right by the British Crown, after the adoption of the law by the Parliament.

● THE VETO RIGHT PF THE BRITISH QUEEN

From a legal point of view, it has become well-known that the integration of the United Kingdom into supranational organizations has considerably affected the legal system of this state. To this is added the objective reality according to which the British constitution has slowly transformed over the centuries, but faster since the 1990s, from a predominantly political one to a formal one and formalized one in written legal texts[2]. The United Kingdom of Great Britain and Northern Ireland presents itself today as a unitary but strongly decentralized state, comprising four historical provinces, each with its own identity but not in distinct states, namely: England, Scotland, Wales and Northern Ireland.

In modern times, the right of veto, considered by some constitutionalists only a deterrent factor, was scarcely employed except for when "the advice came from ministers".

The right of veto (from Latin *veto* – I oppose) is the exceptional right of a person or a state to oppose the adoption of a proposal or a decision[3], "Veto" being the formula through which this right is exercised.

In the category of the extraordinary rights of the Queen of the United Kingdom[1] there is also the sanctioning of the laws with the

[1] UK Parliament, *European Union Act 2017(Notification of Withdrawal),* March 2017.
[2] Elena Simina Tanasescu, *Constituția Regatului Unit al Marii Britanii şi Irlandei de Nord - Prezentare generală*, 3-4.
[3] https://dexonline.ro/definitie

maintenance of a formal veto right, not exercised since the beginning of the 20th century. Initially, Prince William, who de facto is the official spokesman for the Queen, has made it clear that, if the British Parliament adopts the law regarding UK's exit from the EU, Queen Elizabeth could benefit from her veto right and will not sign the document because it is against the national interests of the country.

In the discussions surrounding the exercise of the veto right, the British sovereign biographer Robert Lacey said that Queen Elisabeth II would have asked during a dinner for "three good reasons" in favor of Britain's stay in the EU[2].

As such, the British Parliament approved, without any amendment, the Brexit law, and on 16 March 2017, Queen Elisabeth II officially promulgated the law that allowed Prime Minister Theresa May to activate Article 50 of the Treaty of Lisbon[3], officially launching the negotiations for the country's exit from the European Union.

● THE CONTENT OF ARTICLE 50 OF THE TREATY OF LISBON

The provisions of Article 50 were part of the treaty negotiated in 2002 and 2003 for the European Union to have a legislative framework that would allow it to expand to Eastern Europe. The inclusion of this article in the treaty was initially encountered by a strong opposition, because, at that moment, the idea of leaving the EU was considered a "supreme insult"[4].

At the last negotiating session held in July 2003, when the treaty was finalized, the British conservatives supported, nevertheless, the inclusion of an exit clause. This request was accepted, as no one expected then that a country could ever decide to leave the EU[1]. In fact, this article was to be introduced into the European Constitution, where it would have

[1] The political power of Queen Elizabeth II was also exercised in the Commonwealth member states, such as: Australia, Canada, New-Zealand and Jamaica.
[2] Sorin Popescu, "Brexit: Un biograf spune că regina Elisabeta a II-a ar fi cerut trei motive în favoarea rămânerii Marii Britanii în UE", *Agerpres*, June 22, 2016.
[3] The Queen of Great Britain promulgated the Law for Brexit on March 16, 2017.
[4] Gisela Stuart, a British Eurosceptic Labour Party politician, who served as Member of Parliament for Birmingham Edgbaston from 1997 to 2017, who participated in the drafting of the Treaty establishing a Constitution for Europe.
[1] Sorin Popescu, "Istoria articolului 50 al Tratatului de la Lisabona, o clauză redactată chiar de britanici", March 29, 2017.

been Article 60, being also considered as a possible pressure tool on the states to rapidly ratify the EU Constitution, by creating a mechanism leading to the exclusion from the EU of the countries which do not finalize this ratification within two years. But the Constitution draft was rejected at the referendums held in France and the Netherlands in 2005, and the idea of adopting this Constitution was abandoned. However, a part of the text of the Constitution draft was taken over in the Treaty of Lisbon, and Article 60 became Article 50.

Article 50 of the Treaty of Lisbon states that "*any Member State may decide to withdraw from the Union in accordance with its constitutional norms*". This text[1] requires the EU to negotiate an agreement with the leaving state, setting out "*the modalities of its withdrawal, taking into account its future relationship with the Union*". Even if such an agreement cannot be reached, the EU treaties will cease to apply to the country that leaves two years after the respective state notifies its intention to leave the block, unless the EU Member States unanimously decide to extend this deadline.

Although the withdrawal procedure is clearly mentioned in Article 50, some analysts and European leaders have warned that Brexit, as Britain's withdrawal from the EU is known, will not be an easy process. There are views according to which the United Kingdom can not be in a position to obtain favorable negotiating conditions under Article 50, as the text states that "*the withdrawing Member State does not participate in the discussions (EU) (...) or in the decisions to that end*". Before the referendum, the European officials have warned that a vote in favor of the withdrawal is definitive and have ruled out the idea that it could simply open London's path to negotiating better conditions for remaining within the EU.

Article 50 provides, for example, that any agreement to withdraw shall be concluded on behalf of the Union by the Council, acting by a qualified majority, but only after obtaining the consent of the European Parliament, whose members are likely to have very different points of view concerning Brexit. The agreement does not need to be ratified by the EU Member States, but such a process is necessary for any modification of the international treaties or agreements that will be

[1] *Treaty on European Union and the Treaty on the Functioning of the European Union*, consolidated versions, Official Journal of the European Union, C 326, 26/10/2012 P. 0001 – 0390.

required in connection with the withdrawal, for example a free trade agreement.

Article 50 further specifies that the member of the European Council or of the EU Council representing the withdrawing state will not participate in the debates of these two institutional bodies, or in the decisions concerning it. Also, several EU relations with other neighboring countries have been mentioned as models to follow for the UK, including those of Norway, Switzerland or Turkey.

The European Parliament adopted on 5 April 2017 a resolution, "Red lines on Brexit negotiations"[1], officially presenting the key principles and conditions of the European Parliament to approve the withdrawal agreement with the UK. The resolution, endorsed by a large majority: 516 votes in favor, 133 against and 50 abstentions, shows that the UK remains a Member State until the official departure, this implying rights and obligations, including financial commitments that may extend beyond the date of withdrawal.

The document states that only when "substantial progress" is made in the negotiations on UK's way out of the EU can the discussion on the possible transitional arrangements begin. They can not last for more than three years, and the agreement on the future relationship can not be concluded until the UK has left the EU.

CONCLUSION

The activation, for the first time, of Article 50 of the Treaty of Lisbon formally triggered the negotiations on the UK's exit from the EU. In a two-year period, starting with London's formal notification to the European Council, the British government, other European leaders and institutions will try to establish the terms of the future EU-UK relationship after the British state has left the European community.

An immediate consequence of triggering the withdrawal process was also the aggressive attitude towards Great Britain, cited by the British Finance Minister, referring to the € 60 billion invoice. The European Commission has decided to block the London Stock Exchange and Deutsche Börse joint venture a day after the British Prime Minister

[1] „Red lines on Brexit negotiations". Press release. European Parliament. 06 April 2017.

Theresa May signed the activation clause of UK's voluntary withdrawal from the EU.

Despite the possible animosities that may arise, the relations between the UK and the EU must aim to ensure an equal and fair treatment for EU citizens living in the UK and for the British citizens living in the EU, as the United Kingdom remains a Member State until its official departure, this implying certain rights and obligations, including financial commitments that could extend beyond the withdrawal date.

It remains to be seen how the EU-UK relations evolve, as the idea of early elections in the United Kingdom is increasingly circulating, which will be organized "in the national interest", as "the only way to guarantee safety and security for years to come"[1].

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TRADITION AND MODERNITY IN THE VOCATIONAL TRAINING IN THE PROCESS OF TEACHERS OF ROMANIA AND THE EUROPEAN UNION

Andreea RÎPEANU[1]

Abstract:

The reforms of the education systems in Europe and at global level on training primary school teachers are a necessity established by the fast changing world as well as a partnership and it focuses on: developing access to studies (tertiary); the progress of the company based on knowledge; globalization of (higher) education; mobility, cooperation, competition, interdependency. Because in Europe there is an incredible variety of traditions and systems for vocational training and training of primary school teachers, the focus shall be oriented on the modernization of methods and approaching the study, teaching and evaluation, including on the measures that ensure internal quality.

Keywords: *Tradition, modernity, culture, vocational training, the evolution of the society.*

INTRODUCTION

In Romania the vocational training system for the teaching personnel is at present in a moment of being correlated with the objectives of the European Union, in regard to investment in human resources and their capitalization with the view of increasing quality.

Nowadays, being a teacher in a European education and training sector is a true challenge. In this context, vocational training is a process determined by the evolution of the society, by the development of science and technology. It is an important prerequisite toward the specialization of the teaching career.

In our opinion, in order to continue the actions (process that was commenced in 2001) that lead to a specialization of the teaching career in

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Romania, certain fundamental conditions need to be met, like: capitalizing the experience, normative, organizational and curricula accumulations and, last but not least having the human resources that ensure the optimum vocational training.

The present education requirements entail configuring an education model that is unified, standard, recognized in the European and international region.

In our opinion, an efficient reform in the field of vocational training for the teaching personnel of Romania, that would ensure career development, should ensure a close relationship (correlation) between initial training and forward training; the teacher should benefit from vocational training that would cover the seven areas of competence: *communication, the relationship between school and family, cooperation and contribution within the community, curricula, training of children, evaluation* and *professional development*; the profession should comply with the quality standards in the field of initial training, by means of higher education institutions; the profession should be placed within the European context of continuous professional development/lifelong learning; the profession should be oriented towards mobility, in regard to initial training as well as in regard to forward training at local, regional and European level.

THE OBJECTIVES OF THE EDUCATIONAL AND VOCATIONAL TRAINING SYSTEM WITHN THE EUROPEAN UNION

Starting from the principle expressed in art.15 of the *Charter of fundamental rights*, in accordance to which, *every person has the right to education and access vocational training and lifelong learning*[1], education and vocational training is the subject matter of a rigorous analysis prepared by the European Council and European Commission.

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[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0391:0407:RO:PDF, Official Gazette of the European Union, *Charter for fundamental rights of the European Union* (2012/C 326/02).

In this context, all the European[1] policies that determine access to vocational[2] training relies on the need to provide the society with teachers that hold the necessary ethical and intellectual knowledge and that hold the necessary knowledge and professional attitudes.

The training of teachers is a fundamental component of the processes of cultural reorientation of contemporary Europe.

As a consequence, the Council and the Commission have adopted a work program for 10 years, called *Education and training 2010* (2002/C 142/01). Its objectives are among others, improving the quality of the educational systems and access to education for everyone, as well as opening the educational systems to all the people on a global level. The program is a new and coherent strategic framework that integrates all the actions in the field of education and vocational training at European level. It shall be applied in practice through the open coordination method, by means of which the joint objective shall be established and which shall be translated in the national policies.

The future improvements of the general educational level and the progress level in fulfilling the joint objectives of the work schedule *Education and training 2010*[3] were facilitated by the experience of some efficient systems for training teachers.[4]

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[1] For example, the research policy focuses on improving teaching sciences on all educational levels in the Union. A group at high presidential level chaired by Michel Rocard, European deputy, has examined the present community and national initiatives, innovative in the field of scientific education (their report can be viewed on http://ec.europa.eu/research/science-society/index.cmf?fuseaction=public.topic&id=1100&lang=, and it also includes adopting certain new methods of scientific vocational training, radically different from the traditional pedagogical methods).

[2] The European Union proposed to establish a joint framework on education and training of teachers, starting from the hypothesis that: teachers play an important role in helping people develop their talent and capitalize the growth potential and personal wealth, and support them in gaining a large quantity of knowledge and competences that will be needed by them in their capacity as citizens and employees.

[3] See *Education and training – 2010 – Improving the education and training of teachers and trainers*, European Council, 2006 and *Communication to the European Council and European Parliament on improving the quality of training for teachers*, Brussels, 2007, (http://ec.europa.eu/education/policies/2010/doc/jir_council_final.pdf).

[4] Conclusions of the European Council and of the representatives of the governments of the Member States, on improving the quality of training for teachers, Council meeting, November 15th 2007.

In the *Report on improving the quality of the trainings for teachers* of 2007, the Council and the Commission presented a work schedule detailed in relation to the objectives of the educational and vocational training systems namely: *increasing the quality and efficiency of educational and vocational training systems within the European Union; improving the education and training of teachers and trainees.*

The Commission also believes that all the teachers will gain if: they are encouraged and supported during their career to expand and deepen their competences through formal, informal and non-formal means and their relevant studies are recognized; can access vocational training through exchanges and internships; they have the possibility and time to study in order to obtain additional competences, and are involved in studies and researches for higher education; there is a focus on creative partnerships between the institutions in which the teachers work, educational and research institutions at higher level and other agencies, in order to support the training activities and practical internships of high quality and to develop innovation networks at local and regional level.

The reforms of the (higher) education systems in Europe and at global level on training primary school teachers are a necessity established by the fast changing world as well as a partnership and it focuses on: developing access to studies (tertiary); the progress of the "company based on knowledge"; globalization of (higher) education; mobility, cooperation, competition, interdependency.[1]

The European Union countries focus within the *Objectives of 2010* agenda on developing vocational education and training of primary school teachers: not only initial vocational training of teachers within universities and colleges, as well as on the job training and developing partnerships with schools. Investments in training of teachers and trainers and consolidating the management of education and training institutions are of major importance for improving the efficiency of the education and training systems.[2]

[1] In 2005 a conference of the European Union was organized in Brussels in order to verify the work schedule, before the formal adoption of the **Competences and Skills of Primary School Teachers** within the political structures of the European Union (2006). The conclusion adopted during this conference was that the exchange of good practices and the cooperation between the countries is at present necessary.

[2] *Joint intermediary report of the European Council and of the European Commission*, Official Gazette of the European Union, 79, 2006, p.1.

Because in Europe there is an incredible variety of traditions and systems for vocational training and training of primary school teachers[1], the focus shall be oriented on the modernization of methods and approaching the study, teaching and evaluation, including on the measures that ensure internal quality[2].

Based on the research that has demonstrated that, the training of teachers is significantly and positively correlated with the results of

[1] See the declaration of Ján Figel', the European commissioner for education, training, youth and culture, who declared that: *a better teaching and learning level is very important for the long term competitiveness of the European Union, because the labor force with high qualification is a more efficient labor force. I believe that it is necessary to ensure that the European Union has such high quality teachers in order have successful educational reforms within the Member States,* Meeting of the European Commission, Brussels, August 6th 2007.

[2] Ever since the year 2004, the European Commission started developing a special document regarding the competences and skills of the teachers and trainers. The draft document underlines the role and importance of the quality of vocational training for primary school teachers and trainers in the context of the European Union strategy of Lisbon. The vocational training and training of primary school teachers and of trainers – together with the faculties and schools – was confirmed as a key factor for being a part of the information based society. In this situation, the European Commission proposes to improve the quality of training of teachers in the European Union. The premises was that, the high level of teaching represents a preliminary condition in order to ensure a qualitative education and training system, which represents in turn, a strong decisive factor for the competitiveness of Europe on the long term, as well as for its capacity to create more jobs and generate growth. In the event in which they are adopted by the member states, the proposals which were agreed, shall guarantee that the European Union shall have a labor force with a high level of education necessary in order to cope with the pressure of the 21st century. In order to prepare the students for the European Union society, which relies ever more on knowledge, the teachers are requested to develop within the students a new set of skills, which requires at the same time new teaching methods. Furthermore, there is an increasing demand for teachers to teach in classes that have students of different cultures and different mother tongues, with different skills and needs. Still, the teachers state that they are not used to using new technologies in the class rooms. Besides this, the analysis prepared by the European Commission shows that the present training systems for the teachers of the Member States, are not able to provide to the teachers the necessary training. In fact, in some Member States, there is a low level of systematic coordination between the various elements of the training process of teachers. This leads to the lack of coherence and continuity, especially between the initial training of a teacher and the future period of integration at the job, as well as between the on the job training and professional development.

the student[1] and that this is the most important inter-school driver of these results[2], the *Communication of the Commission to the European Council and Parliament, on improving the quality of teacher's training,* adopted in Brussels[3], proposes to the Member States certain general orientations for the development of practices and policies: ensuring the access of all teachers to the knowledge, behavior, and pedagogical skills that they require in order to be efficient; ensuring coordination, coherence and the appropriate resources for vocational training and development of teachers; promoting a culture of reflexive practice and research among teachers; promoting the status and recognition of the teacher; supporting the professionalization of education.

Other studies[4] have underlined the existence of positive relations between forward training of teachers and the results of students and "suggest that on the job training ... improves the performances of children ... and presuppose that the training of teachers may be a cheap way of obtaining higher grades at the exams rather than reducing the size of the classes or by adding additional classes".

It is important to transform education into an attractive profession in order to recruit the best candidates and encourage career changes in favor of the education sector. Contrary to what was observed in various Member States, it will be necessary to convince the experienced teacher to stay within the profession rather than retire early, which can lead to increased training needs and professional support.

The European Council (2007) unanimously decided that the *purpose of vocational training for the teaching staff should be oriented*

[1] See the example of, Darling Hammond et al 2005, Does teacher preparation matter? Evidence about teacher certification, Teach for America, and teacher effectiveness. Education Policy Analysis Archives, 13(42)16-17,20.

[2] Rivkin, Hanushek and Kain, 2000; Hanushek, Kain and Rivkin, 2005, "Teachers, Schools and Academic Achievement".

[3] Defines a *joint framework for the policies oriented towards improving the quality of the training for teachers.* This document meets the request formulated in 2004 in the Joint report of the Council and Commission on the progress registered in fulfilling the Lisbon objectives in the field of education and training, namely *developing a series of joint principles at European level in order to improve the skills and competeces of the teachers and trainers*.

[4] Angrist and Lavy, 2001, Does Teacher Training Affect Pupil Learning? Evidence from Matched Comparisons in Jerusalem Public Schools http://www.journals.uchigo.edu/JOLE/journal/issues/v19n2/010404/ - fn 1 Journal of Labor Economics, 19, 2, 343-69.

towards developing the general knowledge and personal culture; the ability to learn and educate students; understanding the principles that govern the establishment of better human relationships within the national borders; the awareness of the duty that binds them to contribute by means of education, social, cultural and economic progress[1].

Yet, appropriate vocational training cannot be obtained with reduced investments[2]. That is why, investments in training of teachers and trainers and consolidation of the education and training institutions are of major importance for improving the efficiency of education and training systems.[3]

In the *2012 Joint report of the Council and Commission on enforcing the strategic framework for European cooperation in the field of education and training* (ET 2020), *Education and training within an Intelligent, sustainable and favorable inclusion* (2012/C70/05)[4], within which vocational education and training play a crucial role, especially in regard to integrated orientations of the national reform programs of the Member States and of the specific recommendations of each country. The *Europe 2020 Strategy* has to focus on the reform measures with short term effects on growth as well, as well as on establishing a good model for the medium term. That is why, the education and training systems need to be modified in order to consolidate their efficiency and quality,

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[1] In order to meet this objective "the entire training curricula for the teaching personnel should include: general studies, the study of fundamental elements of philosophy, psychology, sociology applied in education, study of theory and education history, of compared education, experimental pedagogy, of the school administration and of the learning methods for various disciplines; studies regarding the field in which the most interested one has the intention to exercise his/her job; practice in education and in extracurricular activities under the guidance of qualified teachers".

[2] For example: on the job training is mandatory only in 11 Member States (Austria, Belgium, Germany, Estonia, Finland, Hungary, Lithuania, Latvia, Romania, Malta, United Kingdon); if there is on the job training, in general it amounts to less thant 20 hours per year and it never represents more than five days every year; only half of the European countries provide to the new teachers a systematic form of assitance (namely courses for on the job integration, training, councelling) during the first year of teaching activity.

[3] *Intermediary joint report of the Council and Commission on applying the work schedule "Education and training -2010"*, Brussels, February 23rd 2006.

[4] See http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:070:0009:0018:RO:PDF, Official Gazette of the European Union.

but also in order to equip the persons with the skills and competences needed in order to adapt to the new realities.

A few examples in regard to the European forward training systems can be provided by the French and German system.

In France[1], the teacher is seen as a public employee, and the state has a policy that imposes the professional development of its employee.

In order to promote on a social level, the teacher has to permanently improve his/her knowledge for his/her discipline and in regard to pedagogy.

In accordance to this policy, the involvement in training programs relies very often on voluntary basis, yet there are still selection criteria for those who would like to attend these programs.

Attending forward training programs ensures the possibility of having jobs with a higher degree of responsibility.

There are also mandatory trainings, yet they have a more administrative objective.

The authorities that organize training programs are divided in two categories: *central authorities*, represented by the Ministry of National Education, by the School Directorate and by the Directorate of High-Schools and Colleges that develop the National Training Plan; *regional authorities*, represented by academies and vice-chancelleries and for primary education by regional academic inspectorates.

As means of training, we can distinguish: actions from the initiative of the administration with the view of training the administrators, carried out by summer schools, internships within the National Training Program, linguistic trainings through scholarships within the European Program *Lingua*; actions agreed by the administrator in order to prepare the exams or administrative competitions; actions chosen by the trainees and trainers for personal development within which they shall be granted training holidays or special holidays.

All these training actions have as objective developing the link between research and training, developing the exchanges within the education system.

[1] See the Study *Mobility of teachers and trainers*, developed by the General Directorate for Education and Culture, Brussels 2006 (http://ec.europa.eu/education/doc/reports/doc/mobility.pdf).

The evaluation of the teaching staff is done differently in accordance with the characteristics of the training program and it has different consequences on the stakeholders.

For example, the internships provided by the *summer schools* are not supplemented through an exam in regard to the accumulated knowledge, and, therefore, these internships do not have a direct impact on the career.

Even if forward training is based on a voluntary basis, the teachers are motivated to participate because this has consequences on the evolution of their career.

Supporting pedagogical innovation is done within the schools that have autonomy and that can easily implement various alternative programs.

In Germany[1], forward training represents a right as well as an obligation.

In this sense, the private teachers are obliged to be involved in programs of forward training.

All those that fulfill the access criteria can attend training programs if they consider that they are useful and if they do not hinder the job tasks.

In the event in which the training program over lapses with the teacher's activity, he/she shall make a request of availability or request a lower level of tasks, without affecting his/her salary rights.

The teacher can register within the forward training programs, directly or indirectly, by means of the director of the school where he/she works.

A special situation can be seen within the pre-school system.

And the reason is that pre-school education is not part of the education system. This category of teaching staff has the status of educator recognized by the state.

Vocational training has two components: *forward training*, through the improvement of the skills acquired during schooling, providing new teaching skills and developing the psycho-pedagogical studies; *complementary training*, consisting of developing the taught subject, adding new fields to the knowledge of the teacher, the possibility

[1] See the Study *Mobility of teachers and trainers,* developed by the General Directorate for Education and Culture, Brussels, 2006. (http://ec.europa.eu/education/doc/reports/doc/mobility.pdf).

of being qualified for an additional task. That is why, complementary training is an activity organized on modules with several hours weekly, supplemented with group sessions[1].

Because Germany is a federal state, there are three levels of authorities responsible for the training programs at central, regional and local level.

All the components of professional training, initial training, forward training and complementary training, are within the responsibility of the Ministry of Education of each land. Each of them has special laws on training of teachers.

The Ministry of Education has the obligation to supply an offer of forward training.

The Phare funds, the loans granted by the World Bank or the support provided by the enterprises, like Microsoft, play an important role.

In particular, it seems that in the past years, a great amount of the Phare funds was provided for the reforms that focus on lifelong learning.

In regard to developing education and training, *committees* and *tripartite councils* were established in the European countries, in their capacity as advisory bodies for the government and/or ministries[2]. They represent the main base of social partnership in regard to lifelong learning[3].

[1] The trainings are being carried out in the higher education instutions, as well as in the institutions approved by the Ministry of Education.

[2] Thus, the social partners are formally involved in drafting political documents, like *National action plans for employment,* planning documents for structural funds, educational programs or strategies.

[3] Further more, some countries have recently established specialized bodies in order to stimulate investing in forward learning, like: in Lithuania the National Forum for Education (2001), in Hungary: National Council for the Education of Adults (2001); in the Czech Republic: Governmental Council for the Development of Human Resources (2002).

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Vocational training is considered a right[1]. Attending forward training can be done at the initiative of the employer and at the initiative of the employee.[2] It has special importance, being approached with great seriousness not only in the specific internal documents but also in the European and international ones.

In a strict sense, *vocational training*[3] represents the activity carried out by a person before starting work, with the view of acquiring the knowledge of general culture and specialized knowledge, needed in order to exercise a profession or a job. In this sense, vocational training is equivalent to professional qualification[4].

In a larger sense, *vocational training* represents improving such training, namely acquire new knowledge.

In a personal interpretation, it is the key to success of a real teacher.

The *Law of national education no.1/2011*[5] introduced the concept of *lifelong learning*, which includes all the learning activities of each person, starting with early education, with the view of acquiring knowledge, training of habits/skills and developing significant skills from the personal, civil, social and/or occupational perspective (art.13

[1] Art.39 letter g of the *Labor Code*, republished in the *Official Gazette of Romania*, Part I, no.345 of May 18th, 2011, establishes the right of the employees to access vocational training.

[2] Art.196 letter1 of the *Labor Code*.

[3] It has to be mentioned that the term *training* tends to replace in the present approach, step by step the term of education and learning. Using it is the consequence of the evolution of policies and practices in the field of school insertion (prolonging the learning period beyond adolescence). The notion of *training* refers to the set of general, technical and practical knowledge related to exercising a certain job, as well as to the behaviours and attitudes that allow integration within a profession and in general the set of social activities, Alexandru Țiclea, *Tratat de dreptul muncii (Treaty on labor law)*, "Universul Juridic" Publishing house, Bucharest, 2007, p.253.

[4] See Sanda Ghimpu, Ion Traian Ștefănescu, Șerban Beligrădeanu, Gheorghe Mohanu, *Dreptul muncii, Tratat (Labor law, Treaty)*, vol. III, "Editura Ştiinţifică şi Enciclopedică" Publishing House, Bucharest, 1982, p.389.

[5] Published in the Official *Gazette of Romania*, Part I, no.18, of January 10th 2011.

paragraph 2), pre-university education, higher education, forward education and training[1] of adults (art.328 paragraph 3).

Vocational training is a process carried out in two stages: the first is being carried out during school, within the national system, in accordance with the provisions of the *Law of national education no.1/2011*, and the second one which takes time during the professional activity. The latter stage, regulated by the labor legislation is of special importance at the present time, when the technological and scientific processes are highly developed, which has as effect the need to improve, retraining, adapting the employees to the new labor conditions.[2]

Starting from the principle in accordance to which, the essential finality is that to prepare for work and life, the vocational training framework is regulated by the *Law of national education no.1/2011*. The special framework of vocational training is established by the *Labor Code* (art.192-210) and by *Government Ordinance no. 129/2000* on vocational training of adults[3]. In order to apply the provisions of this ordinance the Methodological Norms were issued through *Government Decision no. 522/2003*[4].

Therefore, under art.245 paragraph 1 and 3 of the *Law of national education no.1/2011*, for teaching, management and control personnel, forward training is a right, and at the same time an obligation[5], being carried out in accordance with the evolutions in the field of education and vocational training, including in regard to the national curricula, as well as in accordance with the personal interests and needs of development. It includes professional development and

[1] In this sense, art.275 paragraph 3 of the *Law on national education no.1/2011* states that the teaching personnel for management, guidance and control, as well as the ancilliary personnel must attend forward training activities, in accordance with the law.

[2] See, *Formarea profesională (Vocational Training)*, in Alexandru Țiclea, Andrei Popescu, Marioara Țichindelean, Constantin Tufan, Ovidiu Ținca, Dreptul muncii (Labor Law), Rosetti Publishing House, Bucharest, 2004, p.291 and the following.

[3] Republished in the *Official Gazette of Romania*, Part I, no.711, of September 30th 2002, subsequently ammended.

[4] Published in the *Official Gazette of Romania*, Part I, no.346, of May 21st 2003, amended by Government Decision no. 1829/2004, published in the *Official Gazette of Romania*, Part I, no.1054, of November 15th 2004.

[5] In the sense of regularly attending forward training programs, in order to accumulate every 5 years, considered as of the date of passing the basic teacher's certification, a minimum of 90 professional transferable credits (art.245 paragraph 6 of the *Law of national education no.1/2011*).

career evolution.[1] The professional development of the teaching, guidance and control staff and professional control and retraining are based on the professional standards of the teaching profession, quality standards and professional skills.[2] The career evolution is being carried out through the teaching certification II and teaching certification I, certification exams of various levels of competence.[3]

CONCLUSIONS

In regard to forward training in Romania, a frame document was developed on the *system of transferrable credits*[4] with the view of having a more dynamic teaching activity, as well as with the view of utilizing certain authentic professional criteria of career development. The training programs have also been supplemented, in the sense of implementing certain specific activities (for example: computer assisted educational technologies) and specialized programs have been reconsidered in order to obtain teaching certifications and basic certification.

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[1] Art.242 paragraph 1 of the *Law of national education no. 1/2011.*
[2] Art.244 paragraph 5 of the *Law of national education no. 1/2011.* Art.242 paragraph 1 of the *Law of national education no.1/2011.*
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THE LISBON TREATY – AN IMPORTANT STAGE IN THE DEVELOPMENT OF THE EUROPEAN UNION

Alexandra CHIRIŢĂ[1]

Abstract:

Along its history, the European Union of today established it's directions, means, instruments, and specific methods of action, promoting, elaborating, and applying the regulations enclosed in its normative "acts" named "treaties". The treaties decreed at the level of the European Union have consecrated, each in its own moment, an analysis and a concrete evaluation of the steps made in the overview of the evolution of the entity, and in equal measure, they have projected the future steps, stages, strategies, perspectives, means of institutional development.

One of these treaties, of a cardinal importance to the evolution of the EU, was constituted by the amendment Treaty for the Treaty concerning the European Union and the Treaty instituting the European Community, signed on the 13th of December 2007 at Lisbon, also known under the name of the Treaty of Lisbon.

The main novel modifications and/or elements provided by this Treaty can be circumscribed to the following important aspects: the reaffirmation or certain principles and other fundamental values on which the European adherence process is based, the reaffirmation and guaranteeing of certain stipulations concerning human rights, the reforming of institutions (the President of the European Union, The European Parliament, The European Union Council, the European Commission), external politics, the facilitation of flexibility and the consolidation of UE actions regarding the area of freedom, security, and justice, granting the status of a unique legal entity to the European Union, the principle of supremacy of the community law, the taking into account of certain interests and specific material elements, the novelties in the domain of decision-making procedures etc.

The perfection and adoption of the Treaty of Lisbon positively ended a rather drawn-out process of political searches and unrest, succeeding in bringing to a common denominator the interests of the member states, which found their aspirations were reflected in the form of the legal instrument signed in December 2007.

Keywords*: European Union, Treaty, European values, fundamental rights, freedom, security, justice, institutional development.*

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The Treaty of Lisbon, officially named the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed on the 13th of December 2007 at the summit of Lisbon (Portugal). It came into force on the 1st of December 2009. But what was the context that allowed for the Treaty to be signed?

2. The process of European integration, that originally had as an objective to ensure peace and prosperity in the western part of the continent, has relied for a long time on creating and thoroughly studying new forms of technical and economic cooperation. The context and political will have subsequently allowed for a progressive evolution from intergovernmental to integrated, developing a political dimension that could transform the E.U. into a top-tier actor.

The rejection through referendum by France and the Netherlands of the Constitutional Treaty created a situation without precedent in the E.U.

Why the Constitutional Treaty was rejected in the two countries – confronted with a complex socio-economic internal issue – will be clarified by Robert Podolnjak, who admits that fundamental flaws snuck into the elaboration of the Constitutional Treaty, and these shortcomings have led to the development of a paradox, that is, the rise in constitutional debates have created the so-called "constitutional moment", that didn't result in a constitution: the ambivalence of the ratifying method (referendum or lawmaking through the Parliament) has led to "the disastrous elections in France and in the Netherlands". What has resulted from the European Convention – chaired by Giscard d'Estaing – was a treaty that did not meet two *sine qua non* efficiency conditions: the reduced length of the document and non-technical language, which generated serious issues in comprehending the very content of the document at the level of the public opinion[1].

The distrust in the E.U. institutions was one of the important factors that led to the rejection of the Treaty in the French referendum of 2005, for this John Erich Fossum admitted that "*the constitution must be upheld by the successful operation of a set of institutions, notably popularly elected bodies able to translate goals and values into laws*

[1] R. Podolnjak, „Explaining the Failure of the European Constitution: A Constitution making Perspective", *Social Studies Research Network*: 6, 7, 15.

[…]. They would help ensure public deliberation and efficient collective decision-making through bargaining and voting procedures"[1].

Thus, reported at the level of the French public opinion, was a failure of the *Convention on the Future of Europe*, which had established as one of its goals to build a union *"more democratic, more transparent and more efficient, and bring the citizen closer to the European design and European institutions"*[2], in the institutions in which the French nation had ceased to believe in since 2005.

The negative result of the referendum of 2005[3] seen by the *Le Figaro* newspaper as a "rupture event" of the ratification of the *Treaty establishing a Constitution for Europe*, assigned framework composed out of a series of internal political failures: the faulty internal policies that lacked in socio-economic results, the lack of a pro-Europe community spirit in the French nation, the lack of trust of the state in the direct benefits the European construction brought and in the institutions of the Union, a lacking image of the E.U.[4].

Against all this, the vote against *the E.U. Constitution* was not given against the European Constitution in itself, because only 10 of the interviewed declared themselves against the Republic being a member of the Union[5].

The rejection of the Constitutional Treaty – after the popular vote expressed by the French nation – gave rise to the question of inefficiency (lack of trust) – especially of the French and Dutch public opinion – in what the sustainability of supranational European democracy was concerned[6].

3. An important step of putting into motion a compromise was represented by the agreement of the ministers of foreign affairs in

[1] J.E. Fossum, „Adieu to Constitutional Elitism?", *Arena Working Paper* 10 (2006):13, accessible on www.arena.uio.no.

[2] Podolnjak, „Explaining the Failure of the European Constitution: A Constitution making Perspective", 18.

[3] Neil Walker, „After finalite? The future of the European Constitutional Idea", European University Institute Publishing House, *EUI Working Papers law* 16 (2007).

[4] Regina Veeters, „The Constitutional Debate Revisited – Patterns of public claims-making in constitutional debates in France and Germany 2001-2005", *Arena Working Paper* 16 (2007).

[5] Jean Claude Piris, *The Constitution for Europe* (Cambridge University Press, 2006): 27.

[6] Erik Oddvar and John Erik Fossum, „Reconstituting European Democracy", *Arena Working Paper* 1(2008): 3.

Luxembourg in 2007, of renouncing the name of Constitutional Treaty, choosing instead to use the formula of a unique treaty, that would replace the existing treaties, thus reverting to classic amendment method of the primary legislation of the E.U.

This is the context in which the heads of the state or of the government of the E.U. member states reunited in Brussels, in 2007, to negotiate the mandate of a Governmental Conference that should have as a result the revitalization of the functioning of the E.U. institutions, through the adoption of a new Treaty. The Conference Mandate confirmed the abandoning of the constitutional form, but established that the new Treaty of Reform would keep the main innovations of the previous Constitutional Treaty.

The negotiations on the subject of this mandate were complicated and focused on identifying solutions to a few controversial topics, such as:

1. *defining the qualified majority voting system in the Council* (where the adoption of the double majority procedure introduced in the Constitutional Treaty was met with Poland's inflexibility);
2. *the statute of the Charter of Fundamental Rights* (Great Britain was opposed to this document becoming an integrated part of the future Treaty);
3. *introducing the unique legal personality of the E.U.* (the Czech Republic and Great Britain ar in doubt);
4. *recognizing the principle of supremacy of community law* (although consecrated through the jurisprudence of the C.J.E.U. and the decisions of some Constitutional Courts, there were countries – Poland, great Britain, The Czech Republic – that wanted this principle to remain explicitly outside of the text of the Treaty);
5. *the transition to a qualified majority vote in certain specific domains* (British doubt);
6. *the introduction of a special reference in the Treaty regarding the accession criteria for the E.U.* (the Netherlands insisted on this account);
7. *the clearer delineation of E.U. competences in rapport with the member states*(at the request of the Czech Republic).

The essence of the adopted solution of compromise can be circumscribed to what was stated by the two important figures of the moment:

- Nicolas Sarkozy: „*there are no winners, there are no losers and Europe is in motion*";
- Tony Blair: „*the most important thing is that the obtained agreement allows us to progress in the direction of certain things that, in the end, are much more important*".

4. In 50 years, Europe has changed, like the rest of the world. The Europe of the 21st century must face new challenges[1]: the globalization of economy, the demographic evolution, climate change, energy, the new threats to security, organized crime. The Lisbon Treaty represents a new level in the continuous process of European integration. The member states can no longer deal all these problems without borders by themselves.

Europe must modernize itself, it must have efficient and coherent instruments adapted not only to the functioning of the Union, but also to the rapid transformations through which the world is going today

5. The Lisbon Treaty (LT) maintains the existing rights and introduces new ones. Thus, the LT:

- guarantees the liberties and principles written in the Charter of Fundamental Rights and grants those provisions obligatory legal force (civil, political, economical and social rights);
- maintains and consolidates the "four liberties", as well as political, economical and social freedom of the European citizens;
- provides the fact that the E.U. and the member states act together in a spirit of solidarity in the case in which a member state is the target of a terrorist attack or the victim of a disaster or a catastrophe, including solidarity regarding the supply in the energy field[2];

[1] The European Union Council: *Reformarea Europei pentru secolul XXI*, 13 july 2007, Brussels, IP/07/1044.

[2] Tiberiu Sava, „Obiectivele şi competenţele Uniunii Europene consacrate de Tratatul de la Lisabona*", Revista Română de Drept Constituţional* 2 (2008): 34-53.

- guarantees the effective application of the Fundamental Rights Charter[1]. The Charter groups fundamental rights in six main chapters: dignity, freedoms, equality, solidarity, citizens' rights, and justice;
- it introduces other supplementary rights – that didn't appear in the European Convention for Human Rights – such as: personal data protection, bioethics, and the right to a good administration. The Charter reaffirms important measures regarding the elimination of discrimination based on sex, race, and ethnic origins;
- introduces a new right (that allows the expression of a point of view regarding European problems): through signing a petition by at least a million citizens from several member states, The Commission can be determined to make a legislative proposal;
- underlines – as well – the importance of consulting and of dialogue with the associations, the civil society, social partners, churches and non-confessional organizations[2].

6. At the foundation of the E.U. are three democratic principles: *democratic equality, representative democracy, and participatory democracy.* In this sense, the LT:

1. specifies and consolidates the values and objectives that are at the foundation of the Union;

2. enunciates the idea of a Europe more democratic and more transparent, in which the European Parliament and the national parliaments have a consolidated role, in which the citizens have more chances of being listened to and which defines with more clarity what should be done at a European and national level and by whom;

3. improves the capacity of the E.U. of taking action in diverse domains of major priority for today's Union and for its citizens, such as liberty, security, and justice.

7. The LT separates European values from values, customs and national specificities.

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[1] Official Journal of the European Union, C303, year 50, 14th december 2007.

[2] *Ce que change le Traité de Lisbonne-pour le citoyen, le salarié, le consommateur*. (Quadrige:Fondation pour l'innovation politique, 2008): 31-33.

The E.U must promote the countries, their national values and the well-being of their citizens. Even if the European space is open for its citizens and for a common market, the Union agrees to respect the boundaries of the state, the equality between the member states and their national identity. The countries that are members of the E.U. must develop societies characterized by plurality, by nondiscrimination, tolerance, justice, solidarity, and equality between men and women.

Human dignity, liberty, democracy, equality, the state of law are fundamental values of the E.U. Promoting these values, peace, and the well-being of the peoples of the Union presently represent the main objectives of the E.U.

8. Regarding the reform of the institutions of the E.U. the LT:

- consecrates the Institution of the President of the Council of the European Union, with a term of two years and a half, with the possibility of renewal, which confers the E.U. a greater continuity and prospective political view.

The President of the European Council (EC):

- chairs and boosts the projects of the EC;
- ensures the preparation and continuity of the projects (the EC) in cooperation with the president of the Commission and on the basis of the projects of the General Affairs Council;
- acts to facilitate the cohesion and consensus in the EC;
- presents to the European Parliament a report after every reunion of the EC;
- ensures external representation of the E.U. and problems referring to foreign affairs and common security, without damaging the attributions of the High Representative of the Union for Foreign Affairs and Security Policy, post created to replace that of the previous Foreign Affairs minister of the E.U. (provided by the previous Constitutional Treaty);

- regulates – through numerous modification texts – the Institution of the European Parliament. Thus:

- the EP exercises, together with the Council, the legislative and budgetary functions;
- the EP exercises a function of political control and a consultative function, also having in its competency the election of a new president of the Commission;

- the P.E. is formed out of the representatives of the citizens of the E.U., and their number cannot exceed 750. The representation of the citizens is ensured proportionally descending, with a minimum of six members for each member state. No state can have more than 96 seats.

Protocols 1 and 2 bring important specifications and developments regarding the role of the national parliaments and the application of the subsidiarity and proportionality principles.

The first protocol consecrates the principle according to which all legislative projects addressed to the European Parliament and to the Council are transmitted to the national parliaments, which can elaborate a motivated opinion regarding their conformity to the principle of subsidiarity.

The second protocol provides the motivation of all legislative act projects in rapport with the subsidiarity and proportionality principles. Within eight weeks from transmitting a legislative act project, any national parliament or any Chamber of a national parliament can give a motivated opinion to the presidents of the European Parliament, of the Council, and respectively, of the Commission, in which to express their reasons for which they consider that the respective project is not according to the principle of subsidiarity. If it is the case, all the national parliaments or all Chambers of a national parliament in kind have the duty of consulting the regional parliaments with legislative competences. The Court of Justice of the European Union (CJEU) is competent to rule on actions regarding the violation of the principle of subsidiarity by a legislative act, formulated by a member state or transmitted by it according to the provisions of internal law in the name of their national parliament or of one of its Chambers;

- regulates the E.U. Council**,** consisting of one representative of each member state. The presidency of the Council is ensured on an 18-month period by pre-established groups of three member states. These groups are formed on the basis of an equal rotation of the member states, taking into consideration their diversity and the geographic balance of the Union. The decisions of the Council are adopted with a qualified majority, with the exception of the situations in which the Treaty provides otherwise;

- orders the creation of a specialized body – the General Affairs Council that ensures the coherency of the projects of the different formations of the Council;
- The Foreign Affairs Council – newly created body – elaborates the external action of the Union in conformity with the strategic guidelines established by the European Council and ensures the coherency of the Union's action;
- regulates the attributions of the European Commission. This – on a five-year term – promotes the general interest of the Union and takes initiative according to that goal. The Commission:
  - watches over the application of the treaties, as well as the measures adopted by institutions for this purpose;
  - supervises the application of E.U. Law under th control of the C.J.E.U., executes the budget and manages the programs;
  - exercises coordination, execution and administration functions, in accordance with the conditions provided in the treaties;
  - adopts the annual and multiannual programming initiatives of the Union, with the purpose of closing inter-institutional agreements.

9. Important provisions of the LT are consecrated in the international politics and external action of the E.U. from this point of view:

23. the action of the Union on the international scene has at its foundation the principles that inspired its creation, development, and extension and which it intends to promote in the entire world: *democracy, state of law, universality and indivisibility of human rights and fundamental freedoms, respecting human dignity, the principles of legality and solidarity, as well as respecting the principles of the U.N.O. Charter and the principles of international law;*

24. The Union makes an effort to develop relationships and to build partnerships with third countries, with international, regional or global organizations that share the aforementioned principles; The Union will promote multilateral solutions for common problems, especially within the pale of the U.N.O.;

25. it is ascertained that the innovations brought on the matter of foreign affairs and common security in the Constitutional Treaty is maintained, as well as in the defense department, through taking over the majority of the provisions in these domains;

26. the introduction of the possibility of a tighter cooperation between the member states interested in the domain of security and defense (permanent structured cooperation);

27. the visibility and coherence of European action in these domains is ensured, through establishing the post of High Representative of the Union for Foreign Affairs and Security Policy, which will chair the Foreign Affairs Council and will be, at the same time, one of the vice presidents of the Commission;

28. The High Representative leads the foreign affairs and security policy of the E.U.; it contributes though proposals to the elaboration of this policy and brings it to fruition as a representative of the Council; it acts similarly in what concerns the security and common defense policy;

10. The Codification of the future reform Treaty of the neighborhood policy of the Union – presently it is no specifies in itself among the policies of the Union – and makes the object of a new article – 7 a – that has as a first point the following content: „The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation".

11. The LT contains a series of provisions that permit flexibility and the consolidation of the EU action in what concerns the area of freedom, security, and justice, ensuring answers to the European citizens in topical areas, such as migration, the fight against organized crime or terrorism.

12. granting unique legal personality to the EU constitutes a new provision of the Treaty. The idea – which answers to a constant claim of the EU lawyers – is reaffirmed in Declaration n. 32 adopted by the Conference, which confirms the fact that the EU has legal personality, but this will not authorize it in any way to legislate or to act outside of its conferred competences by the member states though the treaties.

13. The inclusion of the principle of supremacy of Community law, consecrated presently only through jurisprudence, is a novelty provided by the LT. From the jurisprudence of the Court of Justice, it is clear that the supremacy of Community law is a fundamental principle of Community law, principle inherent to the specific nature of the European Community.

14. The LT contains regulations regarding taking into consideration certain specific national interests and elements. Thus, in the case in which the members of the Council representing at least three quarters of the population or at least three quarters of the number of member states necessary to constitute a minority block, announcing their opposition at the adoption of an act by the Council with a qualified majority. The Council deliberates on the problem at hand. During these debates, the Council will make all possible efforts to reach, within a reasonable time frame and without damaging in any way the obligatory deadlines imposed by the Union law, to a satisfactory solution that answers the concerns expressed by the members of the Council that built the minority block.

15. Through the dispositions of the LT the exclusive competence domains of the Union, the shared competence domains, and the supporting or coordinating of the actions of the member states domains are established.

The categories and competence domain of the Union are regulated through the dispositions of art. 2-6 of the TFEU.

The LT identifies three categories of U.E. competences:

- *exclusive competences,* exclusively transferred to the Union;
- *shared competences* between the Union and other member states;
- *supporting, coordinating, and complementing competences* of the actions of the member states.

The delineation of the competences of the Union has at its foundation the principle of conferral. The exercising of the competences of the Union has at its foundation the subsidiarity and proportionality principles.

On the grounds of the principle of conferral, the Union acts within the limits of it's powers conferred by the member states with the goal of reaching the pre-established objectives. Any other power that was not conferred to the Union belongs to the member states.

On the grounds of the principle of subsidiarity, in the domains that are not exclusively part of its attributions, the Union intervenes only when the objectives of the expected action cannot be achieved in a satisfactory way by the member states, neither at a central level nor at a regional and local level, but they can be, according to their dimension and expected effects, be better achieved at the level of the Union.

CONCLUSIONS

The response to the new Treaty was positive, which denotes the value of the diplomatic effort that took place after the Berlin reunion by the diplomats of all states, especially the German, French and Portuguese ones.

Jose Socrates, the president of the European Commission declared that "*Europe had exited its institutional crisis and is ready to face future challenges".* The British Foreign Affairs Minister, Gordon Brown, declared that "*it is time for Europe to move on to other things and to devote itself to the problems that preoccupy the people: economic growth, utilizing the work force, climate change, and security issues".* The former president of France and of the Brussels Convention, Valery Giscard d'Estaing, explained that "*modifications have the role of avoiding a referendum because there are more articles, and the constitutional concepts were eliminated".*

Romania applauded the adoption of the Lisbon Treaty, which fully replies to our country's fundamental position and also to the policy manifested by Romanian diplomacy for more than three years.

The President of Romania, at that time Traian Băsescu, applauded the fact that „*The European Union has a treaty",* and the Foreign Affairs Minister, Adrian Cioroianu, declared that the Lisbon agreement "*is a historical moment".*

The perfecting of the Lisbon Treaty ends, in a happy way, a rather drawn-out process of political searches and unrest, succeeding in bringing the interests of the 28 member states to a common denominator, presently, of the European Union, which have their interests and aspirations reflected in the new form of the legal instrument what was agreed upon.

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HOUSE ARREST-CUSTODIAL PREVENTIVE MEASURE

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Abstract:

House arrest is the custodial preventive measure, provided by the new Romanian Criminal Procedure Code, that could be ruled during a trial by the judge of rights and freedoms during the criminal prosecution, the judge of preliminary chamber during in the preliminary room, and the panel hearing the case during the trial. This measure can be ruled only towards the defendant, not towards the suspect or towards the offender and cannot be ruled by the criminal prosecution bodies or by the magistrate prosecutor.

***Key words** : house arrest, , custodial preventive measure, defendant, judge of rights and freedoms, obligations imposed,, supervision body.*

INTRODUCTION

In doctrine[2] house arrest is defined as "that preventive measure that could be ruled by the judge of rights and freedoms, the judge of preliminary chamber or by the court, consisting of depriving the freedom the defendant accused of committing an offense, which execution is not fulfilled in a place of detention, but in the defendant's house".

Starting from the provisions of art. 202 of the new Criminal Procedure Code, it is found that house arrest is provided among the preventive measures that can be ruled during a criminal trial.

It is newly introduced in the Romanian legislation once with the entry into force of the new Criminal Procedure Code,enforced by Law no. 135/2010, being classified according to its severity order after the judicial control (simple or on bail) and the remand custody[3].

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[2]Mihail Udroiu, *Criminal Procedure General Part*, 3rd edition reviewed and completed, (Bucharest: CH Beck, 2016), 596

[3]Nicolae Volonciu, Andreea Simona Uzlău, Raluca Moroșanu, Victor Văduva, Daniel Atasiei, Cristinel Ghigheci, Corina Voicu, Georgiana Tudor, Teodor Viorel Gheorghe, Cătălin Mihai Chirița, *The new Criminal Procedure Code commented*, (Bucharest: Hamangiu, 2014), 480

House arrest can be ruled both during the criminal prosecution by the judge of rights and freedoms, and during the Preliminary Chamber by the preliminary chamber judge and during the trial, by the panel invested with hearing the case.

Once with this measure, imperatively, the defendant is imposed another two obligations: to appear before the criminal prosecution body, before the judge of rights and freedoms, before the judge of preliminary chamber, or before the court whenever he is called, namely to not communicate with the person injured or with her family members, with other participants to committing the offense, with the witnesses or experts and with other persons determined by the judicial body.

Also, the essence of house arrest is to prohibit the defendant to leave his home throughout this measure, without the permission of the judicial body that ruled this measure or before which the case is pending. It is not envisaged the home address of the defendant, but the address where he actually lives.

CONTENT

During the criminal prosecution, if the criminal prosecution body finds that there is evidence of which results the reasonable suspicion that the defendant has committed the offense concerned, draws up a report by which proposes taking the preventive measure of house arrest. The casefile together with the proposal shall be submitted to the prosecutor supervising the criminal prosecution, so that he, in his turn, to draw up on his behalf a report, that will be submitted to the judge of rights and freedoms together with the criminal prosecution file. The prosecutor may, in his turn, propose ex officio, taking this measure without being necessary the proposal of the criminal prosecution body.

During this stage of the criminal trial is competent to rule taking the measure of house arrest the judge of rights and freedoms from the court that would be competent to hear the case in the first instance,from the court equal in rank to it, in which jurisdiction is located the place where was found the offense or from the court equal in rank to it, in which jurisdiction is located the prosecution office including the prosecutor conducting or supervising the criminal prosecution.

The house arrest measure may also be ruled by the judge of rights and freedoms in the absence of a prosecutor's proposal for taking such measure, if:

-the judge is notified with proposal for taking or extending the measure of remand custody, which he rejects, ruling ex officio taking the measure of house arrest, considering that the house arrest is a sufficient preventive measure, the purpose provided by art. 202 Criminal Procedure Code being able to be fulfilled only under this measure.

-the judge is notified by the prosecutor in order to replace the measure of judicial control or the judicial control on bail with a custodial preventive measure, when the judge assesses depending on the evidence submitted that the remand custody would be a too severe measure, the smooth proceeding of the criminal trial being able to be ensured also by house arrest.

-the judge is notified by the defendant regarding the revocation or replacement of house arrest, the judge estimating depending on the new evidence submitted that the remand custody is too severe, that no longer exist the grounds that imposed its taking or extension and house arrest is sufficient and proportional with the accusation brought.

-the judge is notified through an appeal against taking or extending the custodial preventive measures[4].

When the measure is taken, one must verify whether there is any of the cases provided by art. 16 of the NCPP, which prevents the initiation or pursuit of the criminal proceedings in this case not being able to be ruled a preventive measure, but following to be ruled a settlement.

According to art. 218 of the NCPP, house arrest measure is taken depending on the gravity of the offense, on the measure purpose, health, age, family status and other circumstances regarding the person against whom the measure is taken. The measure cannot be ruled regarding the defendant against whom there is the reasonable suspicion that he committed an offense against a family member and regarding the defendant who was previously sentenced for the offense of escape.

Thus, when ruling this measure there are taken into account both objective causes, regarding the offense committed, and subjective causes, regarding the person accused. The judge must corroborate all these data and to rule a measure proportional to the gravity of the offense and to the

[4] Volonciu ș.a., *The New Criminal Procedure Code commented,* 485

risk level posed by allowing the freedom of the defendant, a measure too easy may be ineffective for achieving the purpose of the criminal trial.

House arrest may be ruled in one of the following cases:

-the defendant ran away or hid in order to evade himself from prosecution or from trial, or made preparations of any nature for such acts;

- the defendant tries to influence another participant to the offense, an witness or an expert, or to destroy, alter, conceal or steal material evidence or to determine another person to have such a behavior;

- the defendant puts pressure on the injured person or tries to make a fraudulent deal with her;

-there is the reasonable suspicion that after the initiation of the criminal proceedings against him, the defendant has committed intentionally a new offense or prepares the committing of a new offense

-the defendant has committed at least one of the intentional crimes provided by art. 223 para 2 of CPP.

a) Taking the house arrest measure during criminal prosecution

Following the drafting of the report with proposals, the prosecutor forwards the report and the casefile to the judge of rights and freedoms, following that the latter to set a deadline for settlement within a period of 24 hours from registering the proposal to the court. For this term the defendant is mandatorily summoned, the presence of the prosecutor and of the defendant's elected or public defender being mandatory. It is not mandatory the presence of the defendant before the judge of rights and freedoms, but if he is present, the judge must inform him on the charge, the rights and obligations that he has as defendant and shall request him to make a statement. The present defendant may invoke the right to remain silent, not to incriminate oneself.

At this hearing, in the council chamber, will be argued the taking of the house arrest measure, the first being granted the word being the prosecutor. He will support his proposal verbally, showing on what evidence bases his charges, following that the defendant's lawyer speak in his defense, contesting certain charges, invoking exceptions, filing requests, among which probably also the rejection of the proposal of the representative of the Public Ministry and the ruling of an easier preventive measure. Following the deliberation, the minutes shall be

prepared in duplicate and the judge of rights and freedoms in enforcing Article. 203 para 5 of NCPP, shall render the resolution in the council chamber.

The resolution of the judge of rights and freedoms must show the duration for which it was ordered the house arrest measure, cannot exceed 30 days, and the obligations imposed upon the defendant, and which supervisory body will check their compliance.

After taking the house arrest measure, the judge informs him on the rights he has as a defendant, the fact that he can warn a relative or a close person close about this measure and the place where he will execute it, the fact that he has the right to emergency medical care, and that has the right to challenge the measure and to require its revocation or replacement with another easier preventive measure.

Within the content of the resolution by which it is ruled the measure are expressly provided the obligations that the defendant must comply and he shall be warned that in case of maliciously violation of the measure or of his obligations, the house arrest measure can be replaced with the remand custody[5].

The resolution must also include expressly the house where the preventive measure is executed, the obligations imposed, the duration of the measure and the body appointed with the defendant's supervision. Other obligations cannot be imposed to the defendant. The judge may order the defendant to wear during the house arrest an electronic monitoring device.

The defendant and the prosecutor may file appeal against the judge resolution by which he ordered the house arrest within 48 hours of

[5]According to art. 221 from NCPP, throughout the house arrest measure, the defendant can leave the house where he it was established the execution of the preventive measure to present himself before the judicial bodies, upon their request. Upon the written and reasoned request of the defendant, the judge of rights and freedoms, the judge of preliminary chamber or the court, by resolution, may allow him to leave the house for going to the workplace, to learning or professional training classes, or to other similar activities or to purchase essential means of existence, and in other duly justified situations, for a definite period if this is necessary for the fulfillment of some rights or legitimate interests of the defendant. In urgent cases, for good reasons, the defendant can leave the house without the permission of the judge of rights and freedoms of the judge of preliminary chamber, or of the court, for the period of time strictly necessary, immediately informing about this the institution, the body or the authority appointed with his supervision and the judicial body that has taken the house arrest measure or before which the case is pending.

ruling, for those present and from communication for those who were absent from ruling the settlement in the council chamber.

During the criminal prosecution, house arrest can be taken for maximum 30 days by reasoned resolution, the measure duration may be extended from 30 to 30 days, up to the maximum of 180 days in this stage of the criminal trial. On completion of this term, house arrest measure shall rightfully cease.

b) Taking the house arrest measure during the stage of preliminary chamber.

During this stage of the criminal trial, the judge of preliminary chamber is the one competent to rule the taking of the house arrest measure.

He may order the taking of the house arrest measure, either upon the prosecutor's proposal, made by indictment or directly in the council chamber, ex officio.

If the prosecutor issues the indictment with the defendant under house arrest, the judge of preliminary chamber is obliged to periodically check, before the expiry of the measure, the legality and validity of taking such a measure, being able to order the keeping, revocation or replacement with another preventive measure .

Taking the house arrest measure during the preliminary chamber is similar with the stage of criminal prosecution, being ruled the summoning of the defendant, the presence of the prosecutor and of the public or chosen lawyer being mandatory, the defendant being informed about the charge and the rights he has and the rights he has after ruling this measure.

During this stage of the criminal trial, the house arrest measure is taken for an indefinite period, however exising the obligation of the judge of preliminary chamber to check of officio upon terms not exceeding 30 days if grounds for keeping this measure still exist. The measure shall not be extended, but it is kept in this stage.

c) Taking the house arrest measure during the trial.

During the trial, the jurisdiction to rule over taking the house arrest measure lies with the court panel invested with hearing the case. Rules for taking this measure from the stage of criminal prosecution are found also during this stage, mentioning that during the trial, where is

specific the publicity, the provisions given over the house arrest are made in public meeting. Thus, in public meeting, the court settles the requests regarding this measure or even verifies ex officio the maintaining of this measure.

If in this stage there is ruled taking the preventive measure, it shall indefinitely be taken, existing the obligation of the court panel to verify periodically, upon terms not exceeding 60 days if there are maintained the measure grounds.

During the first instance trial, the house arrest measure can last for the same time as during the trial stage and in appeal cannot exceed the duration of the sentence imposed through the settlement of the merits.

d) Defendant's supervision during the measure.

Provisions concerning the custodial preventive measure can be found in Law no. 254/2013, in Chapter III art. 124- Art. 133 inclusively.

On these provisions guide the police bodies that supervise the compliance with the measure and with the obligations imposed on the defendant as it follows:

Copy of the resolution of the judge / court shall also be sent to the police subunit appointed with these activities, being assigned a police officer for the case. He will go to the address indicated in the resolution and hears the defendant, informing them about taking the measure of house arrest and communicating him the obligations he must comply with. The case policeman establishes after hearing the defendant a program regarding the compliance with the measure and with the obligations, instructs him on announcing any urgent cases when he needs to leave the address [6].

The supervisory body has the right to enter the house of the defendant even without his will or of the people he lives with, for verifying the compliance with the measure and with the obligations imposed, and if it finds that the measure or the obligations are not observed, with bad faith, must notify the prosecutor, during the criminal prosecution, the judge of preliminary chamber during the preliminary chamber and the court, during the trial regarding those found for replacing house arrest with the remand custody.

[6] *Law no. 254/2013 regarding the execution of sentences and the custodial preventive measures ruled by judicial bodies during the criminal trial*, art. 124-133

With respect to any verification, the supervisory body shall prepare a protocol, which is attached to the personal file of the defendant. During the measure, the supervisory body cooperates with institutions or local authorities, with people who can provide information about the compliance or not with the measure and with the obligations imposed.

CONCLUSIONS

Under the conditions of the social reality from Romania, when there are committed more and more offences, detention places sometimes becoming overcrowded, I appreciate that legislating the house arrest is welcome, primarily being seen as an opportunity given to the defendant to make amends, to reflect on the attitude he must have, to respect for the values protected by law. Moreover, the very State can win through the proper functioning of this institution, because thus he is exempted from expenses to the state budget regarding food, security, transport and other necessities of a person imprisoned.

For a better management of the supervision of persons arrested at home, I consider that it would be necessary the functioning in Romania, like in other countries,of an electronic surveillance system of the person, towards which was taken the measure of house arrest, system that could alert promptly, in real time, both the case policeman and the local authorities for maintaining public order.

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1. Law no. 254/2013 regarding the execution of sentences and the custodial preventive measures ruled by judicial bodies during the criminal trial.
2. The New Criminal Procedure Code, enforced by Law no. 135/2010;

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LEGAL NATURE OF ADMINISTRATIVE – PATRIMONIAL LIABILITY

Tatiana STAHI [1]

Abstract:

The administrative – patrimonial liability holds a special place in the institution of administrative liability. The present article contains a study dedicated to the identification of administrative – patrimonial liability, called upon to develop and rediscover itself together with the evolution of the society.

The administration, by its activity, can cause damages to individuals, damages for which the administration must respond following the litigations settled by the courts. This kind of liability is essential for the protection of natural persons and legal persons from administrative abuses.

Keywords*: legal liability, administrative liability, administrative-patrimonial liability, public officer, damage, sanction, illegal act.*

INTRODUCTION

Legal – administrative liability is the consequence of exceeded responsibility. Only when the subject of administrative law becomes irresponsible towards the law, is not executing his obligations or admits an abuse of rights, can become a subject to administrative – legal liability in the cases and the manner prescribed by law.[2]

The administrative liability as an institution of the administrative law, unlike civil and criminal liability, enshrined in some forms since antiquity, is relatively young.[3] The authors[4] from the Republic of

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[2] V. Guţuleac, *Drept Administrativ* (Chişinău: Tipografia Centrală, 2013), 429.

[3] V. I. Prisăcaru, *Tratat de drept administrativ roman – partea generală – ediția II*. (Bucureşti: ALL Beck, 1996), 416.

[4] M. Orlov and Șt. Belecciu. *Drept administrativ* (Chişinău: Academia „Ştefan cel Mare" a M.A.I. al R.M., Ed. „Elena - VI", 2005), 136.

Moldova also share this opinion, stating that administrative liability has about two centuries since it was instituted following the bourgeois revolution in France, as the responsibility of the administration for the damages caused to individual trough illegal activity. For a long time, the liability specific to administrative law was interpreted traditionally with reference to concepts and institutions specifics to civil law or, where appropriate, to criminal law.

For example, the liability of public administration having a patrimonial character was qualified by reference to civil tort liability. Administrative misconducts committed by administration' staff, represented violations of labor law, and were sanctioned as such. Basically, the forms of liability specific to administrative law, have not outlined for a long time their identity and even now there are authors contesting them, as doctrinal controversies and sometimes even legislative and jurisprudential ones regarding their existence and the legal regime governing them.[1]

The Romanian author A. Iorgovan states that, based on the committed act and its consequences, we can identify three major forms of liability specific for administrative law:

a) The perpetration of the own – said illicit administrative act, designated as disciplinary misconduct, causes the intervention of the first form of liability in administrative law, namely, the disciplinary liability.
b) The second form of the illicit administrative act is called contravention and determines the intervention of the second form of liability specific for administrative law - contraventional liability;
c) The last form of the illicit administrative act is the one that causes material or moral damages attracting as a result the last form of liability in administrative law, namely administrative – patrimonial liability.[2]

According to another author's opinion, Emil Bălan, a component of legal liability contains the following forms: administrative – territorial liability, administrative – contraventional liability and administrative –

[1] V. Vedinaş. *Drept Administrativ* (Bucureşti: Universul Juridic, 2009), 250.
[2] A. Iorgovan. *Drept administrativ. Tratat elementar. Ed. A III – restructurată, revăzută şi adăugată* (Bucureşti: Prodidactica, 1993), 306.

patrimonial liability.[1] The last one holds a special place in the institution of administrative liability.

To clarify what is meant by the concept of administrative – patrimonial liability and what was the purpose of its establishment under the administrative liability, we will do a review on the administrative – patrimonial liability in general, its functions and purpose.

Administrative – patrimonial liability represents a specific form of liability in administrative law. The administration, by its activity, can cause sometimes damages to individuals, damages for which the administration must respond following the litigations settled by the courts. Thereby, this kind of liability is not general nor absolute and has specific rules that target the need to reconcile states' rights with private rights.

As for the notion of liability in administrative law, representing a subject of intense discussions in both Romanian and foreign doctrine (especially the French one[2]), it refers to civil liability and generically is speaking about state's responsibility for the caused damages.[3] Initially, referring to the responsibility of administration for the caused damages was promoted the idea of lack of responsibility based on the sovereignty principle i.e. all citizens had to obey and, in case of damages caused by the administration they could not claim any compensation.

In France, until 1789 and even until the middle of the nineteenth - century the state was considered irresponsible as a corollary of sovereignty, responsibility belonging entirely to the agent, civil servant in charge of law execution and which substitutes his own will to the will of the sovereign state.[4] This solution, very rigorous for individuals, was acceptable in practice taking into consideration the fact that the liberal state, by being very limited in its activities, had little opportunities to cause damages.

In Romanian doctrine, this problem was analysed starting with the interwar period, the focus being put on states 'responsibility for the caused damages.

[1] Emil Bălan. *Instituţii Administrative* (Bucureşti: CH Beck, 2008), 221-222.
[2] Guţuleac. *Drept Administrativ*, 436.
[3] Iorgovan. *Tratat elementar,* 306.
[4] C. Dissescu. *Drept Constituţional,* Ed. A III- a (Bucureşti: 1915), 94-95.

Professor P. Negulescu analyses this problem under the aspect of „*public power*"[1], and Professor A. Teodorescu under the aspect of „*liability in administrative law*", stating that liability results from administrative acts, administrative actions and from civil servants' responsibility. [2] Professor E. Tarangul believes that responsibility is characteristic to administrative contentious and represents the liability of administration for its culpability and mistakes. [3]

In the period 1945-1989 (post-war) in Romanian doctrine, there were views that qualified states' responsibility either as a form of civil liability or as a form of administrative liability. [4]

The doctrine of this period was strongly influenced by the regulations governing administrative contentious, bringing arguments for both the thesis of civil and administrative nature of states' responsibility. This kind of liability named patrimonial, of state administration bodies, has been understood by some authors as a form of civil liability[5], and by others as a form of administrative liability.

The confrontation of ideas between the two concepts, in the opinion of Professor A. Iorgovan has favoured the thesis regarding the administrative nature of patrimonial liability, which is why the patrimonial liability of state administration bodies was qualified as a form of liability in administrative law – administrative patrimonial liability.

It follows, according to A. Iorgovan that the norms regulating patrimonial liability of state administration bodies belonged to administrative law, this liability being classified as an administrative liability.

Regarding the legal nature of public administration patrimonial liability (a form of civil or administrative liability), the author A. Trăilescu states that even if patrimonial liability of public administration

[1] P. Negulescu. *Tratat de drept administrativ. Vol I. Principii generale. Ediţia a IV-A.* (Bucureşti:Institutul de Arte Grafice „E. Marvan" 1934), 258.
[2] A. Teodorescu. *Tratat e drept administrativ.Vol.I* (Bucureşti: Eminescu, 1929), 444.
[3] E. Tarangul. *Tratat de drept administrativ român* (Cernăuţi: Tipografia „Glasul Bucovinei", 1949), 622.
[4] A. Dastic. „Răspunderea administrativ-patrimonială în contenciosul administrativ" *Legea şi Viaţa* 9 (2005): 53-56
[5] V. Gh. Tarhon. *Răspunderea patrimonială a organelor administraţiei de stat şi controlul jurisdicţional indirect al legalităţii actelor administrative* (Bucureşti: Editura Ştiinţifică, 1967), 20-21

is subject to some rules of common law, certain specific legal rules differentiate it from civil tort liability, namely:

- *Is a liability stemming from public administration acts;*
- *At the base of patrimonial liability of public administration lies the presumption of culpability of public authority that issued the illegal act.*
- *The action of reparation/compensation is within the competence of contentious court.* [1]

Similar situations existed in the legal framework of our country until the 90, before the adoption of the Contentious Administrative Law and the new Civil Code.

In our autochthonous specialty literature, the problems of administrative – patrimonial liability are indistinctly elucidated. In this context, Maria Orlov states that "Administrative – patrimonial liability besides being a new form of liability has a complex character and must be examined by the administrative law science in a multidimensional and interdisciplinary manner ".[2]

Professor V. Guţuleac defines administrative - patrimonial liability, *as a form of legal liability which consists in compelling the state (public authorities) or, where appropriate, the administrative-territorial units to repair the damages caused to individuals trough an illegal administrative document or an unjustified refusal of the public authority to resolve a request regarding a legitimate interest of the individual.*[3]

Moldova's legal framework regarding the legal nature of the patrimonial liability is similar to Romania's legal framework. Administrative – patrimonial liability is consecrated in the Constitution of the Republic of Moldova[4] (art. 53 para. (1)) which stipulates that: "*Any person prejudiced in any of his/her rights by a public authority by way of an administrative act or failure to solve a complaint within the legal term, is entitled to obtain acknowledgement of the declared right, cancellation of the act and payment of damages".*

[1] A. Trăilescu. *Drept Administrativ*. (Bucureşti: C.H. Beck. 2010), 399-400
[2] M. Orlov. „Răspunderea administrativ-patrimonială o nouă formă a răspunderii în dreptul aministrativ" (Conferinţa internaţională ştiinţifico-practică. Adiministraţia publică: Aspecte practico-ştiinţifice, probleme şi perspective., Chişinău, 30 ianuarie 2004, CEP USM), 252
[3] Guţuleac. *Drept Administrativ*, 441
[4] Constituţia Republicii Moldova, adoptată la 29.07. 1994, în vigoare din 27.08.1994. În: Monitorul Oficial al Republicii Moldova, 12.08.1994, nr.1 din 12.08.1994

Administrative contentious Law stipulates in Article. 1 para. (1) that Administrative Contentious, as a legal institution, aims to counteract the abuses and power excesses of public authorities in order to ensure legal order.[1]

In conclusion, we can say that the state is responsible towards its citizens, therefore the issuing authority must take responsibility for its acts defined as administrative-patrimonial liability of the public authority.

After analysing the Constitution of the Republic of Moldova and Administrative Contentious Law, we noticed that they declare as constitutional principle state' liability for the caused damages:

- *Exclusive patrimonial liability* of the state for the damages caused by judicial errors committed in courts;
- Patrimonial liability of public authorities for the damage caused by an administrative act or failure to solve a complaint within the legal term (including the liability of civil servants);
- Joint patrimonial liability of public authorities and civil servants for damages caused to public domain or by the malfunction of public services;
- Patrimonial liability of local public authorities for the limits of public service.

According to the theories formulated in the treaties published by professors A. Iorgovan[2] and O. Puie[3] the forms of administrative – patrimonial liability are divided in two categories, namely, the forms prescribed by the law and the forms deduces from doctrine and jurisprudence. Therefore, administrative – patrimonial liability can be:

1) *Objective*, which occurs regardless of public authority's guilt. Objective liability can be of two types:

a) Exclusive patrimonial liability of the state for the damages caused by judicial errors.

The supreme law of the state establishes the principle of state liability for the damages caused by judicial error, which occurs immediately, if the judicial error has been demonstrated. Thereby, it is declared the patrimonial liability of the state for the errors committed

[1] Legea Contenciosului administrativ nr. 793 din 20.02.2000. În: Monitorul Oficial al Republicii Moldova nr. 57-58 din 18.05.2000
[2] Iorgovan. *Tratat elementar,* 308.
[3] O Puie. „Răspunderea autorităţilor publice" , *Dreptul* 2 (2007), 92-112

both in civil as well as in criminal trials. We conclude, therefore, that this form of liability occurs due to *judicial errors* and not because of some acts. Consequently, this kind of liability occurs due to damages derived from court decisions through which were committed legal errors.

b) *Exclusive patrimonial liability* of public authorities for public service limitations.

The underlying conditions of this form of liability are:

- The existence of a public service with limitations, involving some organizational and operational deficiencies, that jeopardize certain material or human values;
- The existence of a damage of a moral or material nature produced due the limits of the respective public service.
- The existence of a causal link between limits and damages, this representing a specific condition of legal liability in general;[1]
- Formulation of claims by the prejudiced party.

2) Subjective, based on public authority's guilt that can be:

a) *Joint patrimonial liability* of public authorities and civil servants for moral and material damages caused by typical or assimilated administrative documents, including administrative contracts. The administrative contentious court is the judicial instance competent to decide regarding the compensations requested, as well as on the unlawfulness of the administrative document, typical or assimilated. This form of liability occurs only in the case of illegal typical or assimilated administrative documents, issued by public authorities. The action also can be formulated against the person who contributed to the elaboration, issuance or termination of the document, or where applicable, is made guilty of the refuse to solve a complaint regarding a subjective right or a legitimate interest.

In the litigations where the civil servant, personally, is a party in the process together with the authority, intervenes the principle of solidarity between the civil servant and the public authority regarding the compensations established by the court as well as the principle of calling in court the hierarchical superior of the civil servant which gave the written order to elaborate or not the respective document.

The liability of civil servant intervenes only if he acted illegally, not being responsible if he acted according to the law even if some damages were caused.

[1] Vedinaş. *Drept Administrativ*, 464.

b*) Joint patrimonial liability* for damages caused by administrative contracts.

In Romanian legislation, are also treated as administrative acts the contracts concluded by public authorities, which have as their object the valorisation of public property, the execution of works of public interest, the provision of public services or public acquisitions.

The same conditions must be met if the liability of public authority intervenes for the damages caused based on administrative contracts.

The current Law on Administrative Contentious of Romania assimilates the administrative document and the administrative contract related to the valorisation of a public property good, the provision of a public service or the execution of public works. These contracts are subject to a public power regime, falling within the competence of administrative contentious courts in solving various litigations.

Therefore, the liability of civil servants is left at the discretion of administrative contentious, this mechanism – guarantor seeking to discipline the civil servant requiring from him competence and professional training otherwise will impose the question of financial repair that in the field of administrative sphere relations reduces the illegal actions and laws 'violations.

On this basis, the Administrative Contentious Law, by its provisions strictly determinates, public authority 'quality as a subject of an administrative contentious litigation defining it as any administrative structure or body established by law or an administrative – normative document acting in a public power regime in order to achieve a public interest.

In the same vein, issuing authorities can be some other authorities assimilated to administrative authorities and their subdivisions, whose documents, according to art. 3 of the Administrative Contentious Law bear administrative – patrimonial liability in the cases when the administrative contentious courts pronounces on the material and moral damage caused by an illegal administrative document or by the non-execution of a preliminary request within the time limits set by law (art. 25).

In this way, the administrative documents of the above mentioned authorities having a normative or individual character, are issued by collective bodies (the decisions of local councils) and by persons with

legal authority (district heads, mayors, people in position of responsibility) and can become objective of the action in administrative contentious if they damage a person's legal right.

Although public administration is responsible for damages caused by a malfunction of the public service no matter the reason, the right of the public institution to hold a civil servant materially accountable is subsisting regardless of the committed act, whether it is a personal deviation (error) or a service one. [1]

Given the "personal liability of civil servants for accomplishing job attributions" is easy to understand that such a liability includes the attributions delegated to them due to their position. Thus, civil servants are obliged to comply with orders received from hierarchical superiors. The civil servant is entitled to refuse in writing and motivated, the execution of orders received from hierarchical superiors if they consider them as being illegal.

If the one who issued the disposal has formulated it in writing, the civil servant is obliged to execute it, unless it is obviously illegal. In such cases, civil servants should notify the superior of the person who issued the disposal. Such a matter of principle, for the future, definitely needs to be reflected in legislation.

Court's task is to examine carefully the quality of complainant of the civil servant in order to avoid errors in the application of sanctions.

CONCLUSIONS

In conclusion, we mention that the theory and practice of administrative – patrimonial liability remains crucial for the science of law and will find its proper application only after the successful implementation of Law no. 793-XIV of 10.02.2000.

We support the opinion of D. Baltag that administrative – patrimonial liability is a new form of liability in administrative law in the Republic of Moldova and its appearance was determined by the establishment of the administrative contentious institution. For avoiding confusions and for a more pronounced prominence of administrative-patrimonial liability as a functional element of democracy it is necessary

[1] Dastic. „Răspunderea administrativ-patrimonială în contenciosul administrativ", 53-56.

to adopt the *Law on ministerial responsibility* and the *Code of Administrative Procedure*.[1]

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THE SUSPENSION OF AN ADMINISTRATIVE ACT. THE WELL-FOUNDED CASE

Marta-Claudia CLIZA[1]

Abstract:

This article is considering the suspension of the administrative act, analyzing specifically the well-founded case. Moreover, we will also detail the types of suspension that can occur in relation to an administrative act, the distinctive grounds based on which the suspension could be established, all based on the legal provisions, relevant doctrine and judicial practice.

Key words: *suspension, administrative act, well-founded case, Law no. 554/2004, grounds.*

For the admissibility of an administrative act suspension petition, two conditions must be fulfilled at the same time, respectively well-founded case and loss imminence. From this point of view, the suspension measure is materialized in a motion to dismiss measure, given that the administrative act enjoys the presumption of legality, which in its turn is based on the presumption of authenticity and truthfulness.

This work analyzes the conditions of the suspension of an administrative act, with special regard to one of its main conditions, namely the existence of a well-founded case, meaning that there are circumstances related to de facto and de jure status which are likely to create a serious doubt on the lawfulness of the administrative act.

The suspension is an operation of temporary interruption of legal effects caused by a legal act[2], especially by the administrative act. The suspension of the administrative acts is a guarantee[3] of legality, but a

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[2] Antonie Iorgovan, *Tratat de drept administrative* vol. II, ed. 4 (Bucharest: All Beck, 2005), 94.

[3] Iuliana Riciu, *Procedura contenciosului administrativ* (Bucharest: Hamangiu, 2009), 303.

guarantee which occurs in exceptional, extreme cases. It is about the temporary interruption of the legal effects, as well as the temporary deferral of the legal effects[1].

Furthermore, it is considered that the suspension should be understood as including the cases when the administrative act comes into force after the date it was issued. This is also the case of the administrative acts which come into force after the date of the publication[2]. The enforcement after publication means the suspension of the implementation obligation, due to the fact this obligation must be effective, according to common law principles, as of the moment of its existence.

The grounds for the suspension of an administrative act are the following:

a) the challenging of the legality by a citizen, non-state organization or a public body;

b) the change of de facto conditions after the issuance of the act and the questioning of the legality on grounds of opportunity;

c) the need to reconcile the administrative act with the acts issued subsequently by superior bodies;

d) the application of a penalty to an individual who committed an administrative offense;

e) the clarification of a doubt of the issuing body on the legality of the act.

Notwithstanding, these cases cannot turn the suspension into a rule of the legal regime of administrative acts, the same as reversal.

SUSPENSION TYPES

By relating to the legislation in force, we consider that the suspension of the administrative acts can occur in the following situations[3]:

a) de jure (under an express provision of the law);

b) under the order of the superior body;

[1] Riciu, *Procedura contenciosului administrativ*, 307-308.

[2] Romulus Ionescu, *Drept administrative* (Bucharest:Editura Didactica si Pedagogica, 1970), 266-267.

[3] Ovidiu Podaru, *Drept administrativ. Vol. I. Actul administrativ. (I) Repere pentru o teorie altfel* (Bucharest: Hamangiu, 2010), 338.

c) under the decision of temporary withdrawal of the issuing body;

d) under a court ruling or an ordinance of the Public Ministry.

Therefore, on the one hand, the suspension can be legal or de jure. On the other hand, it can be ordered by other public authorities. Art. 14 of Law no. 554/2004 of the contentious administrative[1] provides that the court is entitled to proceed with the suspension of the act if there are well substantiated grounds and if the threat of impending loss exists. Art. 15 of the same normative act regulates the suspension which can be requested at the same time with main proceedings, by means of the same petition or by means of a separate petition[2]. Therefore, the suspension can be ordered by a legal act, but it can also be the work of the lawmaker[3].

LEGAL EFFECTS OF THE SUSPENSION

Throughout the suspension, the administrative act does no longer produce its effects, and then, after the disappearance of the grounds which caused such measure, the administrative act is brought into force again or, on the contrary, it is removed from force by legal means.

Regardless if they target individual or normative administrative acts, the effects of the suspension occur *inter partes litigantes*[4]. If the suspension of the administrative act occurred on grounds of non-opportunity, it shall cease de jure upon the completion of the term it was established for or if a term was not established, the suspension shall cease upon the disappearance of the circumstances that caused it[5].

Suspension examples

[1] Published in Official Journal, Part I no. 1154 of Devember 7th, 2004, as further amended and supplemented.

[2] Verginia Vedinas, *Drept administrativ, edition IX, revised and updated* (Bucharest: Universul Juridic, 2015), 123.

[3] Cristina Titirisca, *Contencios administrativ. Suspendarea actului administrativ. Practica judiciara recenta* (Bucharest: Hamangiu, 2016), VII.

[4] Alexandru-Sorin Ciobanu, *Drept administrativ: activitatea administratiei publice, domeniul public* (Bucharest: Universul Juridic, 2015), 88.

[5] Dana Apostol Tofan, *Drept administrativ, Volume II, edition 3* (Bucharest: C.H. Beck, 2015), 68.

The most important suspension case under the law is provided by art. 123 para. (5) of the Constitution, according to which, the Prefect may challenge[1], in the contentious administrative court, an act of the County Council, of a Local Council or of a Mayor, in case he deems it unlawful, and therefore, the act thus challenged shall be suspended de jure.

Another example of suspension under the law is given by Government Ordinance no. 2/2001[2] on legal regime of offenses which provides in art. 32 para. (3), that the offender complaint against the record of findings and subsequent penalties in regard to contraventions entails the suspension of the execution of the penalty.

Furthermore, Law no. 554/2004 of the contentious administrative provides a case of suspension by means of a legal act: the legal court shall be entitled to adopt, upon request, the measure on the suspension of the administrative act contemplated by the litigation referred for judgment „*in well-founded cases and in order to prevent the occurrence of impending loss. The suspension petition shall be settled immediately by the court, by summoning the parties, the pronounced ruling being enforceable de jure*[3]".

SPECIAL CASES OF SUSPENSION PROVIDED BY THE LAW OF THE CONTENTIOUS ADMINISTRATIVE

Two cases of suspension are referred to in the special procedure provided by the law of the contentious administrative, Law no. 554/2004, as follows:

The suspension provided by art. 14^4, according to which, the aggrieved person may request the competent court to rule the suspension of execution, once with the notification, by prior complaint, delivered to the authority which issued the act and the suspension according to art. 15^5, upon the request of the aggrieved party, by means of the petition of annulment of the administrative act or by a separate action.

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[1] Oliviu Puie, *Contenciosul administrativ, Vol. I* (Bucharest: Universul Juridic, 2009), 517.
[2] Published in Official Journal of Romania no. 410 of July 25th, 2001, as further amended and supplemented.
[3] Art. 14 and art. 15 of Law no. 554/2004 of the contentious administrative.
[4] Vedinas, *Drept administrative,* 123.
[5] Vedinas, *Drept administrative,* 123.

The suspension provided by art. 14 of Law no. 554/2004

Article 14 of Law no. 554/2004 shall read as follows:

„(1) For well grounded reasons and for the purpose of avoiding impending loss, the aggrieved person may, on the date of notifying the superior authority or the issuing public authority, subject to Art. 7, request the jurisdictional court to rule the suspension of execution of the unilateral administrative act[1] until a decision on the merits of the case is reached by the Court. In case the aggrieved person fails to file action for annulment within 60 days, the suspension shall end lawfully and without any formality.

(2) The court shall decide on the request for suspension, by an emergency procedure and with precedence, with summons to the parties.

(3) When a major national interest is at stake in the case, which may seriously affect the normal operation of a public administrative service, the petition for the suspension of the normative administrative act can be filed by the Public Ministry, ex officio or upon notice, in which case the provisions of paragraph (2) shall apply accordingly.

(4) The ruling given in favor of the suspension shall be enforceable by virtue of law. It may be appealed on law within five (5) days of issuance. The appeal on law does not suspend the enforcement.

(5) In the hypothesis where a new administrative act is issued with the same contents as the one that was suspended by the Court, it shall be suspended by virtue of law. A preliminary complaint is not required in such case [2].

(6) Several successive motions for suspension cannot be filed on the same grounds.

(7) Enforced suspension of the administrative act results in the cessation of any form of enforcement until expiry of the duration of suspension".

The conditions of the suspension, provided by art. 14, according to the aforementioned text, are the following:

[1] Puie, *Contenciosul administrative*, 511: "*The provisions of art. 14 and 15 of Law 554/2004, both in its original form and after amendment, do not distinguish in the nature of the administrative act suspension, as the suspension regards an authority administrative act of normative nature or of individual nature*".

[2] Ciobanu, *Drept administrativ: activitatea administratiei publice, domeniul public*, 89: "*An identical act is not required", but it is sufficient to produce the same effects as the first one, regardless of its wording*".

1. The aggrieved party files the suspension petition after the filing of the prior administrative complaint[1].

2. The aggrieved party shall prove the fulfillment at the same time of two conditions: *the existence of a well-founded case and the need to prevent impending loss*:

Well-founded case means, according to art. 2 para. (1) letter t) „*circumstances related to the state of facts and law which are likely to create serious doubt about the lawfulness of the administrative decision*". It is necessary that these doubts do not require a thorough analysis on the merits of the legal relation referred for judgment[2]. The suspension is ruled within a procedure which does not prejudge the merits[3]. The well-founded case cannot be argued by claiming certain matters related to the legality of the administrative act, as they target the merits of the act, which is analyzed only within the annulment petition, the court being able only to perform a summarized research of law appearance, due to the fact that the merits of the dispute cannot be prejudged within the procedure provided by the law[4].

Impeding loss, means, according to art. 2 para. (1) letter ș) „ *a future but predictable loss or, as the case may be, a serious and predictable disturbance of the operation of a public authority or a public service*".

3. When a major national interest is at stake in the case, which may seriously affect the normal operation of a public administrative service, the petition for the suspension of the normative administrative act can be filed by the Public Ministry, ex officio or upon notice.

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[1] Tofan, *Drept administrative,* 69: „*By means of this prior procedure, the lawmaker established the right of the administration to review the issued act*".

[2] Civil sentence no. 639 of July 9th, 2014, definitive by lack of appeal – The decision on the granting of payments under support schemes per surface – campaign 2003, issued by A.P.I.A. – County Center. The failure to fulfill the condition of well-founded case, published on site www.portal.just.ro, accessed on April 3rd, 3017, and in book Titirisca, *Contencios administrativ,* 284.

[3] Gabriela Bogasiu, *Justitia actului administrativ. O abordare biunivoca* (Bucharest: Universul Juridic, 2013), 247.

[4] Civil sentence no. 318 of January 31st, 2012, irrevocable by lack of appeal – The suspension of the measures established by the record of findings and subsequent penalties in regard to contraventions. Grounds of illegality, published on site www.portal.just.ro, accessed on April 3rd, 3017, and in book Titirisca, *Contencios administrative,* 287.

4. The court shall decide on the request for suspension, by an emergency procedure and with precedence, with summons to the parties.

5. The ruling given in favor of the suspension shall be enforceable by virtue of law. It may be appealed on law within five (5) days of issuance.

6. The appeal on law does not suspend the enforcement of first ruling.

7. Suspension effects term: the effects of the suspension shall last until a decision on the merits of the case is reached by the Court on the future petition of annulment of the administrative act. They shall cease the jure if the petition is not filed within 60 days as of the admission of the requested suspension.

8. In the hypothesis where a new administrative act is issued with the same contents as the one that was suspended by the Court, it shall be suspended by virtue of law. A preliminary complaint is not required in such case[1].

The suspension provided by art. 15 of Law no. 554/2004

Article 15 of Law no. 554/2004 shall read as follows:

„(1) The suspension of the challenged unilateral administrative act may be requested by plaintiff on the grounds stipulated at Art. 14, as part of his petition to the Court for the annulment of all or parts of the administrative act. In this case, the court may rule the suspension of the challenged administrative act, pending the final and binding resolution of the case. The suspension petition may be filed at the same time with the main proceedings or by means of a separate petition, pending the resolution of the merits of the case. (2) The provisions of art. 14 para. (2)–(7) shall apply accordingly.

(3) The ruling given in response to the request for suspension is enforceable by virtue of law, and the appeal on law initiated according to Art. 14 (4) does not suspend the execution.

(4) In the situation where the action on the merits is admitted, the suspension ordered under Art. 14 shall be lawfully extended until the final binding ruling in the case, even if the plaintiff did not request the suspension of the administrative act under para. (1)".

[1] Ciobanu, *Drept administrativ: activitatea administratiei publice, domeniul public,* 89: " *An identical act is not required", but it is sufficient to produce the same effects as the first one, regardless of its wording* ".

The conditions of the suspension, provided by art. 15, according to the text above, are the following:

1. The request of the suspension by the aggrieved party shall be made by the petition of annulment of the administrative act, or separately, by means of a distinct petition, following the registration thereof on the dockets of the court.

2. The aggrieved party shall prove the fulfillment at the same time of two conditions: *the existence of a well-founded case and the need to prevent impending loss* (as in case of art. 14).

3. The judgment procedure is identical with the procedure provided by art. 14.

4. In this case, the court shall be entitled to rule the suspension of the administrative act, until the definitive settlement of the case.

5. The resolution on the admission of the suspension shall be enforceable by virtue of law, and the appeal does not suspend the enforcement.

The mandatory requirements for the ruling of the suspension of the administrative act must be fulfilled at the same time; this measure cannot be ordered by the contentious administrative court unless both conditions are fulfilled[1].

CONCLUSIONS

In conclusion, the condition of the well-founded case will not be fulfilled if the claimed grounds do not constitute apparent clues which overturn the presumption of legality of the administrative act, but they require instead an analysis on the merits of the legal relation referred for judgment.

Given the aforementioned arguments, the existence of well-founded cases and the prevention of impending loss represent, as we have already shown in this study, the legal conditions to be fulfilled at the same time in order for an administrative act to be suspended.

[1] Decision no. 1097/2014 of the High Court of Cassation and Justice, division of contentious administrative and fiscal, ruled in public session of March 5th, 2014, material available on site www.scj.ro, accessed on April 3rd, 2017.

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APPLICABILITY OF CIVIL PROCEDURE IN SPECIAL JUDICIARY MATTERS. THE RELATION BETWEEN APPLICABLE PROCEDURE AND JURISDICTION

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Abstract:

The scope of the civil procedure is currently provisioned in the beginning of the Code of Civil Procedure. It is derived from a historical reason that, just as the civil law, as common low to the other branches of substantive law, has created the first major rules of the civil social behavior, the civil procedure has created rules, institutions that are also applicable to disputes arising from the realization of the substantive law relations of some branches related to civil law, which undoubtedly gives it the status of a common law procedure. Thus, according to the legislator, both purely civil litigations (to which it applies directly and with priority), as well as labor, administrative, financial and fiscal litigations, or those arising between professionals, although benefiting from special substantive regulations, also involve in their solving the rules of civil procedural law.

We considered as opportune and of interest to give an overview of the issue, in order to selectively capture some special judiciary matters and, if necessary, to reveal the relationship between the specificity of the relevant litigation relation and the nature of the jurisdiction assigned to solve it.

Key words: *civil procedure, jurisdiction, jurisdictional procedure, special jurisdiction, special judiciary matter.*

CIVIL PROCEDURES - PROCEDURE APPLICABLE IN THE JURISDICTION OF THE JUDICIARY

In order to establish the relationship between procedure and jurisdiction, it must be said that each is a cause for the other. Thus, a jurisdiction without procedure is merely a simple statement of intention

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by the authority wishing to establish it, while a procedure without jurisdiction is not positive law.

Formally, the jurisdiction validates the procedure, and the procedure gives authority and regularity to the jurisdiction. A jurisdiction gives legal force to its jurisdictional act and the procedure gives it intrinsic validity.

From a *substantive, content* perspective, the jurisdiction is the expression of the authority that instituted it, while the procedure is the technical-normative means that make this exercise functional.

Henceforth, we will only consider jurisdictional procedures organized by the state as public authority. From the stipulations of the texts results that two such procedures refer to the core activity of justice. One concerns all civil cases, i.e. disputes arising out of civil law relations or legal relationships derived from other substantive branches of law, related to civil law (such as commercial law, tax law, administrative law, family law, etc.) and is called *civil procedure*.

The second, as is normal, applies only to disputes relating to criminal law relations and is called *criminal procedure*.

In practice, the share of these two procedures is different. Thus, the civil procedure has – similar to the substantive civil law - a preeminence position. This is expressed by the fact that it constitutes *common law* for all cases - purely civil and assimilated civil - except criminal ones[1]. In contrast, the scope of the criminal procedure is significantly reduced compared to that of the civil procedure, an obvious situation, due to the legal nature of criminal law and, implicitly, of criminal procedural law[2].

[1] For details, see Gabriel Boroi et al, *Noul Cod de procedură civilă, Comentariu pe articole (The New Code of Civil Procedure, Commentary on Articles), vol. I, Art. 1-526*, (Bucharest: Hamangiu, 2013), 4 et seq.

[2] Limited and of strict interpretation, the criminal procedure applies only to cases arising from substantive criminal law relationships, that is, derived from committing offenses. Any other anti-social acts, irrespective of the public perception of the degree of social danger they present, in the absence of their classification as criminal offenses, will lead to litigation subject to *civil procedure*, as a common law jurisdictional procedure.

2. THE LIST OF JURISDICTIONS IN ROMANIA, TYPES OF JURISDICTIONS

2.1. The meaning of the notion of jurisdiction

From an etymological point of view, the notion of *jurisdiction*[1] is the result of the joining of two terms of Latin origin: *"juris"* (law) and *"dictio"* (to say, to speak, to dictate), which translates as *"to say the law"*, *"to speak the law"*[2]. In other words, it means applying the legal, general, impersonal norm to a concrete case, to apply the text of the law to the conditions of a factual situation.

Lato sensu, the term is used to qualify the group of institutions of the judicial authority and the belonging to them (with the meaning of "to be under a jurisdiction").

Stricto sensu, the concept covers two aspects. On the one hand, *jurisdiction* means *the prerogative to judge*, to apply the law in a concrete situation, on the occasion of the settlement of a dispute (the procedure being contentious) or on the occasion of the authorization or certification of a non-conflictual legal situation (the procedure being non-contentious). On the other hand, *jurisdiction* is defined as *the authority* invested with this prerogative to judge.

Thus, the notion encompasses both a substantive component (what is called *judicium*) and an institutional one.

Starting from the joining of the etymological examination advanced earlier, our older doctrine[3] showed that *jurisdiction* is that part of the state's activity which has as its object the solutioning, at the request of

[1] About *jurisdiction* in a broad sense, the doctrine speaks in terms of defining the powers of the state to enact rules and to give them the force to be imposed; from this point of view, there are two forms of jurisdiction that deserve to be mentioned: *prescriptive jurisdiction* (assimilated to *iuris dicere*, meaning the prerogative of the state to establish rules of conduct) and *applicative jurisdiction* (associated with the state's prerogative to enforce and apply the norms) – for details, see Ion M. Anghel, *Personalitatea juridică şi competenţele Comunităţilor Europene/Uniunii Europene (Legal Personality and Competences of the European Communities/European Union)*, (Bucharest: Lumina Lex , 2006), 14 et seq.

[2] The Roman law, placing among the sources of private law the edict of the pretor and the jurisprudence, considered that *"the pretorian law is the lively voice of civil law"* or understood by it *"the power of the magistrate to organize the court"* – for details, Emil Molcuț, Dan Oancea, *Drept roman (Roman Law)*, (Bucharest: Șansa SRL , 1993).

[3] Eugen Herovanu, *Principiile procedurii judiciare (Principles of Judicial Procedure)*, (Bucharest, 1932), 318.

those interested and according to its own formal prescriptions, of all legal problems arising from the social relations which are characterized by juridical acts of sovereignty, through which the will of the law materializes, imposing it on the will of the individuals.

Our recent literature[1] understands by *jurisdiction* the joining of those rules governing the organization of the judiciary and the competence of the judicial courts, so that the interested party may address either to the court or to the body of jurisdiction or with jurisdictional activity whose capacity to resolve a particular dispute has been recognized by the law.

2.2. General jurisdiction of the judiciary and special jurisdictions.

First of all, it must be said that we consider state-owned jurisdictions, that is, those organized by the public authority, some of them with express constitutional support.

Of these, the most important and with significant share is the *jurisdiction of judiciary*. The fundamental law states that "*justice* shall be exercised by the High Court of Cassation and Justice and by the other courts established by law".

The courts other than the supreme court are identified and enumerated by the text of the organic law[2], such as "*courts of appeal, tribunals, specialized tribunals, military courts, regular courts*".

But *justice* is not the only form of jurisdiction that operates in our current system. Beyond it, there are other kinds of jurisdiction, which, in relation to justice, have a particular position. The latter are authorities charged with court duties in strictly regulated matters, usually referred to as bodies with jurisdictional activity or special jurisdictions.

Because the overwhelming proportion of the cases brought to justice lies with the jurisdiction of judiciary, it is qualified - rightly so - an *ordinary jurisdiction, of fullness*. In relation to it, all others are *special jurisdictions*. By way of example, this category encompasses: the constitutional jurisdiction (ensured by the Constitutional Court), the competition jurisdiction (ensured by the Competition Council), the disciplinary jurisdiction (ensured by the Superior Council of Magistracy), the ecclesiastical jurisdiction (ensured by the Eparchial Consistory).

[1] Mihaela Tăbârcă, *Drept procesual civil (Civil Procedural Law),* vol. I, (Bucharest: Universul Juridic, 2013) 7.
[2] Art. 2 (2) of Low no. 304/2004 on the organization of the judiciary.

The position of preeminence of the jurisdiction of judiciary over other jurisdictions is expressed in at least two essential dimensions. The first is the rule of *competence* according to which, if a dispute is not given to a special jurisdiction, then it is within the competence of the judiciary.

The second concerns *the ability of the judicial courts*, i.e. the courts of the justice system, *to resolve conflicts of jurisdiction between judicial courts and special jurisdictions*.

It has to be said that, if the jurisdiction of the judiciary is an element of the origin of public power, being of its essence, always present, the special jurisdictions fall into the field of a political regime, of a stage of evolution, present or not in the Romanian system.

Their crystallization gained concreteness in the second half of the 19th century when, under the conditions of the dynamics of a society founded on the civilization of commerce, of the open, pluralistic society, *a civilization of the rule of law*[1], new types of jurisdiction would be claimed as necessary, forms of contentious: constitutional, administrative, fiscal, litigations of commercial and competitive nature, labor disputes. On the same grounds, there is also a slight disinflation of the statal act of justice, as a result of the regulation of arbitration (institutional or private). As trade evolves, jurisdictions are emerging in new specialties, such as securities. Intellectual creation is also an object of analysis regarding the specialization of the jurisdiction it involves.

Simultaneously with this permanent tendency of diversification, of specialization of jurisdictions, there is a procedural tendency to generalize mandatory requirements, the fulfillment of which conditioning the actual instituting of the courts of justice. This is the institution of the *preliminary procedure*, the following of a phase that precedes the approach to justice and aims to try to solve the dispute in this way, thus trying to avoid the congestion of the courts. Such examples are: direct reconciliation (in commercial litigations), administrative complaint (in administrative contentious and in the contract of transport by rail, post and telecommunication), and today the mediation institution is taken into consideration for this qualification as well.

[1] For a more extensive study of this issue, see Steluţa Ionescu, *Justiţie şi jurisprudenţă în statul de drept (Justice and Jurisprudence in the Rule of Law)*, (Bucharest:Universul Juridic, 2008), 45-50.

What has provoked permanent doctrinal and practical interest was the justification of special jurisdictions. The appreciation of the advantages and disadvantages they present is not treated unitarily in doctrinal studies.

As *advantages*, it is considered that the rationale for the establishment of special jurisdictions must be sought in at least a few considerations:

- in accordance with the nature and subject matter of the dispute, they are in a position to ensure a better solution by the fact that those charged with the judgment have the necessary knowledge to solve the case;

- they involve a faster and less costly procedure and are much more open to conciliation. Thus, it is considered that there are sufficient grounds for not questioning the effectiveness of such procedural constructions.

Concerning the *disadvantages* or *shortcomings*, it is considered that special jurisdictions are a permanent source of conflicts of competence, that they are affecting the unity of the judiciary and the jurisdictional fullness of the courts of justice, thereby weakening their authority, and that, in practical terms, they do not necessarily imply a gain in rationalization, since they only delay the access to justice as the last filter for judgement. The supporters of such a position believe that a safer substitute for the practical success of the idea that determined their necessity is the specialization of some judges in such matters, as well as of some departments of the courts.

It should also be said that, in terms of the conclusion of the procedure as well, there are notes of interest which the issue of special judiciary matters raises. Since the ultimate act of the judgment is the expression of its finalization and its purpose, the generically established title is that of *jurisdictional act*.

Terminologically, at the level of the *jurisdiction of the judiciary*, the name most satisfactorily covering the jurisdictional act is that of a *judicial decision*. In turn, the judicial decision may be of generic character, since the procedural law distinguishes between types of judgments such as: *judgments, sentences, decisions*.

A particular designation is also the *order* (e.g. the presidential order, the order for adjudication in the field of forced execution).

In the sphere of *special jurisdictions*, the name of the jurisdictional act can also take the form of: decisions (Constitutional Court, Competition Council), resolutions or even judgements.

3. JUDICIARY MATTERS/SPECIAL LITIGATIONS TO WHICH THE RULES OF CIVIL PROCEDURE APPLY

The area of jurisdiction of the civil procedure is confirmed today by norms, in the beginning of the Code of Civil Procedure, when its general applicability is provisioned[1]. It derives from a historical, organic reason – that just as civil law, common to the other branches of substantive law, has created the first major rules of civil social behavior, the civil procedure has created rules, institutions that are applied to litigations stemming from the realization of substantive law relations of some branches that, in fact, are only related to the civil law. Thus, according to the legislator, both labor disputes, as well as administrative, financial and fiscal litigations, and those arising between professionals – although they all benefit from substantive regulations, some with support in the Civil Code, others in other sources – are solved according to the rules of *civil procedural law*[2].

For exemplification, we will retain some special judiciary matters to which the rules of civil procedural law apply, indicating in each case the competent jurisdiction - the jurisdiction of the judiciary or the appropriate special jurisdiction. It will be noticed that the preeminence of the civil procedure is naturally also manifested in relation to other forms of litigation, for whose settlement the state has established special jurisdictions. For the sake of illustration only, we will briefly outline some aspects that characterize two such special judiciary matters - the constitutional and the commercial competition contentious.

a) Disputes between professionals (or commercial litigations), called "economic" during the period of real socialism (1948-1990), have benefited from a special procedure ever since the commercial code (of

[1] Provisions of Art. 2 of the Code of Civil Procedure (Law no. 134/2010).

[2] It is also necessary, in this context, to specify that the civil procedure is also exceptionally addressed to criminal matters, where the Code of Civil Procedure becomes applicable to unregulated issues in the (New) Code of Civil Procedure (it is the case of civil action in the criminal case – situation in which, in criminal proceedings, secondary to the criminal case, civil liability for reparation of the damage caused by the offense is also requested).

1887), form tribunals or specialized sections (even with judges elected by traders, according to the first regulations of the judicial organization).

After 1990, by adopting Law no. 15/1990 on transformation of state enterprises into autonomous companies, they remained in the jurisdiction of the courts of justice (with oscillations on the first instance material competence: the regular court or the tribunal), without benefitting from sufficient special rules, the ones in the commercial code remaining out of date and disarticulated.

GEO no. 138/2000 brings into the code of civil procedure the necessary and unified special rules, in a new chapter, XIV of book VI, entitled "Provisions for Dispute Settlement in Commercial Matters".

At the level of the judiciary, there was a legislative initiative in 2004, for the establishment of specialized courts, some of them dealing with commercial matters. Unfortunately, although welcomed as an intention, the legislator's vision did not enjoy the expected success, at this time only three specialized courts in the matter being in operation[1].

Today, after the entry into force of the New Civil Code[2], the issue is reassessed. The *professionals* phrase is established, and the disputes between them remain within the jurisdiction of the courts of common law. In addition, the Code of Civil Procedure comes with more flexible and faster procedures, responding to the natural requirements of a dynamic business environment[3].

Today, the *litigations between (business) professionals* are heard in the *courts of common law (the jurisdiction of the judiciary).*

b) Litigations of administrative contentious and fiscal contentious

Litigations of administrative contentious have had the most shaken judicial history, which can be explained by the resistance of the most present state power – the executive – at the control of its acts. After being adjudicated by the courts under the 1865 Constitution and earned a remarkable personality, they went out from the jurisdictional inventory for 20 years, motivated by the lack of personality in a regime of "popular democracy." They were brought back, with substantial control

[1] The Cluj Specialized Tribunal, the Mureș Specialized Tribunal and the Argeș Specialized Tribunal.
[2] Low no. 287/2009, enforced in 2011.
[3] For example, the payment order procedure stipulated by the provisions of Art. 1013 of the Code of Civil Procedure.

restrictions, into the portfolio of the judicial courts through Law no. 1/1967 and were completely rehabilitated by Law no. 29/1990[1].

Today, litigations of administrative contentious are in the concurrent jurisdiction of the tribunals and the Courts of appeal, the attribution of competence being given according to the criterion of the quality of the author of the injurious act (tribunal - when the author of the act is a local public administration body; the court of appeal - when the author of the act is a central public administration body).

The new law in this field is Law no. 554/2004 on the administrative contentious, which stipulates the procedure for solving disputes specific to the matter, the provisions of which shall be supplemented, if necessary, with those of common law contained in the Code of Civil Procedure (Art. 28 of Law No. 554/2004).

Fiscal contentious litigations have been taken over from the judicial courts after the code of tax procedure was repealed. The *public financial contention* (of public accounts) had the most decided stability and a special jurisdiction.

Thus, the Court of Auditors functioned under the Constitutions of 1865 and 1923, until 1948, when the jurisdictional powers were taken over by a direction from the Ministry of Finance and the jurisdictional activity was considered, under the Constitutions of 1948 and 1952, as uninteresting. In 1973, this jurisdiction is taken over by a new body, the Superior Court of Financial Control, and after a two-year interruption (1990-1992), it returns to the traditional court - the Court of Auditors.

The law revising the Constitution, adopted by the November 2003 referendum, brought the jurisdiction being discussed to the judicial courts, leaving the Court of Auditors to function only to exercise control over the use of budgetary resources, i.e. without jurisdictional powers[2].

The framework law on the organization and functioning of the Court of Auditors is Law no. 94/1992 and stipulates, in full agreement with art. 139 of the Constitution, the following: "The Court of Auditors is the supreme institution of financial control on the formation, administration and use of the financial resources of the state and of the

[1] Details in Danil Matei, *Drept prcesual civil (Civil Procedural Law)*, Edition 2012, (Târgoviște), 25 et seq.

[2] Details on the current status and competence of the Court of Auditors in Rada Postolache, *Drept financiar (Financial Law)*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2013.

public sector". The law was to be modified successively in 2000, 2002, 2008 and was republished in 2014[1].

Today, both *administrative contentious and fiscal contentious litigations, as well as those of public financial contentious* are dealt with in the *courts of common law (jurisdiction of the judiciary).*

c) Labor disputes have earned their authority under the 1923 Constitution and the 1924 Law on Judicial Organization, also benefiting from special courts ("Labor Courts"). In the post-December 1998 period, after 1992, they fully return to the common law courts.

Labor jurisdiction is the activity of resolving labor disputes by competent bodies (judicial courts and other bodies with jurisdictional activity), under a specific legal procedure. Responding to practical requirements and attempting to reinstate an old tradition existing in the Romanian legislation especially during the interwar period, it was attempted to re-establish the labor jurisdiction on new bases.

The issue of labor disputes is dealt with today, according to the framework law in the field – the Labor Code – Law no. 53 of 2003 (Title XII, Art. 266 - 275), under the suggestive title *The Labor Jurisdiction*, which shall be supplemented, if necessary, with the provisions of the Code of Civil Procedure (Art. 275 of the Labor Code)[2].

Today, *labor disputes* are dealt with in the *common law courts (jurisdiction of the judiciary).*

d) Infringement litigations concern the causes involving the liability for contraventions. Although, by its specificity, this matter appears closer to the matter of criminal law, the infringement litigations are subject to the procedure provided by the framework law in the matter - GO no. 2/2001 on the legal regime of contraventions, the norms of which are supplemented, if necessary, by the provisions of the Code of Civil Procedure (Art. 47 of GO No 2/2001).

Today, infringement litigations are dealt with in the *common law courts (jurisdiction of the judiciary).*

e) The constitutional contentious deferred to the judicial courts, first by way of the case-law, under the 1865 Constitution and then by the Constitution of 1923, which has been absent for more than four decades from the jurisdictional procedures, seems definitively won by the

[1] Details on *www.rcc.ro* – the official website of the Court of Auditors.
[2] For an extensive analysis of this issue, see Dan Top, *Tratat de dreptul muncii (Labor Law Treatise),* (Târgoviște: Bibliotheca, 2015).

specialized jurisdiction of the Constitutional Court established by the Constitution of 1991 and Law no. 47/1992.

The link between the judicial courts and the specialized constitutional jurisdiction still resides in the referral of the Constitutional Court for the post-promulgation control only through a judicial court and only with regard to the legal provisions on which the settlement of the case depends.

Today, the *constitutional contentious* enjoys a separate jurisdiction from the common law jurisdiction – the *Constitutional Court*.

f) Commercial competition contentious is transferred to a completely new jurisdiction, conducted by the *Competition Council according to Law no. 21/1996 on the commercial competition*.

This jurisdiction has a point of contact with the jurisdiction of the judiciary by the requests for sanctions addressed to the appeal court, once the means of coercion at the disposal of the Competition Council have been exhausted.

Today, the *Commercial competition contentious* enjoys a separate jurisdiction from the common law jurisdiction – the *Competition Council*.

CONCLUSIONS

Under the title of *General Applicability of the Code of Civil Procedure*, the provisions of Art. 2 of the *Code of Civil Procedure* stipulates the common law qualification of the code of procedure in civil matter. It is thusly acknowledged the applicable nature of the provisions of civil procedural law in matters other than those derived from substantive civil law relations, some of them with normative support in the Civil Code (family law litigations, disputes between professionals, etc.), others in special domain laws (labor law litigations, administrative, financial and fiscal litigation, infringement litigations, commercial competition litigations, etc.).

From this perspective, the study analyzes the interferences between the civil procedure and the Romanian jurisdictional environment. Having as a criterion their importance and practical frequency, the presentation is selective, retaining only a few of the special judgement matters to which the rules of the civil procedure refer, in each case also indicating the competent jurisdiction.

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EU REGULATIONS ON ADMINISTRATIVE PROCEDURE

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Abstract:

Nowadays, at EU level, we can observe the need of establishing an EU regulation on administrative procedure that can improve the quality of the EU's legal system by reducing the fragmentation of applicable rules.

The paper aims to emphasize that the experience of Member States can confirm that an administrative procedure act can contribute to balancing the need for sector-specific rules with clear generally applicable procedures.

Key words: *Administrative procedure, European Union, Regulation, recent developments*

INTRODUCTION

A number of rules or principles which specifically address administrative procedures or which are relevant to them can be found in the Treaties of the European Union, for example the ECCS Treaty of 1951 refers to the obligation to motivate in Article 15, which was reiterated in the EEC Treaty (Article 296 of the Treaty on the Functioning of the European Union (TFEU), the consolidated version - and in Article 5, the publicity principle preceding the principle of transparency contained in Articles 11 and 15 of the TFEU and the principle of openness contained in Articles 1 and 10 of the TUE, 15 and 298 of the TFEU.

Under the Charter of Fundamental Rights of the European Union, the European Union's administrative procedure is governed by Article 41 on the right to good administration and Article 42 on the right of access to documents in Article 43 on the European Ombudsman, Article 47 governing the right to an effective remedy and a fair trial, and Article 48 on the presumption of innocence and the right of defense. At the same

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time, Article 8 on the protection of personal data, Article 20 on equality before the law and Article 21 on non-discrimination are equally relevant to the administrative procedure.

There are also rules and/or principles contained in international agreements to which the European Union is a party. The best example is the Aarhus Convention, which guarantees the right of all citizens to receive environmental information held by public authorities, the right to participate in environmental decision-making and the right to request the modification of administrative procedures.

The European Parliament's Resolution of January 2013 on the adoption of a Regulation on the Administrative Procedure at European Union level includes a recommendation on the objectives and the purpose of the Regulation that is to be adopted[1].

1. EU REGULATIONS ON THE ADMINISTRATIVE PROCEDURE

A series of preoccupations for the establishment of unitary administrative procedures in line with the requirements of a modern and democratic administration have been in place since the 1970s. As a first step in this direction, on 6 September 2001, the European Parliament endorsed the resolution ratifying the Code of Good Administrative Behavior, which the European Union institutions and bodies must respect, their administrative services and the staff in contact with individuals.

As a consequence of the own-initiative inquiry, the European Ombudsman drew up the draft text, which he then presented to the European Parliament as a special report. The European Parliament resolution on this code is based on the draft of the European Ombudsman, along with the amendments introduced[2].

Transforming the Code into European law would help to eliminate the disruption within the European Union institutions and

[1] The objective of this regulation is to guarantee the right to good administration by establishing an independent, efficient and open administration based on a European Union law on the administrative procedure.

[2] This decision would highlight the binding nature of the provisions and principles contained therein and ensure its uniform application to all EU institutions and bodies, thereby encouraging transparency and compliance.

bodies, which results from the existence in parallel of different codes, would ensure the application of unitary fundamental principles by these institutions and bodies in their contacts with citizens and would emphasize the importance of these principles for both citizens and officials[1]. There are some important rules that have been included and supported by the Ombudsman before the European Parliament, rules embodied in the Code of Good Administrative Conduct:

- obligation to enforce law, rules and legal procedures - the principle of legality;
- the obligation to eliminate discrimination - the principle of equal treatment;
- the obligation to take measures proportionate to the degree of danger - the principle of proportionality
- the obligation to eliminate abuse of power;
- the obligation to ensure objectivity and impartiality.

The European Ombudsman uses this Code when considering possible situations of inappropriate conduct in the administration, relying on the provisions regarding his control function. At the same time, this Code is also a very useful guide and source of information for public service workers, urging them to apply the highest standards in the administration.

With the entry into force of the Treaty of Lisbon, there have been several proposals from the European Ombudsman and the European Parliament to create a regulation on the administrative procedures of all the administrative institutions. So far, the legislative context has not been favorable to the implementation of these goals.

At present, rules regulating administrative procedures at the level of administrative institutions are found in several sources of Primary or Secondary Law. For example, Article 41 of the Charter of Fundamental Rights of the European Union, which establishes the right of every person to a fair and impartial administration[2]. Secondary legislation also

[1] The Code takes into account the principles of European Administrative Law contained in the judgments of the Court of Justice of the European Union and also draws inspiration from the laws of different countries.

[2] For more details on the interpretation of the Charter of Fundamental Rights of the European Union, see Doc. 2007 / C 303/02
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF

sets out administrative procedures that apply to the different policies of the European Union. For example, Regulation no. 1/2003, which contains the procedures of the European Commission in the field of competition policy. At the same time, the principles of good administration have been established by the case law of the Court of Justice of the European Union - the principle of non-discrimination, the principle of proportionality, the right to be heard before an unfavorable decision is taken by a public authority, etc.

A law regulating all European administrative procedures would increase legal certainty, would create a clear set of procedural rules for all EU institutions increase the efficiency of the European administration and the confidence of citizens in the European Union. In this context, the European Parliament adopted a resolution in January 2013 requesting the European Commission to submit a draft regulation[1].

Over the years, the European Union has developed a lot of administrative procedures in several sectors without correlating them, and this has led to inconsistencies in the application of these procedures. The fact that the European Union does not yet have a coherent legislative framework in the field of administrative procedure makes it difficult for citizens to understand their rights within the European Union and an efficient European administration is essential for the public interest. Both over-regulation and a lack of procedural rules can lead to maladministration, which may also result from contradictory rules and procedures that are not consistency or unclear.

Correctly structured administrative procedures generate both an efficient administration and a correct application of the right to good administration, a general principle guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union.

2. DRAFT REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ADMINISTRATIVE PROCEDURE OF THE EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES (2016)

At the beginning of 2016, the European Parliament and the Council drafted the regulation of the Parliament and the Council on the administrative procedure for the institutions, bodies, offices and agencies

[1] European Parliament Resolution of 15 January 2013 (2012/2024 (INL))

of the European Union. The purpose of this regulation is to establish a set of procedural rules that the EU administration must comply with when performing the activities under its authority. These procedural rules seek to ensure an open, efficient and independent administration and a correct application of the right to good administration.

The rules of administrative procedure contained in this draft Regulation of the European Parliament and of the Council aim at implementing the principles of good administration which are laid down in several sources of Union law and developed by the case-law of the Court of Justice of the European Union.

CONCLUSIONS

The purpose of adopting a European Union regulation on administrative procedures is to improve the quality of the European Union's legislative system by encouraging the application of general principles in the context of fragmentation between sector-specific procedures and the multitude of actors involved in the implementation of EU policies. This fragmentation has, in most cases, led to a lack of transparency, predictability and confidence in administrative procedures, and to the effects they have on citizens in particular.

A regulation on administrative procedures can also help to simplify European Union law through the existence of a single piece of legislation and the application of the principle of better regulation that allows for the quality of the legislative system to be improved.

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GUIDELINES REGARDING THE BANK RECOVERY AND RESOLUTION DIRECTIVE AND RESPONSIBILITY IN THE BANKING ACTIVITY

Adriana PÎRVU [1]

Abstract:

The Banking Union is considered by many specialists as a necessity within the current economic context. But there are also more skeptical authors who "see" this "union" as an attempt to salvgard the ideal of peace and prosperity represented by the European Union, along with other "unions", such as the military, tax and budgetary ones. Finally, the most skeptical specialists consider the banking union as an utopical construction, impossible to achieve.

The banking union supposes the existence of three main pillars: a sole regulation body, a sole supervision mechanism and a sole resolution mechanism.

In future, they wish the consolidation of the banking Union by enacting some measures of reduction and distribution of risks, measure referring to the additional reduction of risks in the banking system and to the establisment of an European insurance system for deposits.

Key words: *Banking Union, reform, risks, deposits, resolution.*

INTRODUCTION

Although it has been almost 10 years since the 2008 economic crisis, its consequences are still being felt and it seems that all of us still have many lessons to learn from this phenomenon.

The financial crisis affected everyone. Its consequences were difficult to bear even by persons or entities that were considered almost invincible, at least at the time, as was the case of credit institutions.

Regardless of the "role" that the latter had the financial crisis, the fact of the matter is that credit institutions required financial support in order to survive.

The lack of appropriate instruments at EU level needed for the effective management of the situation of the credit institutions that were in difficulty led to the involvement of states in saving them by using

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taxpayers' money, measure that did not escaped more or less justified criticism.

THE BANK RECOVERY AND RESOLUTION DIRECTIVE AND RESPONSIBILITY IN THE BANKING ACTIVITY

Directive 2014/59/UE to institute a framework for the recovery and resolution of credit institutions and of investment companies (Bank Recovery and Resolution Directive – BRRD)[1] emerged precisely with the purpose of placing at the disposal of the states the necessary instruments „in order to intervene early and quickly enough in the case of a nonviable institution or that was on a path to enter a difficult situation, in order to guarantee the continuity of its critical financial and economic functions, at the same time reducing to a minimum the impact of the difficult situation of the institution on the economy and the financial system"[2].

The state intervention to save credit institutions started to be felt especially after the Great Depression of 1929-1933. Thus, it is considered that up until that moment the bankruptcy of a bank lead, first of all, to the loss of the bankers' fortunes, the depositors also registering collateral losses. Subsequently, between the two world wars, and „in order to avoid entering a crisis spiral", the state began to intervene by awarding loans to the banks. This mechanism, though considered imperfect, was considered to be ensuring an economic balance, as well as financial- banking stability and social peace"[3].

The new regulations applicable for the distribution of assignments in the case of a banking resolution are determined by the Bank Recovery and Resolution Directive (BRRD), adopted by the Parliament in April of 2014. The Directive stipulates resolution modalities for banks in

[1]Directive 2014/59/EU of thr European Parliament and of the Council, accessed on 29.09.2016, at 16.35,
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[2] The exposition of motives of the Directive, accessed on 29.09.2016, at 16.30,
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[3] Dan Străuț, "A dangerous precedent: seizing the money from the banks would be possible, after the decision of the Court of Justice of the European Union", accessed on 28.09.2016, at 17.30, article available on http://adevarulfinanciar.ro/articol/un-precedent-periculos-confiscarea-banilor-din-banci-ar-fi-posibila-dupa-o-decizie-a-curtii-de-justitie-a-uniunii-europene/.

difficulty without the need of salvage actions financed by the tax payers, by applying the principle according to which the losses must be supported mainly by its shareholders and creditors, and not by using state funds.

At a first sight, the Directive found the optimum solution to such situations, without driving the responsibility of persons without fault in the production of the difficult situation of the credit institution. The ones that have to undergo such a risk are mostly the bank's private investors, its main shareholders. They are the ones that must ensure financial support in such situations, before the European states or the tax payers. By processing in this way, the Directive imposes the raise in discipline and responsibility of credit institutions, which will have to pay more attention to the risks they assume[1]. However, the Directive maintains the possibility of a public intervention to face the threats that the banking and financial markets experience.

The main responsibility for preventing and solving such problems is accrued to credit institutions. These must elaborate the recovery plans and update them regularly, determining the measures that need to be taken in order to reestablish their financial position. „These plans must be detailed and they must be based on realistic hypotheses, applicable to a series of solid and serious scenarios (...) The institutions should have the obligation to present their plans to the competent authorities for a complete evaluation, which would determine, among other things, if these plans are comprehensive enough and if they could restore in a timely manner the viability of the institution, even in times of grave financial difficulties"[2].

Normally, a credit institution that tends to reach a difficult state should be liquidated through the usual insolvency procedure. However, it is considered that by undergoing such a procedure the financial stability would be endangered, it would interrupt the course of critical functions and the protection of the depositors would be affected. These are circumstances that may be the object of public interest, situation in which

[1] PWC, "EU Bank Recovery and Resolution Directive'Triumph or tragedy?"", accessed on 29.09.2016, at 17.30, available on https://www.pwc.com/im/en/publications/assets/pwc_eu_bank_recovery_and_resolution_directive_triumph_or_tragedy.pdf.

[2] Exposition of motives by the Directive, accessed on 29.09.2016, at 16.30, accessible at http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0059.

the resolution procedure may be triggered, and the resolution instruments can be applied[1].

The resolution is final as being „a process of reorganization of a credit institution, which follows the insurances of the continuity of its essential functions (payment options, deposits, etc.) offered to its clients, reestablishing its trust, totally or partially, and the liquidation of the residual part through the usual insolvency procedure". The entire process is managed by an authority designated by the legislator for this purpose, which disposes of a set of specific instruments and competences[2].

The resolution is a measure that has as **main objectives** (article 31 of the directive):

- Ensuring the continuity of the critical functions of the institutions that are subject to resolution;
- Avoiding significant negative effects on the financial stability, especially by preventing contagion, including on the infrastructures of the market and by maintaining the market discipline;
- Protecting public funds by reducing to a minimum the extraordinary public financial support;
- The protection of depositors that enter under the incidence of the legislation regarding the deposit assurance;
- Protecting the clients' funds and assets.

The Directive indicates four **resolution instruments** that can be applied to an institution (article 37 of the directive):

- **Selling the business** (article 38 paragraph (1) of the directive) – the resolution authority realizes the transfer of shares, of other property instruments issued by the institution in resolution or the transfer of any category of assets, rights or liabilities of the institution, to a buyer that is not a bridge institution;
- **The bridge institution** (article 40 of the directive) – the resolution authority ensures the transfer of shares, of other property instruments issued by the institution in resolution or the transfer of any category of assets, rights or liabilities of the institution to a bridge institution, juridical person especially created with this purpose, which is totally or partially under the ownership of one or several public authorities and is managed by the resolution authority;

[1] Ibidem.
[2] B.N.R., „Frequent Asqued Questions", accessed on 29.09.2016, at 15.30, http://www.bnr.ro/Intrebari-frecvente-13774-Mobile.aspx.

- **The separation of assets, which is applied only in conjunction with another resolution instrument** – the resolution authority ensures the transfer of shares, of other ownership instruments issued by the institution which is in resolution or the transfer of any category of assets, rights or liabilities of the institution to one or more juridical persons, called vehicles of asset management, and that are totally or partially under the ownership of one or more public authorities and under the control of the resolution authority, in order to maximize their value by means of a possible sale or by their orderly liquidation;

- **Internal recapitalization** (bail-in – article 43 of the directive) – is the instrument through which the resolution authority exercises its competence of reducing the value and/ or conversion into capital titles of certain debts of the credit company under resolution, in order to absorb the losses and to recapitalize the institution enough to be compliant with the authorization requirements and to continue the activities for which it was authorized, as well as maintaining the market's trust. This measure should always be preceded by the absorption of the losses by the shareholders and by the owners of other instruments of capital.

Internal recapitalization is considered to be the main element of the form of the management system for banking crises at European level.

Within the internal recapitalization, there should be observed, among other things (article 34 of the directive enumerates a series of general principles that regulate the resolution), two principles:

- The principle according to which the losses should be firstly sustained by the shareholders and secondly by the creditors of the institution in resolution, in order of preference (article 44 paragraph (9) letter a) of the directive);

- No creditor will sustain losses greater than those it would have sustained in case the institution in resolution would have been liquidated through the usual insolvency procedure as per the safety mechanisms; no creditor should be disadvantaged (article 34 paragraph (1) letter g) and article 73 of the directive).

Regarding the creditors of the institution, they can be holders of securities or depositors. They will participate in the internal recapitalization process according to a hierarchy, on the „cascade principle".

The adequate division of costs is done between the shareholders, the holders of hybrid capital and the subordinate creditors. The hybrid

capital instruments, including the preferential shares, are titles that reflect both the capital and debit characteristics. The subordinate creditors are the ones that accept that their rights will not be prevalent in relation to other debts. Since „in case of insolvency or liquidation of the issuing entity, the holders of these instruments are paid after the holders of common bonds (classic), but before the shareholders, in exchange of the financial risk thus undertaken by their holders, these financial instruments, that represents investments and not deposits, benefit from a higher performance"[1].

Those creditors that invested in higher-risk instruments (with higher performance) will firstly partake in the absorption of the losses of the bank.

In the reduction of losses, the covered deposits cannot be used, respectively the ones protected by the Bank Deposit Guarantee Fund, with a limit of 100,000 EUR equivalent in Romanian currency, per depositor and per bank.

In the case of deposits that are above 100,000 EUR, it is considered that their holders benefit from an „additional protection", since they will be involved in the internal recapitalization only if the contribution of the other creditors will be considered as insufficient to resolve the difficult situation the bank is experiencing[2]. In exchange for their participation in the losses of the institution, such an affected creditor will receive, according to the conversion rate, a number of the institution's shares.

In this context, we remind the fact that the entire procedure of internal recapitalization must be completed observing the principle „no creditor will sustain losses greater than those they would have sustained in case the institution in resolution would have been liquidated through the usual insolvency procedure according to the safety mechanisms". In case the losses sustained by the affected creditors become greater, they are entitled to an appropriate compensation on behalf of the Resolution Fund, administered by the Bank Deposit Guarantee Fund, based on an assessment performed by an independent valuer.

[1] Cristian Bichi, „The truth regarding the recent decision of the Court of Justice of the European Union regarding bail-in", accessed on 30.09.2011, at 18.00, availabe on http://www.bursa.ro/bail-in-adevarul-despre-recenta-decizie-a-curtii-de-justitie-a-uniunii-europene-referitoare-la-ba...&s=banci_asigurari&articol=303647.html.
[2] Ibidem.

Internal recapitalization was not created by Directive 2014/59/UE, being applied in different forms in the European states before the Directive's coming into force. The directive only introduced this measure in the modalities of banking resolution that are going to be applied to credit institutions starting January 1st, 2016.

The internal recapitalization is a measure that refers to sustaining the losses of a credit institution, measure on which the European Commission expressed its view during one of its communications regarding the banking sector, in 2013. Points 40-46 of the communication are meant to justify undergoing a measure of internal recapitalization.

Thus, it is considered that the state support may lead to the subversion of discipline and responsibility of subjects on the banking market. At the same time, such a support may create a state of moral hazard, for which reason it is preferable that losses be sustained by the market investors, in the first place.

The communication regarding the banking sector made by the Commission and, subsequently, the Directive 2014/59/CE indicate and determine the restrictive conditions when state help is required. The help is conditioned by the foremost implication of the shareholders and of creditors subordinated in sustaining the reorganization and recapitalization cost of the institution. The message transmitted by the Commission and by the Directive is that the financial support from the state in the banking sector should be limited, should resume to the minimum required, in order to diminish the impact on the competition in the internal market. Limiting access to state financial aid is aimed at making banking institutions more responsible, and to discourage them from resorting to high-risk financial instruments.

The Court of Justice of the European Union was recently forced to answer some questions phrased on the internal recapitalization procedure, as it was presented in the Communication and subsequently regulated by the Directive[1]. Among these, there is also the one referring

[1] The Court of Justice of the European Union was asked by the Constitutional Court of Slovenia, in its term notified by private investors, to pronounce itself regading the validity and interpretation of certain articles of the European Commission Communication from 2013. The Court's Decision is available on http://curia.europa.eu/juris/document/document.jsf?text=&docid=181842&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=91948, accessed on 30.09.2016, at 16.00.

to the breach of the right of property in the case of internal recapitalization. The Court considered that the measures to divide the losses (the burden-sharing measures) between the shareholders and their subordinate creditors does not represent a breach of the property right of neither one of the two afore-mentioned categories. Thus, the quality of shareholders of a limited liability company (joint-stock company, in our country), imposes on them to sustain the losses of the institution, within the margin of their contribution to the registered capital. Regarding the subordinate creditors, they are in possession of financial instruments that mean taking certain risks. For that reason, should the common law procedure of insolvency be applicable, the holders of said instruments would be paid before the shareholders, but after the holders of common bonds. Also, these creditors benefit from a rather high protection, as we were mentioning before.

As a conclusion, by resorting to internal recapitalization, as it is set up by the Directive to institute a framework to redress and resolve credit institutions and investment companies, the following aspects are of interest:

- maintaing financial stability;
- avoiding to use public funds to salvage banks;
- complete protection of deposits under 100,000 EUR, regardless of who the holder is;
- that the loss of the banks be sustained primarily by the shareholders, then by other creditors, including key depositors (for the part exceeding 100,000 EUR) and the holders of financial instruments;
- ensuring the functioning of essential banking services, such as: access to accounts, use of credit lines and the use of cards.[1]

As a result of the information presented, we consider that baking resolution and, more specifically, internal recapitalization, are measures that needed to be regulated, especially in the current economic, social and political context. We disagree with the fact that these measures lead to the infringement of the depositor's right of property, as long as these measures, the conditions and means to apply them are public and the depositors are informed regarding the risk they are exposed to.

[1] Bogdan Olteanu, „Internal recpitalization – preferred alternative to bankruptcy or to using public funding", accessed on 30.09.2016, at 19.30, article available on http://www.opiniibnr.ro/index.php/macroeconomie/88-recapitalizarea-interna-alternativa-de-preferat-falimentului-sau-folosirii-banului-public.

The measures within the resolution process are exceptional measures. They are created with the purpose of protecting public interest. In any state the public interest is protected, when need be, even by using exceptional measures. The public interest we make reference to is, on one side, connected to the limitation of situation in which the state could offer support to banking institutions who are in difficulty, the public finances being thus protected, and on the other hand some banking institutions have become, with or without our desire, subjects „to big to fail", subjects whose „fall" would dramatically affect the entire financial system of a country.

We agree with numerous critics addressed to the current banking system, however we consider that the shortcomings of the system could be and they must be corrected. For this reason, in our opinion, the Directive analyzed accentuates an increase of the responsibility of the entities in the banking system. In this context, we remind the fact that the resolution, as well as the internal recapitalization, respectively, these so controversial mechanisms, are solutions applied only when all other measures of recovery failed.

The Directive allows national authorities of the state in which a banking institution is in difficulty to tackle the crisis situation on three levels:

- Prevention – it imposes the realization of adjustment plans and their constant updating by banks and the constitution of a resolution fund which would be financed by the banking sector and that could be utilized when required. It is considered that the resolution fund could be used to:

● offer temporary support to the banks that require resolution (under the form of loans, guarantees, acquisition of assets or capital for the bridge banks);

● compensate shareholders and creditors, but only if their losses during the internal recapitalization procedure exceed the ones they would have experienced during the insolvency procedures;

● absorb the losses or recapitalize a bank in specific and exceptional cases.

- Early intervention – the resolution authorities can intervene before the irremediable decline of the bank's situation requesting the application of some urgent reforms, the drafting by the bank, together with its creditors, of a plan to restructure debt. Moreover, the resolution

authorities have the possibility to make changes at the bank's management level, naming special or temporary administrators;

- Resolution – stage in which the resolution authorities can opt between:

● selling a part of the institution in difficulty;

● creating a bridge bank to continue the most important activities;

● separating the good assets from the toxic ones (so that the latter ones be transferred to an asset management entity)

● applying the measure of internal recapitalization.[1]

The provisions of the Directive were translatable in our country through Law no. 312/2015 regarding the recovery and resolution of credit institutions and investment companies, as well as for the amendment and completion of some legislative documents in the financial field[2]. According to this legislative document, in our country, the National Bank of Romania and the Authority for Financial Supervision are resolution authorities.

CONCLUSION

We consider that at least under the aspect of its form, Law no. 312/2015 can be improved. As it could well be observed in the doctrine, the law contains over 100 definitions, extremely important terms and phrases.[3] Unfortunately, though, the majority of times, in order to define the terms, the law makes reference to numerous other legislative documents, both from internal legislation and from that of the European Union, which makes them difficult to follow and to understand. For this reason, we also consider that „in the situation in which almost 100 definitions and expressions of Law no. 312/ 2015 are not understood by the majority of the persons reading them (not even by a person with

[1] Consiliul Uniunii Europene, „Recovery and banking resolution", accessed on 30.09.2016, at 19.00, article available on http://www.consilium.europa.eu/ro/policies/banking-union/single-rulebook/bank-recovery-resolution/.

[2] Published in the Official Gazette no. 920 from 11.12.2015.

[3] Nicolae Grigorie-Lacrița, „How to correctly understand and apply them?", accessed on 30.09.2016, at 20.00, article in the Economic Tribune, on-line format, available on http://www.tribunaeconomica.ro/index.php?id_tip_categorie=1&id_categ=6&id_revista=16081&id_nr_revista=458&mod=arhiva.

proper training in the respective field), neither will the provisions of this law be understood and applied correctly."[1].

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GENERAL ASPECTS REGARDING THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS IN EUROPE

Georgeta-Bianca SPÎRCHEZ[1]

Abstract:

In the context of free movement of workers ensured within the European Union, the most important aspect to be analyzed is the one related to the recognition of the professional qualifications. This thesis focuses on the general legal framework regulating this aspect, following its transposition into the Romanian internal law, but also on the presentation of a few practical aspects that occurred in its correct application.

Key words: *professional training, free movement of workers, regulated profession*

INTRODUCTION

According to art.45 of the Treaty on the functioning of the European Union[2], free movement of workers is guaranteed within the European Union. This guarantee involves mainly, the elimination between the Member States of the obstacles impeding the free movement of workers.

In order to achieve this objective, a legal framework was adopted allowing the mutual recognition of diplomas, certificates and other professional qualification titles by the Member States. In this respect, the framework directive we relate to, is Directive 2005/36/EC of the European Parliament and of the Council, on the recognition of professional qualifications[3], whose purpose is to allow the exercise of economical activities in the host states, by nationals who obtained their

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[2] The text as it was published in the Official Journal of the European Union, C 202, 7 June 2016

[3] Published in the Official Journal of the European Union, L 255, from September 30, 2005

professional qualification in other Member States, either by accepting the obtained professional qualifications, or by recognition of the national certificates of services issued in the state of origin[1].

I. OVERVIEW OF THE PROVISIONS OF THE DIRECTIVE ON THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS

The field of application of Directive 2005/36/EC is the one set in art. 2. Therefore, this Directive applies to any national of a Member State, including members of freelancing professions, who wish to exercise a profession regulated in a Member State, other than the one in which they obtained their professional qualifications, either as freelancers, or as employees.

We mention that in the view of the European lawmaker[2], „regulated profession" is "a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications".

Also, it is important to retain that the Directive does not apply to specific aspects regulated by sectoral directives, such as Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts[3], respectively Directive 98/5/EC-to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained[4], Directives that are setting additional modalities by which one can provide cross-border services, either temporarily, or by establishing their residence in other countries of the E.U.

To summarize[5], we note that the Directive 2005/36/EC provides three qualification recognition systems:

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[1] Anamaria Groza, *Uniunea Europeană.Drept material* (Bucharest: C.H. Beck, 2014), 69

[2] Art.3 of Directive 2005/36/EC

[3] Published in the Official Journal of the European Union, L 157, from June 9, 2006

[4] Published in the Official Journal of the European Union, L 77, from March 14, 1998

[5]Summary of legislation, available at: http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32005L0036&qid=1493371741725 (accesed on 10th March 2017)

- the automatic recognition for the professions whose minimum training conditions are harmonized at European level: medical doctors, nurses, dentists, veterinarians, midwives, pharmacists and architects. For automatic recognition of professional qualifications, the Directive analyzed refers to a "common training framework" meaning a common set of minimal knowledge, skills and competencies necessary for the exercise of a certain profession. Thus, for the purpose of access to a profession and its exercise in a Member State regulating that particular profession, a Member State grants the professional qualification titles obtained on basis of a framework as such, the same effect on its territory as the qualification titles it issues, under the condition that this framework must comply with the conditions set by art.49a par.2 of the Directive 2005/36/EC.

- the automatic recognition of certain occupations: professionals in crafts, trade and industrial activities may request automatic recognition on basis of their professional experience.

- the general system for the above mentioned professions that do not comply with the conditions for automatic recognition and that it is based on the principle of mutual validation of qualifications. This principle is not an absolute one, the host state being able to subordinate the recognition of a professional title to the fulfillment by the applicant of certain compensation measures, as well as skill test or stages of adjustment. In the doctrine[1] three situations have been centralized, in which such measures may be ordered, as follows:

- the length of the training is smaller by at least one year as compared to the one necessary in the host state;

- the professional training focused on significantly different subjects as compared to the ones studied in the training program from the host state;

- that certain profession contains professional activities in need of specific training.

[1] Groza, *Uniunea Europeană. Drept material*, 70

II. TRANSPOSITION OF DIRECTIVE 2005/36/EC ON RECOGNITION OF PROFESSIONAL QUALIFICATIONS, TO THE ROMANIAN LAW

In Romania, the common legal framework ensuring the transposition of Directive on recognition of professional qualifications is provided by Law no.200/2004 on recognition of titles and qualifications for the professions regulated in Romania[1]. According to art.1 of Law no. 200/2004, this regulation applies to:

- any citizen of a Member State of the European Union who wishes to exercise in Romania, as a freelancer or as employee, a profession regulated by the Romanian law;

- for the certification by the Romanian competent authorities of a Romanian official qualification title, possibly completed by professional experience or regulated training, in order to access or exercise a profession regulated in a Member State of the E.U.

Equally, at the sectoral level, for specific professions, the following regulations are part of the legal measures for the transposition of the Directive on the recognition of professional qualifications:

- Government Emergency Ordinance [O.U.G.] no.144/2008 on the exercise of the profession of nurse, midwife and the profession of medical assistant, as well as on the functioning of the Order of Nurses, Midwives and Medical Assistants in Romania[2];

- Law no.64/2014[3] for the amendment and completion of Law 184/2001 on organization and exercise of the profession of architect;

- Law no.37/2009[4] for the amendment and completion of Government Ordinance no. 2/2000 on the organization of the activity of judicial and extra-judicial technical survey, as well as Government Ordinance no. 75/2000 on the certification of criminologist experts who can be recommended by the parties to participate in the performance of criminology surveys[5];

[1] Published in the Official Gazette of Romania, Part I, no.500/03.06.2004, with its subsequent amendments and completions
[2] Published in the Official Gazette of Romania, Part I, no.785/24.11.2008, with its subsequent amendments and completions
[3] Published in the Official Gazette of Romania, Part I, no.355/14.05.2014
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[5] Published in the Official Gazette of Romania, Part I, no.407/29.08.2000, with its subsequent amendments and completions

- Law no.95/2006 on reformation in the field of healthcare[1].

III. A FEW INTERPRETATIONS OF THE EUROPEAN COURT OF JUSTICE IN THE FIELD OF RECOGNITION OF PROFESSIONAL QUALIFICATIONS

For the practical application of the stipulations of Directive on recognition of professional qualifications, we shall refer in the following lines, as example, to a few preliminary judgments of Court of Justice of the European Union.

Thus, in a case[2] in which it was requested several times the validation in Italy of qualifications obtained in Germany, in order for the applicant to register on the list of holders of scientific titles, after the Court of Luxembourg had decided that Directive 2005/36 could not be invoked so as to obtain on one hand the exemption from the employment selection procedure, responded to the preliminary question in the meaning that access to a profession is reserved to candidates declared passed following a procedure aiming at the selection of a predefined number of persons on basis of comparative assessment of the candidates, not by application of absolute criteria, that awards a title whose validity is strictly limited in time, it does not have as consequence the fact that the profession is regulated in the meaning of art.3 par.1 lit. a of the Directive analyzed by us. In spite of this, the Court emphasized on this occasion as well, that the Member States have the obligation to take into consideration within a procedure as such, the qualifications obtained on other Member States.

For cases concerning the validation of the capacity of certified translator, we shall relate to the Judgment of the Court of Justice of the European Union from March the 17th, 2011[3] and we shall retain the following aspects the Court made reference to:

- The mission assigned, in a litigation pending before a court, to a professional – judicial expert translator, is a provision of services, in the meaning of art.57 of the Treaty on the functioning of the European Union;

[1] Republished in the Official Gazette of Romania, Part I, no.652/28.08.2015, with its subsequent amendments and completions

[2] Judgment of the Court (Eighth Chamber) of 17 December 2009 in Case C-586/08, Angelo Rubino, EU:C:2009:801

[3] Joined cases C-372/09 and C-373/09, Josep Peñarroja Fa, EU:C:2011:156

- The activities of judicial experts in the field of translations, does not constitute activities to be connected to exercise of public authority, considering the fact that these have auxiliary character leaving intact the assessment power of the judicial authority;

- The national regulation that constitutes a restriction on the free provision of services and does not set effective control modalities of jurisdictional nature in terms of taking into account the proper value of the qualification of a judicial expert translator acknowledged by the courts of other Member States, does not comply with the requirements of Union law.

Regarding the situations of derogation from the analyzed principles, we mention that art.45 par.4 of the Treaty on functioning of the European Union, provides that the stipulations of this article do not apply to the classification in public administration.

Thus, in a recent judgment[1], The Court of Justice of the European Union indicated that the mentioned regulation considers the legitimate interest the Member States have to reserve their own nationals an assembly of jobs in relation to the exercise of public power with protection of general interests.

Yet, it was decided that the analyzed exception only concerns the access of nationals of other Member States to positions in public administration, aspect the conclusion of the Court was based upon, in the meaning that art.45 of the Treaty on the functioning of the European Union opposes to the possibility of the case we made reference above, respectively that the jury of a contest for the recruitment of legal clerk at a court of a Member State, upon analyzing an application to this contest filed by a national of that Member State, to condition this participation by possession of titles required by the legislation of the Member State concerned, without taking into account all the diplomas, certificates and other titles, as well as relevant experience of the concerned person, performing a comparison between the professional qualifications certified by them and the ones required by that particular law.

[1] Judgment of the Court from October 6th, 2015 in case C-298/14, Alain Laurent Brouillard, EU:C:2015:652

CONCLUSION

As it was stated in the doctrine[1], European regulations in terms of recognition of professional qualifications and national measures adopted in order to transpose it into internal law, have an outstanding importance in the creation of the legal and institutional framework to ensure the free movement of the work force and services within the European Union.

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[1] Nicolae Voiculescu, *Recunoaşterea calificărilor profesionale în dreptul comunitar. Reglementări recente şi incidenţe asupra dreptului intern*, în Revista Română de Dreptul Muncii 3 (2008), article consulted in the database www.idrept.ro (accessed on 07.04.2017)

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TERRORISM AND SUPERVISION'S PROPORTIONALITY ON INTERNET

Claudiu-Ionut MORARU[1]

Abstract:

As the Internet has become a mechanism of mass communication, law enforcement authorities have developed new capabilities and information surveillance and have been assigned new legal powers to monitor their users. Confidentiality and the right of non-discrimination, which are based on European legal framework are "caused" by increased surveillance and profiling suspected terrorists. Their disproportionate nature is problematic for democracy and state law, and will lead to practical difficulties of cross-border cooperation between law enforcement authorities.

Key words: *Terrorism, internet as a tool, data exchange, European legislation.*

INTRODUCTION

Over the past 15 years, the Internet has developed a network of academic researchers specialized in mass communications mechanism.

As it might be expected from any such widespread technologies, law enforcement agencies have paid attention to the growing use of the Internet for criminal purposes, especially by suspected terrorists.

Terrorist groups such as Hezbollah, have been observed using the Internet for communication, advocacy, research, planning, advertising, fundraising and creating a sense of community. E-mail and discussion forums are used to plan operations, while websites were frequently used to prevent controls editorial media and communicate directly with supporters groups and potential recruits.

However, these new powers have caused significant concern that the privacy of Internet users who have no connection with terrorism or with serious offences is breached, disproportionately.

The right to privacy refers to the right of private life guaranteed by article 8 of the European Convention on human rights (ECHR), but is

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also a "shorthand" for a more specific right, which usually referred to in terms of "data protection". This is recognized as a *sui generis* right (for example, in article 8 of the EU Charter of fundamental rights) and is addressed not only to the protection of individuals in relation to unauthorized intrusion into their private life or confidentiality of their life, but in the wider aims of their protection against collecting, storage, or network shares and use of their data.

The focus is on the central issue in the "information society" to the expansion of control by "operators" on individuals – ususlly entitled as "relevant people" - by possessing their data.

Proportionality of surveillance on the Internet aims the core values of a democratic society, which raise serious constitutional problems in many States. However, it refers to a phenomenon in terms of terrorism-which States feel forced to respond and to take the most drastic measures, if needed, notwithstanding obligations incumbent upon them routinely on human rights applicable in "normal" times.

However, terrorism is not a passing phenomenon. While wars or other public emergency situations generally have a more or less clear end (though this can be greatly delayed), there is no foreseeable end to the fight against terrorism. Even at the national level, anti-terrorism legislation tends to become semi-permanent.

THE USE OF THE INTERNET IN TERRORIST PURPOSES

While media attention focused more on the dramatic possibilities of "cyber-terrorism", the reality of the use of the Internet in terrorist purposes is more ordinary. Researchers found that online terrorist activity is more common for communication, propaganda, research, planning, advertising, fund-raising creating a shared sense of community.

Terrorists communicate on-line in order to achieve social interactions, planning and execution of documents. Email is their primary tool, but Voice over Internet Protocol (VoIP), is also largely used to support existing relations. Blogs, chat rooms and message boards

(sometimes with secure passwords), are also used to reach a wider audience, particularly the supporters and potential recruits.[1]

Use of encoding for altering the content of the messages is not more spreaded among the terrorists than among the general population – last but not least because it could highlight the messages.

Use of steganography to hide the existence of the messages is discussed more than information services used by terrorists because it is technically challenging and therefore less appealing.

Websites often contain valuable technical information (which vary in quality), such as maps, plans, conspiracy theories, militant texts and anti-terrorism programs. Most of the "recipes" for biological and chemical weapons available online are of poor quality and unlikely to lead to the production of usable weapons.

Terrorist websites make considerable efforts to increase public sympathy for the cause for which they are engaged and they resemble doubts regarding the validity of the status quo.

The Internet is an ideal tool for propaganda and most extremist groups, therefore, are present on the web. The sites are cheap to accomplish while looking professional, adding the validity and legitimacy of a cause. It is relatively easy for extremists to use the multimedia, that appeal to the young and those less "trained".

Groups can now bypass these janitors and can communicate directly with supporters and potential recruits. Al-Qaeda publish images of attacks and lists of "martyrs" and has public relations, with no problems with his own agency. Sites are monitored by journalists who play footage again with the most shocking scenes of the central press-including videos.

Websites are also a route for misinformation and psychological operations, such as displaying casualty figures and warnings of attack. In contrast, previous terrorist groups such as ETA and the IRA had to rely on oral warnings and local newspapers.

Terrorist groups monitor online forums for potential new recruits who will be contacted directly by an ideologue (a "International dating service"), that will lead to the hardening and security guard training. Once these objectives have been fully prepared, are transmitted to the

[1] Titu I. Băjenescu, *Internetul, societatea informaţională şi societatea cunoaşterii: Aspecte tehnice, economice, politice şi sociale* (Bucureşti : Matrix Rom, 2006), 478-480.

operational leader who will be responsible for tactical training specific skills.

SURVEILLANCE, PROFILING AND DATA SHARING

Parallel to the development of communications technology, which led to Internet development, we continue to see exponential increases in computing capacity and data storage. Processing power has doubled approximately every two years, up one million times in 1965. Bandwidth and storage capacity are growing even more quickly, doubling every 12 months.

The new surveillance technologies that exploit these capabilities include monitoring mechanisms, screening and analyzes billions of records of telephone conversations and e-mail; "Bugs" and tracking technologies that can access the geographic position of mobile phones and acts as a remote listening devices; and undetectable (even with anti-virus tools) "spyware" secretly installed on the computer of a suspect by the authorities that can remotely monitor and secretly online activities of its passwords and e-mail and even camera and microphone computer. Computer surveillance not only observe: they direct the attention of the police and other authorities to "targets" identified by the algorithm.[1]

There was a commensurate expansion of surveillance data ("dataveillance"): monitoring "data tracks" left by individuals in numerous transactions, through access to databases containing such routes communications.

The Data Retention Directive in the EU since 2006, provides mandatory retention period beyond the period for which they can be stored under your "normal". These data include records of phone numbers formats and email senders and recipients - but not the content of calls or messages.

Rules on access to and preservation of communications data is opaque and does not guarantee that data on innocent people will not be obtained and held by law enforcement authorities, or used for "profiling". The image of an individual that can be built in data communications is extremely detailed. Intimacy is diminished when state investigators can

[1] Lionel Bochurberg, *Internet et commerce électronique: Site web, contrats, responsabilités, contentieux* (Paris : Dalloz; Delmas, 2001), 352.

see who we communicate to, what we read and what we track online, and where we travel through the use of mobile phone.

Data collected by law enforcement agencies are now available for Distributed throughout Europe under the principle of "availability", established in "Hague Program" of the European Union, as follows:

From 2008 it was regulated the exchange of information through the conditions set out below with regard to the principle of availability, which means that, throughout the EU, an enforcement officer in one Member State who needs information to perform their duties, may obtain this from another Member State and that the law enforcement agency in other Member State which holds this information will make it available for the declared purpose, taking into account the requirement of ongoing investigations in that State.

Methods of exchange of information should make full use of new technologies and must be adapted to each type of information, where appropriate, through reciprocal access to information or interoperability of national databases, or direct access (online).[1] This enables data sharing and open access, without any "obstacles" ordinary traditional instruments contained in transnational cooperation between law enforcement agencies. These include the European Convention on Mutual Assistance in Criminal Matters of 1959 (Council of Europe) and the two Additional Protocols and the EU Convention on Mutual Assistance in Criminal Matters of 2000 (based on Council of Europe Convention Convention), the Additional Protocol, which entered into force (both) in 2005. Procedures included in these treaties take time and, more importantly, involve formal request for information specified and often require judicial authorization.

Law enforcement agencies in Europe now typically rely on the use "Profiling" to target suspects. Such profiles are becoming more numerous, and are not created by any national police force (and / or agency and information), but are part of international cooperation (especially within the EU). In order to "facilitate targeted searches for suspicious persons" states' members collect data from registers of foreign residents, students and other similar sources of information. Their goal is to match these data to physical, psychological or behavioral that are considered by law enforcement agencies that would indicate a high probability of terrorist activity.

[1] Ion Bica, *et al*. *Securitatea comerţului electronic* (Bucureşti : All, 2001), 388.

Police and intelligence agencies are not just looking these massive data resources in order to find previously identified suspects for specific crimes (terrorism or other). More often they "catch" information through such databases in order to "fit" everyone involved with "profile". Moreover, such searches are typically prepared based on intelligence, unquestionable, developed as part of EU policies. Profiles created in this way suffer from embedded deviations that even software manufacturers often do not know, or could become apparent only when these programs are used in practice - and then only if their operation is monitored suitably for such distortion.

Many of these technologies represents an inherent threat to privacy: they allow a state extremely close control on people's lives. But they are not infallible - contrary, these technologies are subject to serious, inherent limitations. "Profiling" and "data mining" seem to work up to a point, but they inevitably lead to action against a large number of innocent people on a scale that is both unacceptable and unnecessary in a democratic society.

Attempts to identify incidents very rare or objective from a very large data set are likely to result in unacceptable numbers (high) to "false" (identification of innocent people as suspects) or, on the other hand it is not possible to identify the true criminals or terrorists.

CHANGING ROLE OF POLICE

In many European countries, police are increasingly being seen as part of a wider "full societal alliance", implementing general state policy. This inevitably expand the states are justified to take measures, including intrusive or punitive, against people who have not committed (yet) no violence.

Definitions of crimes in question - or more general "reasonable suspicion" which are felt to justify police actions - are becoming increasingly vague. Despite the great attention given by Member terrorism, especially after 9/11, even the concept is still largely undefined.

Specifically, neither European Convention on Suppression of Terrorism of 1977, nor the UN International Convention for the Suppression of Terrorist in 1999 does not define the word "terrorism". Also, not even United Nations Security Council (or, moreover, the EU)

adopted a definition, despite punitive actions are directed against suspected of being "terrorists".

Further, a major change in the police refers to the relationship between police agencies and agency information. The first work increasingly close and are based on information gathered and transmitted by the latter. Police also adopts many of the techniques and technology information agencies.

As a result, the base of police's interest for a person and the nature of evidence against that person are hidden. This has a direct impact on the treatment of such persons is likely to be spied, harassed, arrested, to be denied a job-all without knowing why, or without being able to challenge the reasons for such actions. The increasing relationship between the police and the agencies information undermines the fairness of processes against persons accused of being involved in organised crime or terrorism, in the sense that the courts permitted increasingly more efficient secret evidence, as well as problems arising from anonymous witnesses to form the basis of a convictions

PROPORTIONALITY AND EUROPEAN LEGAL FRAMEWORK

European legislation privacy is complex, developing a separate domain, developing in a series of separate instruments often ad hoc by various judicial bodies national and international (European), or other bodies .

Privacy was developed under Article 8 of the ECHR.

Over the last decade, European Court of Human Rights gave a strong recognition of the principles of data protection in accordance with this article, in particular, where Peck v. the United Kingdom (concerning CCTV), Amann v. Switzerland (On wiretapping), Rotaru v. Romania (concerning secret Files service) and Copland v. the United Kingdom (concerning situations where legal basis for processing personal data can be considered to be appropriate -to be a "law" - in terms of the ECHR).

Privacy, however, is also increasingly seen more as a *sui generis* right, in particular by the Charter of Fundamental Rights, which gives a separate provision (Article 8). More specifically, the following European general data protection tools were developed:

• 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Additional Protocol.
• Directive 95/46 / EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.
• Directive 2002/58 / EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and privacy electronic communications sector (also called Directive on privacy and electronic communications or DPEC).

Under these instruments they were issued rules and guidelines that relate specifically to the processing of personal data for law enforcement purposes. These include, in particular, Recommendation R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector (1987). This recommendation became effective standard regarding this issue: it is specifically called instruments of European police cooperation, including treaties Schengen and Europol and its associated regulations, and is invoked periodically in recommendations by the Parliamentary Assembly of the Council of Europe and the Committee of Ministers of the working group and the European Parliament.

European Court of Justice (ECJ) in Luxembourg, was also strict in applying the principles of data protection (derived both from the ECHR, as reflected in the "general principles of Community law", and directives EC above); see in particular cases Österreichischer Rundfunk v. Austria and Sweden v Lindqvist. It is clear from these cases that, according to the ECJ, data protection is a fundamental issue, constitutional, which should be applied in accordance with the European Court of Human Rights. ECJ clearly approved and adopted for itself ,,approach typical "standard" developed Human Rights Court in Strasbourg and follows this approach and to assess cases on the Framework Directive.

In their decisions, European Court of Human Rights and the European Court of Justice developed a standard range around data protection and law enforcement. They need a legal basis for any collection, storage, use, analysis, disclosure/sharing of personal data for law enforcement and combating terrorist actions, a legal basis vague general is not enough. Such processing must be based on legal norms

specific to the particular type of processing operations concerned. These rules should be mandatory and should set appropriate limits on statutory powers, such as a precise description of "the type of information that can be recorded", "categories of persons against whom could be taken supervisory measures, such as collection and processing of accounting information "and" circumstances in which such measures may be taken "(Rotaru vs. Romania).

Legislation should include a clearly established procedure that must be followed for the authorization of such measures, limits on storage of old information and on the period for which new information can be stored. It must include also explicitly detailed provisions regarding the reasons for which can be opened files, the procedure to be followed for opening or accessing files, the persons authorized to consult records, the nature of the files and the use that can be made of information from files. Such rules may be established subsidiary rules or regulations - but to qualify as "law" under the Convention, they must be published.

To comply properly with the basic principle - "specification-purpose and limitations" is not sufficient to indicate that the processing serves "police work" or even a specific task police (investigation and prosecution of crime, counter threat of immediate controversial "prevention"). The personal data collected in a specific purpose by the police (for example, threat) may only be used for another specific purpose (for example, the investigation of crimes), where the data were collected independently in this second purpose. Police or other law enforcement agencies should not collect personal data "just in case".[1]

EC Data Protection Directive (Directive 95/46 / EC) provides that in case that a person is subject to a decision fully automated, the individual should (at least) have the right to know the logic in this decision, and would be taken to protect the legitimate interests of the individual.

The scope and application of this principle are still unclear, even in the first pillar. However, the basic principle - that would violate "human identity", "dignity" or "personality" to treat every individual on this basis without stringent security measures - must surely also be

[1] Myriam Quéméner, *Cybersociété : Entre espoirs et risques* (Paris: L'Harmattan, 2013), 244.

applied third pillar. This has clearly implications for "profiling" of terrorist suspects.

In addition, there must be strong "guarantees established by law" to ensure proper supervision (and efficiency) of the relevant activities. Normally the judiciary should conduct this surveillance. Otherwise, there should be alternative mechanisms for strong supervision, such as a tight parliamentary control. This requirement is part of the standard that the legal norm is subject to - whether or not is the appropriate quality. But the existence of such procedures is also essential in assessing compliance with Article 13 (right to an effective remedy before a national authority). European Court of Human Rights confirmed that a remedy should be available to anyone with an "arguable claim" of a violation of a right from Convention: it is not necessary to prove that there has been a real violation - which, in case that the secret surveillance would put individuals in an impossible situation.

CONCLUSION

It follows from the foregoing that the collection of data, collecting information through intrusive or secret means (wiretapping and interception of emails), and use techniques of "profiling" and indeed, the "preventive" activity of police, generally, must be the subject of a necessity and proportionality test, and be secured by strong guarantees.

Data regarding different categories of subjects (individuals invicted formally, suspects, associates, accidental contact witnesses and victims, etc.) should be clearly distinguished. The nature of information and operational data coming from parties requires additional safeguards, *inter alia* to ensure the accuracy of this information since these are personal character data in a commercial environment. This access should be allowed only on a case by case basis for specific purposes and be under judicial control in the Member States.

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SOME REFLECTIONS ON THE CONCEPT OF LEGAL ORDER AND HIS RELATION TO THE SOCIAL ORDER

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Abstract:

The legal order is defined as the order established for the conduct of social relations enshrined by legal rules in their entirety, which make up the national justice system in a particular state. Social order includes legal order, and the latter is identified as part of the whole when they relate to social order. The condition which presupposes through legal norms for a normal conditions of all social activities is the legal order. The legal order represents the normative state that legitimizes the legal order.

Key words: *social order, order, order of law, legal liability, legal report, the legal norm, domestic law, international law.*

INTRODUCTION

Philosophical concern for understanding the order of the universe as order based on a certain unity of all things, still lags in the center of interest in theoretical thinking. In absolute social environment, science etc. there is a certain ordering of things, phenomena etc., which leads us to submit some nature reflections and the essence of that system, especially of characterizing the law. It is worth mentioning that preconceptuale forms of rule of law, of the social, etc. can decipher some ancient texts, from presocraticii, especially bowing to understanding the relationship between natural order - moral social order -the order, with consequences for law[2].

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[2] Emil Georghe Moroianu, „Conceptul de ordine juridică", in *Studii de drept românesc 1-2 (2008)*, 33-42, http://www.rsdr.ro/Art-2-1-2-2008.pdf.

THE CONTENT OF THE PAPER

Social order and law are reported as two specific notions, namely that the law of social responsibility and legal liability. As liability is a form of social responsibility as social responsibility includes legal liability, so the social order includes law, and the latter is identified as part of the whole when we compare the social order. The legal order is defined as the order established for the conduct of social and economic relations established by legal rules in their entirety make up the national legal system in a given country at a given time.[1]

Or, as a society to exist and its members to live without adverse or dangerous reciprocal is absolutely necessary, even vital, the establishment of social order, which is manifested by the existence of predetermined rules of behavior in different areas of social life. When we talk about law and order which requires the law or legal system in the social order, we cannot omit the notion of the rule of law. These two mutually determined. The way this interdetermination is manifested, going to put it out below.

The rule of law is the state via legal means ensuring conditions for the normal development of all social activities. Rule of law that establishes social relationships as a result of strict observance of laws by citizens and state bodies is a fundamental social value of our Soviet elite and is protected by the criminal law.[2] We add here the idea that criminal law is not only to defend the rule of law, but absolutely all the legal rules governing liability do. The way in which the rule of law is linked to the liability can be drawn from the definition of legal liability and opinions of authors vis-à-vis the interconnection impact on the legal system. In fact the impact is still one another and continuously

Thus, the legal liability arises solely by virtue of committing the illegal act, so the abuse of legal norm. According to this opinion, liability is a process that starts at the time of committing the illegal act and continues by passing several stages[3].

[1] Базылев Б.Т. *Юридическая ответственность* (Красноярск, 1985).
[2] Hans Kelsen, *Pure doctrine of law* (Bucharest, 1995). 290.
[3] Emil Moroianu, „Considerations on the natural and social order in ancient Greek philosophy", in *The philosophy magazine* 1 (1990), http://www.rsdr.ro/Art-2-1-2-2008.pdf.

In this regard, N. S. Leikin noted that criminal liability is incurred at the time of the offense and shall expire upon completion of his sentence or the expiry of the limitation period[1]. However, crime is not only illegal act, so when it comes to defending the rule of law, we should necessarily include here all the legal rules governing legal liability. Indeed we see that the existing legal order determines the order of law coexistence.

In legal doctrine there is an opinion on the relationship between liability and the legal defense of the rule of law. Prof. SS Alexeev believes that the legal defense of the rule of law is a broader category than the legal liability. However it should be mentioned that liability exists and is performed within the scope of legal and defense through the rule of law[2] legal . Report born as a result of committing the illegal act not equivalent to legal liability. OE Leist noted in this regard that a certain amount of legal defense of the rule of law resulting from the commission of illegal acts legal liability exceed[3]. BT Bazilev mentioned that liability is a special report for the defense of the legal order, it developing in the general defense report the rule of law[4]. Prof. SS Alexeev assumed liability characterizes only the content of legal defense of the rule of law, especially from the point of view of the legal status of the offender, his obligations that arise as a result of committing the illegal act[5].

Regarding the social order as a set of norms, rules and obligations, prohibitions and social practices governing social relations between individuals social groups and organizations, it has two meanings: a) first meaning refers to the sequence of regular events, facts from -a society; b) The second meaning refers to the nature of the political regime political organization of society and has a biological connotation because it requires unconditional compliance requirements of individuals in the system. Most authors consider that every sense of the term includes social order and its opposite, that of social disorder that

[1] Леикина Н.С. Личность преступника и уголовная ответственность. Л., 1968.
[2] Алексеев С.С. Общая теория социалистического права. Вып. 2. Свердловск, 1964.
[3] Лейст О.Э. Санкции и ответственность по советскому праву. М., 1981.
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[5] Алексеев С.С. Общая теория социалистического права. Вып. 2. Свердловск, 1964.

may occur due to the existence of areas of incompatibility of individuals[1].

Social order is necessary but not sufficient condition for the stability and functionality of the company. In dealing with individuals it did not guarantee that actions they will be accepted or recognized by others. Suspicion that others did not perform their duties or obligations is enhanced by the fact that often are found justification for the violation, breach or non-fulfillment of these obligations. Even in the presence of a determined social order it is difficult to imagine that all individuals will accept and unconditionally follow the norms and rules of conduct imposed by society in the absence of coercion and constraint mechanisms more or less organized and institutionalized. Exactly the same happens if the rule of law, it exists inclusive lack of it in some distinct cases, we can talk about the legal reporting also violated an existing company.

Or, the rule of law including the light is measured irregularities which the company has actively. And that does not mean anything other than that not all members of society (and legal rules absolute all legal concerns, which derive from the abstract nature) accepts existing legal order, violating it, which affects the rule of law. Representing the core synthesis or social order, law is by definition a coercive order of public rules addressed to rational persons in order to regulate their behavior and ensure the necessary framework for social cooperation. Proper functioning of society requires a single rule of law, as two distinct legal orders simultaneously employed may not be valid for the same individuals in the same territory in the same period of time.

Law provides orientation, conduct and control social actions and behaviors based on a hierarchical system of legal norms. The legal rules is the foundation of the legal system and social norms also protects the core values and social relations by imposing allowing or denying certain actions or behaviors[2]. Romanian legal literature, the first systematic discussion on the concept of orders were proposed doctrine since the 90s, so we mention here only illustrative, teachers Raluca Migu-Besteliu[3] Alexander Bolintineanu Dumitra Popescu, Gheorghe Michael Roxana Munteanu, who made distinctions between international order and state

[1] http://www.juridice.ro/wp-content/uploads/2014/05/teza_Bancila_A.pdf.
[2] http://www.juridice.ro/wp-content/uploads/2014/05/teza_Bancila_A.pdf.
[3] Raluca- Miga Besteliu, *Law interrnațional. Introduction to Public International Law* (Bucharest: ALL Beck, 1997).

orders, international orders and order community, public policy, law and order legal order.

George Avornic legal order or law defines as "organization of social life based on law and legality, which reflects the real quality of relations social identity"[1]. Boris Black and Black Alina treats law as the way social order arising from the practical implementation of legal norms designed legal system find all the legal reality[2]. The concept of legal order means a whole a lot better orderly and coherent (by finding some internal criteria under whose logical requirements are established and validated) the legal rules and legal institutions by which a society is organized legally and politically, and how to regulate by such rules and institutions, relations between the various subsystems of the global society considered relations components of the assembly itself respective regulatory and institutional framework[3].

The legal order is a synonym or more precisely, equipotent the normative order. Preaching that any state is / are an order of law, such an attribute is, however, relatively, because under certain determinations socio-political, the legal order can be reversed, replaced, sometimes brutally, with another order of law, without the state to cease its existence as a political organization of society data; the more we can appreciate an involutive stage that would place the state in question following a change in its legal order, understood this order as a public policy[4].

The legal order is only the layer rule which legitimizes the rule of law, justifiable formal as legal norms against which acts as a united bloc, the rule of law are produced in accordance with procedural requirements laid down by a rule assumed to be fundamental , we refer to the theory and kelseniană[5]. The concept of legal order is not just an attribute of domestic law, whereas any legal order, any order of law / public National / State is inter positioned to such other order in the plane existence of an international society and increasingly internationalized as Nearly full effect of globalization. As such, a symmetrical internal legal order, the doctrine stated that there is a general international legal order, with some

[1] Gh.Avornic, *General theory of law* (Chisinau: Neighborhood Legal), 476.
[2] http://www.manager.ro/dictionar/ordine-juridica-nationala/1966.html.
[3] Moroianu, „Conceptul de ordine juridică", 33-42.
[4]Idem.
[5] Kelsen, *Pure doctrine of law*, 290.

private notes that are given by the very nature of public international law, its mode of creation as specific legal field.

It appeared in doctrine, it is not permissible to design a rift between domestic law and international legal order, that between these two orders there is a certain unity logical and theoretical majority opinions in doctrine tilting today towards monism law with rule of international law compared with the intern. Even the Constitution of Moldova and the Romanian Constitution stipulates this. Thus, according to the. 2, art. 4 of the Constitution of the country, where conflict between the covenants and treaties on fundamental human rights to which Moldova is a party and its domestic laws, international regulations have priority[1].

And Constitution in the. 2, art. 20 stipulates that if the conflict between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall prevail unless the Constitution or national laws comprise more favorable provisions[2]. Thus, the constitutional idea of relationship we inserted between domestic and international law, and this is part of the existing social order within the state and our society.

CONCLUSION

The conclusion is that the law is not possible without social order. Law can exist only within a framework of social order. There is no way without a pre-existing social order to conceive in any way the legal system. And the latter, in turn, has a decisive impact on law and order and the rule of law.

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THE INTERNATIONAL CONFERENCE
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THE SOCIAL CHARACTER OF COERCION

Oleg TĂNASE [1]

Abstract:

The changes that occur in everyday life, as a natural evolution of things, concern either legal, political, bank or any other field, entail an objective change to rules and procedures of these areas specific to the social cohabitation order.

Coercion is one of the elements which aims at regulating the social behaviour of an individual, involves certain considerations that ensure the protection (provide safety) of citizens and society as a whole, against actions that break the rule of a good coexistence in society.

Key words: *(5-7 words) social environment, rule of law, power of the state, constraint, legal liability, state authority, etc.*

Taking into account that the field of regulation of social methods is different one, beginning with religion rules, rules of morality and ending with classical rules, the constraint as action exercise, is present at each stage from this domain. Thus either we speak about social, moral or legal constraint – this presupposes a reaction, a certain attitude toward a derogatory behavior.

The term of "constraint", depending of object of the analysis involves the study of administrative law, constitutional law, civil law, criminal law and of law in general.

Speaking about social constraint, it goal involves the protection of the person, of the community against the phenomenon which contravene to the rules of good cohabitation in the social environment.

The concept of constraint has as objective the security of the person, of the community from social environment, toward the acts and facts which disregard the rules of coexistence from that social

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environment. The social rules or coexistence rules, are concepts *in concreto* as a certain behavior, a certain standard of conduct formed in the social environment.

The study of the constraint's concept has its origin even from the formation of social community, as social form of existence, and as political form. The formation of social power, but especially its organization, has led to the establishment of some rules, the infringement of which lead to the liability of the person for derogatory behavior.

May be emphasized that there is competition between freedom – as form of manifestation of wishes, intentions, aspirations, while the constraint – is a form that suppresses the wishes, intentions and aspirations. This duality of freedom-constraint can be found within each individual.

Thus, if an individual from a social group aspires for something, may be the fact that from the part of community to exist an „opposition", a contradiction with the desire of the individual, being placed at the opposite extremes.

In the same sense, we could speak about that the constraint handcuff the aspiration, the spirit, thus stifling the inspiration.

If we refer to the social constraint, then this presupposes a social demonstration of the fact, of the report between social power which is realized for the safety of the individual and of the community as a whole.

Therefore, in function of social conditions, of economical conditions of the community, as well as of the character of the individual (to which are added its mentality, own ability of analysis), each person is able to create his/her own liberty, at the same time applying to himself the own constraint. From this point of view there are individuals:

- who have a libertine behavior,
- and others are more reserved.

This difference of liberty, influences on the individual, and on those with whom the individual interacts, on those with whom the individual has any relations.

Even in the social environment the freedom doesn't presuppose to make whatever in function of wishes, with risks of commitment of a „bad thing" against any individual or community.

But at the same time, there are some barriers between freedom of some persons and freedom of others, and this highlights the indices of constraints, which through the effects of these generates some values, it

would be paradoxical, but these are: the right to live and the right to be free – based on coercion to restrain the wish; right for hopes and enthusiasm – based on coercion to experience them all, etc.

On the way of consequence, we are entitled to claim that freedom and constraint are pair notions, which coexist, reciprocally determining each other, without cancelation.

At the level of modern state, we cannot relate itself to an institutional level divided into distinct centers of political impetus and we must observe that the state aims, indifferently of which institutional level is, to regulate all, legally to qualify any legal behavior, any individual or of group behavior.[1]

This tendency is opposed by the tendency of civil society to get rid of this regulation, to exercise the public power outside the regulatory actual framework. In this sense the society is politically active, it seeks to supply and dominate the state institutional level, its reaction toward the state coercions is not to run, but to attack.[2]

Thus, the rule of law become an order of constraint, an order that justified the police state, theory which has produced an important modifications in traditional legal thinking, capturing the attention of theoreticians of the law. The criticism comes from many directions, of which we could remember, on the one side, the criticism of identification of the sate with law, the criticism of application at legal order of a formal logic of mathematical type or, on the other side, a criticism of the purity concept of the object of science of law. Thus, one that led to the development of a legal state is the identification of state with law, theory characterized by objectivism, which results from the importance of which the author attaches to legal rule and to constructivism developed in the basis of a concept of hierarchy in the legal system on constitutional rule.[3]

Therefore, the law - as a totality of legal rules, and the constraint by themselves presuppose a result of social activity, as we show, that are elements of rule of law which cannot be seen and analyzed in isolation from each other.

The interaction between these elements highlights two aspects:

- The coercive character of the law is indispensable to it,

[1] Mariana-Mihaela Vanghelie (Nedelcu), "Administrative coercion and state of law", (PhD Diss. - summary, Bucharest, 2015.
[2] Vanghelie (Nedelcu), „Administrative coercion and state of law", 4.
[3] Vanghelie (Nedelcu), Administrative coercion and state of law, 5.

- The social constraint, following „the way of law" gets another integration, becoming legal constraint.

The constraint in Law has a basic goal – is the determination to fulfill (respect) legal rules, the achievement of which is based on grounds of law and in certain procedures of different complexity.[1]

Even if the legal coercion (through its methods: of prevention, of protection and legal responsibility), is the most analyzed in jurisprudence[2], this is developed permanently, being a living organism.

From the jurisprudence of European Court of Human Rights, we consider that to the category of legal coercion is adhered and the incompatibility. The establishing of incompatibilities for elective public functions, in accordance with European Jurisprudence, is not contrary to the provisions of the Convention for protection of human rights and of fundamental liberties. Thus, through decision from June 15, 2006, pronounced in the *case Lykourezos against Greece,* the paragraph 51, the Contentious Court of human rights ruled that, by virtue of the obligation of Contracting States to organize elections under conditions which ensure the free expression of the people's opinion, foreseen in Article 3 of Protocol No. 1 to the Convention, the States have a wide margin of appreciation in imposition of some limitations or incompatibilities of public functions and of some specific rules on the status of parliamentarians, according to historical and political factors peculiar to each State[3].

Concerning the social coercion, this will have own methods of regulation[4]. Thus, among them could be:

- The motivation – manifested through influence on individual or collective conscience; influence on psychology of individual and collective personality.

[1] http://studopedia.ru/7_116312_pravonarushenie-priznaki-vidi-sostav.html

[2] This could be explained through triggering of state mechanisms in regulating of individual behavior, but for not allowing of abuse from the part of the authority were outlined principles and rules specific to rule of law.

[3] Decision no.972 from November 21, 2012 referred to notification formulated by the president of Superior Council of Magistracy on the existence of a legal conflict of constitutional character between judicial authority, represented by High Court of Cassation and Justice, from one hand, and legislative authority, represented by the Romanian Senate, on the other hand, Published in the Official Gazette no.800 from November 28, 2012.

[4] Anatolii Vengerov, *Theory of State and Law* (Moscow, 2009), 342.

From the moment in which the personality is considered a social product, there is an interdependence of society toward the individual. Thus, the anthropological and sociological literature distinguish, in the formation of the personality, two variables: which is the culture and society itself[1].

- The belief – being the determination to adopt a behavior, a certain set of rules, toward certain facts and things.

In this order of ideas, for notion of social coercion is specific the term of exterior coercion and that of interior coercion.

Thus, when an individual rejects certain social rules of coexistence, he could justify his acts or facts on some "interior" constraints, not only on some "exterior" constraints. This exposure will led to the idea of human as dominant „moral automaton" toward the irresistible starting.

If we say that there are no interior constraint, in consequence we will cancel the differences of essence between a deliberately act or fact, committed intentionally and consciously, toward acts or facts committed under the influence of outside fear, fears or effects of fear, anger or other emotional states.

The theory of social constraint could be an exercise which by certain social elements and conditions of facts would actually embed in itself a mixed character: being indices of the interior and exterior constraints.

These behavioral differences, generated by impulse and type of coercion, if would be excluded, would eliminate the distinction between free behavior and manipulated behavior, between a honest behavior and a disguised or apparent behavior.

In these conditions, the theory of liberty reports us in a theory of rules system, of the relation between an individual and community, of the individual with social group, as well as of the relation with society.

As the result of studies of personality's psychology, based on the eight cultures of some primitive tribes, the scientist Kardiner states that, within each social group, there is a structure of behavior common to entire social group, which he calls basic personality. Thorough the basic personality he understands a specific psychological configuration, appropriate to the members of a specific social group, which is

[1] Angela Cucer, *Course Notes at discipline of Personality's Psychology* (Chisinau 2013), 5.

objectified in a certain lifestyle, the "matrix" on which subsequently is developed the features of individual character. For Kardiner, the causality has a double meaning: on the one hand there are causal relations from the environment to individual, on the other hand from the individual to the environment.[1]

We believe that this causative report was the source for which were enacted some type of social constraint: road traffic code – regulates the road safety and normality, and in fact would indicate that this regulation is "contrary to" freedom of movement. Another form of social constraint, but unregulated, but that requires a protocol behavior is the code of good manners - being "contrary" to real thinking and desires of the individual, freedom of personality.

CONCLUSIONS

On the way of consequence, there are prerequisites to say that the social constraint, as dualist report „freedom-coercion", has a relative character, depending on the social position in which the individual is.

Therefore, we are free and at the same time we are constrained from social point of view, depending by our level of perception, adaptation, interest and preoccupation toward a certain condition of fact, because it hasn't big importance what happens with us, but how we perceive or understand this thing. Or, our perception is determined also by the social environment in which the person is and to which the individual has taken action.

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ROLE OF THE CRIMINAL PROSECUTION BODIES IN THE CRIMINAL TRIAL

Anamaria BURCEA [1]

Abstract:

Criminal prosecution bodies have an important role in most criminal trials; being the first which receive the victims' complaints, carry out the first ascertaining of the facts, gather the necessary evidence for filing charges. They hear the person injured, witnesses, suspects, defendants, require a legal, forensic, or, where appropriate, financial and accounting expertise. They also make proposals to the prosecutor regarding the taking of the preventive measures and rule for taking the custodial preventive measure and after submitting all the evidence, file final proposals for the settlement of a case.

Key words: *criminal trial, criminal prosecution bodies, suspect, defendant, supervision of the criminal prosecution.*

INTRODUCTION

Most often, when a person has been victim of a crime, addresses herself with a complaint to the police authority in order to restore the previous situation, remedy of the damage and criminal liability of the perpetrator[2].

The intimation of the injured person is registered to the competent police with subject-matter, territorial and personal jurisdiction, following that within a short time to be registered also to the prosecutor's office attached to the competent court to hear that case,to the prosecutor's office attached to the court equal in rank to the one which has jurisdiction to hear the case in first instance, in which jurisdiction is

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[2]The person may directly address with a complaint to the prosecutor's office attached to the competent court to hear the case, where the complaint is recorded firstly to the prosecutor's office, following to be registered to the police, where one starts conducting research in order to determine exactly all the circumstances of the offense and of the criminal and civil liability of the perpetrator. If a complaint was wrongly directed to a public authority, it will be administratively submitted to the competent unit.

located the place where was ascertained the offense or to the prosecutor's office where works the prosecutor supervising the criminal prosecution.

Firstly, the intimation concerned is sent by the manager of the police unit to a policeman, criminal prosecution body, the latter assuming the task to gather evidence both for and against the offender, in order to establish the truth. Within the activity carried out by the criminal prosecution body, it is supported, guided, supervised and controlled by a magistrate prosecutor, the criminal prosecution body being able to receive oral and written instructions, that it is required to fulfill, subject to their legality.

Criminal prosecution bodies within the judicial police[1] are officers and guards, workers skilled within the Ministry of Home Affairs, expressly appointed by the Ministry of Home Affairs, with the favorable opinion of the General Prosecutor's Office attached to the High Court of Cassation and Justice or who are appointed and work differently according to some special laws (on DNA activity, DIICOT). According to Law no. 360/2002 updated, on the policeman's status, the policeman is a public servant with special statute, armed, wearing usually an uniform, and performs the duties established by law for the Romanian Police, as a state specialized institution. Policeman works in the interest and support of the person, community and state institutions, exclusively based and under law enforcement, in compliance with the principles of impartiality, non-discrimination, proportionality and graduality. Policeman is obliged to respect human rights and fundamental freedoms, the Constitution and national laws, the oath of trust towards Romania, the provisions of service regulations and to meet the legal provisions of his superiors regarding his professional activity[2].

CONTENT

a). Activity of the criminal prosecution bodies

Within criminal cases handled by the criminal prosecution body of the judicial police, there is carried out a complex activity. It fulfills all the acts given by law to its jurisdiction, rules for starting the criminal prosecution, towards the offence actually committed, or of which

[1]Mihail Udroiu, *Criminal procedure. Special part*, 3rd edition, reviewed and completed, (Bucharest: CH Beck, 2016), 7
[2]Law no. 360/2002 regarding the Policeman's statute, as amended and completed, art. 3

committing is prepared, gathers evidence for establishing the truth: hears the person injured, rules by ordinance and carries out the scene investigation in the presence of a forensic, establishes the circle of suspects, hears the direct and indirect witnesses, collects and rules the handing over of videos that could have captured the moment of the offense, collects and rules the handing over of the documents necessary for the settlement of the case, carries out the body search and over the car of the suspect of the offense, prepares reports requiring the prosecutor the approval of the court for taking technical measures for monitoring or research (interception of communications or of any kind of remote communication, access to an informational system, video, audio or photo surveillance, location or monitoring through technical means; obtaining data regarding a person's financial transactions; retention, handing over or searching the postal items; the use of the undercover investigators and of collaborators; authorized participation to certain activities; controlled delivery; getting traffic and location data processed by providers of public electronic communications networks or providers of publicly available electronic communications[1]) or the home search and enforces the mandates issued by the court following the prosecutor's request.

Within the activity carried out, the criminal prosecution body may require the support of some specialized persons, as appropriate, for ruling some findings or forensic expertise, criminalistic (impression evidence, ballistic, dactyloscopic, handwriting), technical, car, or for ruling the carrying out of a finding for detecting simulated behavior.

According to the new provisions from the Criminal Procedure Code[2] the criminal prosecution body within the judicial police has the authority to rule by ordinance the further carrying out of the criminal prosecution towards the person on which there is evidence that committed the crime under investigation, the person achieving the status of a suspect. This measure taken by the criminal prosecution body is subject to confirmation of the prosecutor supervising the criminal prosecution within 3 days. Thus it is found that the role of the criminal prosecution body within the judicial police has increased, it gaining the legal force to rule certain procedural measures.

[1] Criminal Procedure Code, art. 138
[2] Criminal Procedure Code, art. 305 para. 3

The criminal prosecution body is often the first which comes into contact with the perpetrator after the criminal prosecution activity carried out, during which it notifies to the suspect, namely to the defendant, the quality acquired, the offense for which he is investigated, the legal classification of the offense, and the rights and obligations of the suspect / defendant. The only preventive measure that can be ruled by the criminal prosecution body is the detention, and its duration may not exceed 24 hours. Regarding the other preventive measures, the criminal prosecution body shall prepare a report by which proposes to the prosecutor, either the ruling of the measure of judicial control or of the judicial control on bail or the request for the ruling by the judge of rights and freedoms of the house arrest or of the remand custody.

Following the submission of all the evidence, the criminal prosecution body within the judicial police shall prepare a report by which makes proposals to the prosecutor for closing, waiver to the criminal prosecution or for termination of the criminal prosecution, in the first case the defendant being prosecuted.

b). Professional training of the criminal prosecution body

Policemen are officers or police agents and come usually from the graduates of educational institutions belonging to the Ministry of Home Affairs.

Police officers may also come from the officers graduates, with diploma or degree, of the higher education institutions for long or short term, belonging to the Ministry of Home Affairs and of other higher education institutions with profile corresponding to specialties necessary to the Police, established by order of the Minister of Home Affairs[1].

Both officers and police agents may be assigned directly to the position after holding a contest.

Police Academy "Alexandru Ioan Cuza" from Bucharest trains the future police officers, the study programs being differentiated, of three or four years, depending on achieving or not of the diploma of Bachelor of Laws for the future graduate. On graduating this faculty, the professional degree achieved is of Police Sub-inspector.

[1] . Law no. 360/2002 regarding the Policeman's statute, as amended and completed, art. 9

The Police Academy has implemented sections on training students, having as specializations Police, Border Police, Staff for Penitentiary and Gendarmerie.

Police agents schools from Romania are Vasile Lascăr from Câmpina, and Septimiu Mureșan from Cluj-Napoca. At these schools, the courses have the duration of two years, on which graduation, one achieves the professional level of police officer.

On the entrance examination to educational institutions of the Ministry of Home Affairs, and on direct employment of some specialists has access any person, regardless of race, nationality, sex, religion, wealth or social origin, which fulfills, besides the legal general conditions provided for officials, the following special conditions: is physically and mentally able; has no criminal record or is not under any criminal prosecution or trial for committing any offenses; has a behavior proper to the conduct requirements accepted and practiced within the society.

The Policeman is obliged to be loyal to the institution to which he belongs, to comply with the principles of the state of law and to defend the democratic values. He must show solicitude and respect for everyone, especially for vulnerable groups, to devote his professional activity to the fulfillment with competence, integrity, honesty, correctness and conscientiousness of the service specific duties provided by law.

He must continuously improve his level of general and professional training, to be disciplined and show professional integrity and moral throughout his activity, to be respectful, courteous and fair towards his superiors, colleagues or subordinates. During his activity, the policeman should support his colleagues in exercising their work duties, to inform his superior and the other competent authorities regarding corruption actions committed by other police officers, of which he acknowledged, and through his entire behavior, to prove himself worthy to the consideration and trust imposed by the police profession.

The policeman is obliged: to keep the secrecy and confidentiality of data acquired during carrying out his activity, under the law, unless carrying out the job tasks, justice needs or law require their disclosure; to show fairness in solving personal problems, so as to not benefit nor to leave the impression that benefits from the confidential information acquired in his official capacity, to provide the correct information to the citizens over public affairs and of their matters of personal interest under

the legally established powers; to have a proper behavior, to not abuse of his official capacity and not to compromise, by his public or private activity, the prestige of the position or of the institution to which he belongs.

The policeman is prohibited in any circumstance: to receive, require, accept, directly or indirectly, or to make to be promised for himself or for others, considering its official quality, gifts or other benefits; to settle claims not within his jurisdiction or which have not been distributed by his superiors or to intervene to settle such claims, to use force, otherwise than under the law; to cause a person physical or mental suffering in order to obtain from that person or from a third person information or confessions, to punish her for an act that he or a third person has committed or is suspected of having committed, to intimidate her or to put pressure on her or on a third person; to collect money from individuals or legal entities; to write, print or distribute materials or publications of a political nature, immoral or inciting to indiscipline; to have, directly or through intermediaries, within an establishment subject to the control of the police unit that he belongs, interests likely to compromise his impartiality and independence.

c). Proposal according to the intended law:

Since the activity carried out by criminal prosecution bodies within the judicial police represents the activity on which, most often, rely the representatives of the Public Ministry, most of the activities from criminal cases being conducted by police officers, propose the inclusion within the Public Ministry of the criminal prosecution bodies within the judicial police and thus the acquisition of such rights, including wage, higher than those granted within the Ministry of Home Affairs.

d). Elements of comparative law:

In **ITALY** the investigation bodies during the criminal trial are the prosecutor and the judicial police[1].

[1]General Prosecutor Office of the Republic of Moldavia, *Comparative study regarding the systems of the criminal prosecution bodies for their optimization*, 5, accessed on 01 April, 2017, http://www.procuratura.md/file/0909_Studiu_comparativ_privind_sistemele_organelor_penale-PG-2012.pdf

The Public Prosecution Office of the Republic is a body of the judicial system, composed of magistrates who exercise the powers of the Public Ministry.

The Public Ministry monitors the laws compliance, on the observance of the State rights, of legal entities and of those lacking capacity, requires, when emergencies, the necessary legislative measures to be taken, promotes and stimulates the repression of crime, promotes the enforcement of safety measures.

The prosecutor is a magistrate who deals directly with the investigations. He must gather the necessary evidence, evidence both for and against the accused. The prosecutor may use the judicial police, which must carry out all investigations that are ordered or entrusted and which must follow the prosecutor's instructions.

In Italy, the Judicial Police is generally the first authority in charge of a criminal prosecution.

It is required to gather information on offences, even ex officio, so as to prevent the subsequent consequences of some offenses already committed.

Police should take appropriate measures to protect the evidence and to gather other items that might be useful for the administration of criminal justice.

Judicial police must, even on its own initiative, take note about crimes committed, to prevent their committing, searching for their offenders, to gather the evidence necessary and sufficient to file an accusation.

It conducts any investigation and activity assigned or delegated by the court. Judicial police consists of officers and agents of the judicial police.

Subordination of the judicial police.

Judicial police stations depend on the magistrates leading the offices to which they are established.

The leading officer of the judicial police services is subordinated to the prosecutor of the Republic attached to the county court where is located the service of the judicial police activity carried out by himself and by the staff employed. Judicial police officers and agents are required to fulfill the tasks entrusted to them. Those related to these sections cannot be detached from the judicial police activity but by order of the magistrate whom they depend on.

Italian law provides the principle of maximum simplicity. This principle tends to eliminate all acts and activities non-essential, in order to meet the requirements regarding the celerity of the act of justice, to ensure that any criminal offense committed is punishable within the shortest time.

Thus, the prosecutor must complete preliminary research within a specified period of six months from the occurrence or notification of the fact.

This period may be extended by the judge for preliminary investigations, and if there are good reasons (eg. for serious offenses), this period may be extended up to two years. Such cases are settled within different terms, depending on their gravity.

In SPAIN the investigation bodies during the criminal trial are: the police, the prosecutor, the judicial courts and the victims[1].

Spanish police includes two national forces: National Police, operating in big cities and Civil Guard, operating in smaller cities and rural areas.

Both forces are subordinated, generally, in front of the State Security Manager. All police officers are part of the "judicial police".
Spanish criminal law distinguishes between two types of offenses: public offenses and private offenses.

Public offenses are prosecuted without a formal complaint from the victim, and private offenses can be prosecuted only upon the victim's request.

Judicial police must investigate all public offenses committed within its jurisdiction and to conduct these investigations in order to establish the offenses and the offenders.

The Police must also gather all evidence related to the offense and if there is the risk of their disappearing, to submit them to the judicial authorities.

Members of the judicial police are auxiliaries to criminal courts and prosecution offices. They are obliged to follow instructions from these authorities regarding the investigation of offenses and prosecution

[1]General Prosecutor Office of the Republic of Moldavia, *Comparative study regarding the systems of the criminal prosecution bodies for their optimization*, 11, accessed on 01 April, 2017, http://www.procuratura.md/file/0909_Studiu_comparativ_privind_sistemele_organelor_penale-PG-2012.pdf

of perpetrators. As soon as judicial police officers find a public offense of the victim requires the investigation of a private offense, the police must notify the judge or the prosecutor.

If the instruction judge or the municipal judge began the preliminary judicial investigation, all preventive police investigations must stop and police officers must immediately submit the case to the judge, together with all the seized objects, related to that offense and to provide him with those arrested.

CONCLUSIONS

In Romania, like in other European countries, the role of criminal prosecution bodies within the judicial police is meaningful, their activity representing most often the starting point of the trial. These investigation bodies are specialized in investigating the scene of the crime, in gathering evidence that a certain person is guilty of the offense and not another, these activities being carried out in compliance with the principle of celerity, so that the perpetrator shouuld be found within the shortest time possible and in order to prevent other offenses. Criminal prosecution authorities carry out their activity under the supervision of the magistrate prosecutor, who can rule out certain measures if they are not legal and sound.

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MANAGERAL COMPETENCES OF COMMUNICATION AND SOCIAL RELATIONS IN ORGANIZATIONS- CASE STUDY-AUTOMOBILE DACIA S.A. PITEȘTI, ROMANIA

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Cristina-Maria PESCARU[2]

Abstract:

Anyone can give a definition of internal communication, according to its own experience, the place he occupies in the organization and the ability to serve certain methodological tools. Some focus on purposes, others on objectives, and some on the specific techniques. But there are some people who prefer a completely different approach: they refer to their own practices and to the "lack" of information or communication situation. Communication depends on people, content, expectations, problems to be solved ... Each of these definitions contain some truth. Neither of these is "false", but at the same time, none has a global character and it is not satisfactory. The only inconvenient, if we are the followers of the clarity, is the confusion they maintain in communication among students and practitioners in organizations, confusion reflected on the effectiveness of the internal communication.

Communication is not only the art to convey and understand information. It is the art of direct exchanges of information to make the actors reach close viewpoints and thus understand better the managerial decisions. It *is not represented by the simple question that takes place during a partner's meeting, but it is the only form of internal communication. Internal communication is talking about is a whole device and a communication plan which takes place in time and space, a kind of information exchange. In his opinion "internal communication" refers to a set of organized and completed informational exchange which runs between actors and it is directed hierarchical.*

Key words: *organization, communication, leadership, social relations, responsabilities.*

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INTRODUCTION

Internal communication is a managerial act. First, because it is initiated and coordinated by the managers and secondly, because it answers, as any act of management, an issue that reveals the organization functioning and its human potential. Internal communication is undoubtedly a tool of management. Through the internal communication, information and communication sciences become partners of management sciences. They have their place in teaching management, having the same position, for example, psychology, which has monopolized a long time teaching the communication elements.

The organization is divided into a set of situations concerning the stakeholders, problems that they must solve through discussions and influence games. The systematic and constructive communication considers communication as a response of the actors involved in the organization's problems and situations.

CASE STYDY - AUTOMOBILE DACIA S.A. PITESTI

1. Internal communication

Internal communication brings together all communication acts that occur within an organization or enterprise. Its approach differs from one organization to another. Internal communication also performs several functions: to expose a result or balance sheet; to transmit information; to explain (a new orientation, a project of the company). Internal communication is part of the dynamics of achieving the image of the company, as well as external communication, media relations and corporate identity.

The image of an organization depends on the image people within it transmit to the others. A motivated and informed staff makes the enterprise become a beloved one outdoors.

At Automobile Dacia S.A, internal communication is ensured largely by the Internal Communication Service which serves to maintain a correct and effective communication among employees.

Its role is to carry out a number of general tasks, among which the most important are:

- supports communication through field research (interviews, meetings, surveys, etc.);

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- supports communication through field research (interviews, meetings, surveys, etc.);
- optimizes the flow of information communication tools adapted to the communication channels;
- ensures consistency of all publications of the enterprise;
- has the ability to propose communication strategies best suited to the enterprise;
- is in charge of internal communication and must be permanently available to internal and external customers;
- has a duty to ensure the best possible implementation of a communication between employees and management.

A. Communication with employees

"Jurnal de bord", a publication edited by the Communication Department of Dacia, with a monthly and internal distribution only. The structure of the publication is as follows: 4 pages A4 color, with a circulation of 12,000 copies. The information contained herein refers to certain changes occurring within the company, the new rules and the rules introduced in the labor process and production models in carrying interviews with employees regardless of the position they occupy, presenting new areas of Dacia and merits mention of those who were able to achieve performances in the different fields of activity of the organization.

"Infoautoturism", a publication of the Dacia carmakers, edited and performed by Dacia syndicate together with other collaborators in the company. The information presented in the four pages resembles that of the aforementioned publication, but there are differences. One of the most important is that publication promotes poetic talent. For this, on the last page, creations of "native" employees appear, who with the help publishers have the opportunity to participate in certain competitions of poetry.

Other means by which employees are informed and communicate:

- ✓ "Notă informativă", is a summary of the latest issues of the company, appearing whenever needed; usually appears on billboards with an immediate release;
- ✓ "Revista Presei" showing all the news, information and data relating to Automobile Dacia, is given to immediate release;
- ✓ There are people in charge of receiving and distributing correspondence, letters and other materials, so that an internal mail service providing transmission of these supports all services directly or whom they are intended;
- ✓ Providing fixed and mobile phones, computers, Internet and Intranet access, meeting rooms specially equipped with television, video, overhead etc;
- ✓ A football tournament is organized between departments, every year from July to August, with cash prizes provided by Automobile Dacia trade union.

B. Salaries and rights:

For work performed under the Collective Labour Agreement, each employee of S.C. Automobile Dacia is entitled to a cash salary, agreed upon by contract. The salary consists of basic salary, salary increases and bonuses.

Regarding the basic salary, it shall be determined for each employee, with the importance and intricacies of the post to which he belongs to, as well as training and professional competence. The basic salary is determined by negotiation between each employee and committee comprised of management sub-unit or department and will be recorded in "Safety wage setting" which becomes part of the employment contract, settling for a work program of 170 hours per month.

In the company, the following payment forms can be applyed:

- ➢ after standard time;
- ➢ after legal personnel;
- ➢ specific forms of remuneration; passenger and freight transport activity and methodologies approved under current regulations.

Another right of employees is constituted by the inventiveness and creativity. Thus, employees authors of technical achievements, inventions, drawings and / or designs applied in S.C. Automobile Dacia have the right to obtain a certificate of copyright issued by law, with name and quality of the patent granted plus a

duplicate of it and make mention of this work records, and any other act on their creation or publication.

For the analysis and assessment of inventiveness, creativity, novelty, utility, industrial application and pay the authors in S.C. Automobile Dacia Creativity Evaluation Council operates on the basis of its own regulation approved by the Steering Committee. Therefore, the employee who is an author of technical achievements, inventions, industrial design must inform in writing as soon as possible on their hierarchical. If there are several authors, information will be made jointly or by their representative. The notification shall contain sufficient data on the object technical achievement, invention, industrial design, the conditions under which they were created, a description that will expose the problem raised, given the art, their application in the automotive industry, the proposed solution and one embodiment. Information is personal registration number compartment which includes respect for confidentiality.

In the case on inventions and drawings/designs, the enterprise and the employee, during the entire procedure until the publication of the patent or the certificate of registration, undertakes to refrain from any disclosure of the invention and of the industrial design.

C. Obligations and salary responsabilities:

Obligations:

- to participate, based on job or position, to achieve quantitative assortment, quality and value of the production program and all the other tasks of the job, the job description, specific procedures and guidelines;

- to execute and contribute to the production activity in accordance with the technical, constructive and quality provisions;

- to use and track use of the work only according to technical and technological, in order to achieve quality products and reliable fixed costs;

- not to introduce or promote the flow of manufacturing or selling products not complying with deviations from quality, low reliability, which can generate operational contingencies or decrease producing brand image of the product and the manufacturer;

- to execute any product or work so that it does not entail making products with quality deviations, additional consumption that may jeopardize the integrity or heritage activity or harmful, dangerous or fatal actions to the contractor or the environment;

- to comply with labor duties, procedures and guidelines established in accordance with the technical, technological, organizational and payment system specific to business, product or workplace, recorded in documents or provision of specialized management;
- to participate with interest to the conduct of the professional training programs organized by the company;
- to follow the rules, periods and conditions for access to the unit and to come to work in full capacity to work;
- to have permanently the ID card and present it whenever required by the control bodies and announce immediately in case of ID card loss, those who issued it;
- to ensure and maintain the permanent order and cleanliness achieved at work through individual and collective action;
- not to take and provide the design and the technical documentation to others, papers and secret documents which affect the interests of society and functionality.

Responsabilities:

Employees are responsible for:

- failure of the activity production program established, if it is the fault of the employee;
- failure in terms of quality of products or services performed;
- failure to follow instructions, work procedures and decisions in accordance with specific provisions in the Regulation;
- disciplinary, administrative, organizational, technical and economic proceedings by others, but determined by the employee and resulting from investigations or legal referrals;
- brand image degradation of the products and the manufacturer, where it is demonstrated;
- leaving employment in poor condition which may cause accidents, environmental infestation incidents on different activities;
- not warning the subordinates of the events happened and the deviations from decisions, rulings, published or issued instructions under business and activities;
- failure in term and in accordance with the implications and expected outcomes, measures and tasks of work programs, measures and targets set by activity directors and the General Director.

2. Communication with the leadership

The leadership of Automobile Dacia S.A. is the one that should ensure the smooth course of the organization by maintaining a suitable climate for both communication plan and the production plan with internal and external environment.

Much of the media and the communication elements that relate to the management members are the same as those for employees, but we can also mention "some differences":

- formation of a Board consisting of the General Manager, Industrial and Executive Director of Automobile Dacia Directors, who analyze the entire business of the enterprise, and in times of crisis the President and the Vice President of the company are announced;

- the management members have access to more sources of information than employees in manufacturing such as Internet connection and Intranet, external media etc.

A. Management obligations and responsabilities

Obligations:

- identifies key trends and economic direction of the country or system to correlate the immediate or future company's business;

- establish the management structure and functioning of society to its normal course, which it applies effectively after the approval by its shareholders;

- runs and negotiates with the employee representatives the Collective Labour Agreement of the Company;

- negotiate the individual employment contracts with the staff;

- establish technical and technological documentation, procedures and guidelines for the functioning and operation of machinery, equipment and plant technical parameters of work, rules of handling, storage and use of raw materials and consumables;

- conceives and requires the application of technical development strategies and policies, technological, economic and social activities and the company's products;

- grants audiences and receive suggestions and complaints from employees, establishing measures for the answer or solution;

- establishes tasks and measures for efficient use of computerization and equipping and employment of computer activity;

- periodically test and confirm or, as the case does not confirm, employees in workplaces or jobs, according to the results of the

processes and conditions of work and the professional quality of employees, with the participation of trade unions;

- establish programs of measures and goals activities, areas and directions, responsibilities and deadlines for implementation of works and effective, quality activities and in accordance with the orders.

Responsabilities:

The management is responsible for:

- failure or non-compliance with the provisions of the collective labor agreement;
- failure or misapplication of the law, resulting from state law or established by the shareholders;
- failure efficiency indicators set by shareholders;
- immediate and permanent failure of organizational, administrative and disciplinary measures against employees guilty of deviations from the Collective Labour Agreement;
- the entrusted heritage, the management of its technological and correct use by employees by setting technologies, procedures and instructions in this regard;
- not being loyal towards the company, to conduct their activities in competition with the company they run or hijacking values for purposes other than those of the company;
- failure or establish programs of measures, harmful works and objectives or deviations from achieving efficiency indicators and budgets of business or company;
- responsible to the institutions and non-governmental bodies, shareholders or legal actions and activities contrary to the interests of society or the law and may result in bankruptcy, social discontent, the company and product image decrease, the decrease in profitability.

3. External communication

A. The customers

The customers are in fact beneficiaries of the products or services which completes the company's activity. The range of the customers is very wide, including both middlemen (wholesalers, retailers, distributors) and final, actual or potential customers[1].

Dacia customers benefit from a special department to receive news, communicate and receive answers their questions and requests.

[1] C. Florescu, *Marketing Economic*, (Brăila: Independence Publishing, 2007), 43.

Voice of the Customer is the department dealing with the problems faced by customers. The 31 councilors of *Voice of the Customer* work under two distinct entities: "*Front Office"* and "*Back Office".* The *Front Office* answers calls. A good part of them is the information requests (25,000) coming from existing customers or potential information on the Dacia and financing offers, but it can also be complaints. In the latter case, the counselor's Front Office transmits the request to the Back Office whose task or responsibility is to contact the specialized departments at the factory, the dealer or the Service Unit network to solve the customer's problem. The customer is kept informed about the progress of actions taken to resolve his complaint. Finally, the Back-Office software handles all requests for information submitted in writing (e-mails, letters, faxes, messages on website).

Voice of the Customer has ambitious projects for the future. Outside current activities, it aims to conduct telemarketing campaigns (selling cars via phone), offering them an attractive customer oriented accurately and in line with their expectations.

The role of Back and Front Office counselors

The role of Back Office counselors is to convey sectors within the enterprise customer complaints regarding Dacia product quality, to ensure that the problem is solved and verify this by contacting the client. The purpose of this activity is to have satisfied the customers of Dacia products and service benefits provided by units of the network enterprise.

However, Back Office counsellors have the mission to take advantage of all market opportunities by working with Special Sales Department and concession vendors. When identifying a potential client, one or more dealers are informed, the customer is invited for a test drive, Dacia offer and funding opportunities are presented, thereby aiming at turning as many as commercial opportunities in vehicles sales.

Front Office role of counselors is to record all information requests received from Dacia customers and answer them, and to respond to complaints received by telephone. Their duty is to provide as fast and accurate responses and relevant solutions to the customer's requests.

B. The suppliers

At Automobile Dacia, Communication with suppliers is, for the most part, based on procedures that suppliers must comply in order not to jeopardize Dacia product quality.

In the following we present a quality case that applies to suppliers. It comprises a set of elements of which the most important are: develop and foster relationships with the best suppliers and how to choose the suppliers.

C. Developing and maintaining relationships with the best suppliers

This stage involves the development of criteria so Dacia to choose the most efficient suppliers to work with. Regarding the criteria used:

- seeking internal and international partners;
- working with suppliers able to implement the actions of progress and continuous improvement of competitiveness;
- building lasting relationships based on best defined mutual objectives;
- retaining the best performing suppliers who can take charge of their development and realization of mutual fund based on well-defined objectives;
- retaining the best performing suppliers who can take charge of their development and implementation of integrated functions;
- ensuring selection of the best suppliers, by permanent competition, in particular, on the emergence of a new vehicle.

D. Description of the activities of choosing the suppliers

The activity of choosing the suppliers is divided into several stages, namely:

Checking Panel existence in which the *Supplier Performance Manager* and *Project purchase head* checks the existence of a panel of suppliers.

Providers' consultation- depending on the outcome of the first actions the consultation panel suppliers and suppliers of Dacia list is chosen.

Analysis of available suppliers- the suppliers offers correspond to the two landmarks categories:

- A landmarks category (parts that require study and development of the supplier);
- B landmarks category (known and rebuilt pieces that does not require the supplier's development);

The Performance Project Supplier Manager and Head of the purchases examine, with the buyer and the managers of the Study Office, Quality Directorate and Logistics Directorate, the provider offers and

take into consideration the quality, costs and timescales objectives, assessing the risks and the opportunities, the competitiveness and make a comparative balance file.

Findings providers results from the analysis of objective elements that allow ensuring the Purchasing Strategy, which requires compliance with a minimum of four selection criteria:

Quality - the analysis is done on the premises of the supplier quality evaluation followed by a quotation digital (maxim100) synthesized by a report in accordance with *the referential EAQF94 or ISO 9001*.

Competitiveness - assessment indicates the supplier's ability to meet the requirements of the costs and deadlines.

Management - evaluation is done according to audit *EAQF and assessing the quality Suppliers Relations Division collaboration with Dacia.*

Finance - starting from the company balance analysis, financial evaluation by determining a calculated score based on the financial analysis that measures the "weaknesses" of the financial company.

Following this analysis, some paperwork is completed and mentions the choice of the supplier.

The choice of the supplier - the decision to choose or reject suppliers is taken in the *Impairment Committee*, which is chaired by the Suppliers Relations Director and it is the subject of a summary document by completing a form and validated by the Suppliers Relations Director, being the point that allows the development of business relations between Dacia and the supplier.

Expertise analysis- the Impairment Committee Members check whether the supplier's offer meets the objectives of quality, cost and timetable, the appointment of a pilot provider. This status is granted if the balance was positive. If the balance is negative, two cases may presented:

- targets are unrealistic and require revision after an analysis with supplier, enabling the pilot to be named provider;
- goals are realistic and, in this case, another expert provider is called.

Communicating the decision to the supplier – the chosen supplier is announced by the buyer through a "*Launch Address*", accompanied by fact files:

- the commitment file of the technical and financial results;

- the responsibilities file relating to the supplier's role for the development;
- organization file for project supplier;
- economic changes tracking file, and those not-elected are informed by sending a "communication address".

Responsibilities related to the chosen supplier's development role:

Privacy and industrial property

The provisions relating to industrial property to which the supplier undertakes are:

Automobile Dacia S.A. will be the holder of the intellectual and the industrial property rights as the "savoir-faire" generated by the provider give its subcontractors in the execution of an order covering Automobile Dacia specific items. Automobile Dacia by specific elements are fully realized any product or a product-specific adaptation of existing requirements or needs of society according to a specification provided by Dacia. The provider gives exclusive basis for Dacia rights of reproduction, distribution, representation, marketing, translation, use and adaptation to specific elements of society protectable by copyright, and this for the exploitation of these rights throughout their worldwide unlimited stretching or destination.

The confidentiality dispositions to which the supplier undertakes are:

- commitments to keep strictly confidential and not to disclose or communicate to third parties, by any means, documents, logistics, data etc. which were submitted by Automobile Dacia or which would have access when performing its service;
- preserve the information confidentiality and sharing with staff members use only or to its suppliers that could be brought to the project, only with the express, prior Dacia agreement. The officials and the suppliers will have to deal with confidential information submitted in accordance with the above;
- the use of the information obtained only for the execution of the contract, these provisions will remain in force regardless its term.

C. Participation in the study conduct

Outside the measures under which signatory may propose, the projects previous experience justifies Automobile Dacia ask at least the achieving of the following benefits:

- participation in the set or equivalent structures to the requirements expressed by Automobile Dacia and pilotage study by a project leader supplier;
- participation of workers provider to conduct pilot study and to take part in particular and various analyzes and reviews of the project study;
- transmission of digital data in a geometric exploitable format by Automobile Dacia in accordance with the Office's request study;
- Dacia supply of all plans, including the detailed plans necessary to define the interface.

CONCLUSIONS

In this case study we tried to capture the means and techniques by which both internal staff (employees and management) and external (customers and suppliers) are informed of the changes that occur in Automobile Dacia in order to maintain a favorable climate, in terms of communication and the achievement of a production to satisfy customer demand. Moreover, it can be seen that Dacia has a precise mechanism in the communication with suppliers, requiring them clear criteria for supply of raw materials at European level.

There is an appropriate answer of the actors in any organization to the multiple difficulties the staff has to overcome. Among these difficulties, we note the complexity of internal and external environmental complexity. Offering employees the opportunity to express their views, makes the internal communication partners involved, competent and resourceful in solving their problems.[1]

The audit is an assessment and a judgment. Evaluation and judgment is always done by reference to referential, i.e. a series of explicit or implicit rules that establish the "best practices" used to achieve the intended objectives.

Informing the staff means not only to transmit data to them in a language that it can decode it. To inform is to transmit "messages working close to the situation transferred to another situation, in a comprehensible manner and keeping the sense that the "broadcaster" has invested.

[1] A. Mucchielli, *Communication in institutions and organizations*, (Iași: Polirom Publishing, 2008), 261.

Communicating with staff is not to manipulate in different ways, the information you send and you must accept them, but means to get him to participate in exchanges, build a definition of collective work situations, encountered problems and possible solutions.

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THE RECONSTITUTION OF THE DISSOLVED LOCAL OR COUNTY COUNCIL – AN UNCONSTITUTIONAL LEGISLATIVE SOLUTION

Mihai Cristian APOSTOLACHE [1]

Abstract:

The completion of the Law of Local Public Administration no. 215/2001 has instituted a new way of establishing a local or county council, namely the reconstitution. Although the fundamental act enshrines the election of the local public administration authorities as the only form of their establishment, the delegated legislator has ignored the constitutional provisions and regulated the reconstitution in case a local or county council is dissolved under Article 55 paragraph 1 letters a and b from the local public administration law. The article presents the manner of referral to the Constitutional Court so that the constitutional court can analyze the legislative texts considered by us to be unconstitutional and emphasizes the need for the legislator to abolish from the Romanian legal order the reconstitution as a way of instituting the local or county deliberative authority.

Key words: *reconstitution, local council, county council, unconstitutionality, Constitutional Court*

INTRODUCTION

The legislative solution of the reconstitution of a dissolved local or county council was introduced in the Romanian legislation in 2015, when the Romanian Government approved the Emergency Ordinance no. 41/2015[2]. Through this normative act, the Executive has supplemented Law no. 215/2001 on local public administration with two articles, i.e. articles 55¹ and 99¹. The legislative intervention, which we categorized[3]

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[2] Published in the Official Gazette of Romania, Part I, issue 733 of 30 September 2015.

[3] Mihai Cristian Apostolache, *Legea nr. 215/2001 a administratiei publice locale comentata si adnotata*, (Bucharest: Universitara, 2015), 171.

as a legislative invention, had the purpose, according to Government, of unlocking the situation at the level of some administrative-territorial units where the local public administration authorities were no longer in operation. The reconstitution of the local or county council, according to the norms contained in Articles 55¹ and 99¹, shall be carried out by means of alternates if the rightful dissolution occurred as a result of the cases provided by Article 55 paragraph 1 letters a and b of Law no. 215/2001 on local public administration. The two cases are: the local or county council has not met for two consecutive months, even if the convocation has been made in accordance with the legal provisions, and the non-adoption by the local or county council of any council decision in 3 consecutive ordinary sessions. Besides these, the local public administration law regulates another case of termination of the mandate of the local or county council, but to which the norms contained in articles 55¹ and 99¹ do not refer, namely when the number of councilors is less than a half plus one and it can not be filled by alternates.

THE RECONSTITUTION – AN UNCONSTITUTIONAL LEGISLATIVE SOLUTION

By the way it is regulated, the reconstitution of the local or county council by alternates is emerging as a new way of setting up a local or county council. However, such a legislative solution is outside the Romanian constitutional framework which enshrines the election as the only form of establishing a local or county deliberative authority. The revised Constitution of Romania states in Articles 121 and 122 the fact that the deliberative local authorities, the local council and the county council, are authorities elected according to the law. The local public administration law and the law for the election of the local public administration authorities, two normative acts that develop the constitutional norms, regulate both the direct election[1] and the indirect election of the local public administration authorities. In this respect, it is stipulated that the mayor, the local council and the county council are

[1] The direct character of the vote is appreciated in the jurisprudence of the Constitutional Court as being "the essence of the democratic representativity, where citizens express directly and personally their option for a certain candidate proposed in the elections" (Decision of the Constitutional Court no. 752 of 1 June 2010, published in the Official Gazette of Romania, Part I, issue 495 of 19 July 2010).

authorities elected by universal, equal, direct, secret and freely expressed vote, and the president of the county council is the authority of the local autonomy elected from the county councilors, therefore through indirect vote. Consequently, the election, as a way of setting up local and county councils, is both constitutional and legal. The principle of the eligibility of the local public administration authorities, by its dual juridical nature, both constitutional and legal, decisively influences the legal status of the autonomous authorities established at the level of the administrative-territorial units. As the doctrine emphasizes[1], "the election is not a mere way of setting up autonomous local authorities. It influences the very legal nature of these authorities".

The establishment of a local or county council through a different way than the election is in contradiction also with the standards included in the European Charter of Local Self-Government, which recalls the elected councils or assemblies and the regular and fair elections. The European document, part of the domestic law by its ratification by the Romanian Parliament through Law no. 199/1997[2], is considered to be the most important European legal instrument to ensure the uniformity of the general legal rules on local public administration within the member states of the Council of Europe[3]

Subsequently, it is unequivocally clear that the local deliberative authorities are set up solely by elections. If a local or county council is dissolved, it ceases to exist definitively and elections are required for the establishment of a new local or county council. The closure of the local or county council attracts the loss of the quality of the elected councilors and also of the alternates. The sanction of the suspension of the local or county council has legal consequences both for the administrative body as a whole, and for the elected persons that make up that body, as well as for the alternates. As long as there are no alternates, the prefect can not start the procedure of the reconstitution provided by Articles 55^1 and 99^1 of the Local public administration Law.

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[1]Verginia Vedinas, *Drept administrativ*, 10th ed., revised and updated, (Bucharest:Universul Juridic, 2017), 219.

[2] Published in Official Gazette of Romania, Part I, issue 331 of 26 November 1997.

[3] Mihai Cristian Apostolache, *Influenta Cartei Europene a Autonomiei Locale asupra legislatiei privind administratia publica locala din Romania*, the volume of the International Conference "Uniformizarea dreptului – efecte juridice si implicatii sociale, politice si administrative/The Uniformity of Law – legal effects and social, political and administrative implications", (Bucharest: Hamangiu, 2014), 447.

The reconstitution of the dissolved local or county council by the alternates is a legislative solution contrary to the Constitution and it should be urgently removed from the rule of law. This requires the intervention of the institutional actors indicated for this purpose by the fundamental act. We refer here firstly to the Parliament, which, by a law, can revoke the provisions of Articles 55^1 and 99^1 of the Local public administration Law, and also the People's Advocate, who can directly refer to the Constitutional Court by raising the exception of unconstitutionality. Also, in a trial before a court, the exception of unconstitutionality can be raised with regard to the provisions of Articles 55^1 and 99^1 of Law no. 215/2001 on local public administration.

THE LAWFUL ANNULMENT, BY THE PARLIAMENT, OF THE PROVISIONS CONTAINED IN ARTICLES 55^1 AND 99^1 OF LAW NO. 215/2001 ON THE LOCAL PUBLIC ADMINISTRATION

The establishment without elections of a local or county council under Articles 55^1 and 99^1 of Law no. 215/2001 on local public administration is likely to produce a deliberative body lacking popular legitimacy, representativity, and also constitutional basis. The mandate that the alternates acquire as a result of the reconstitution of the dissolved local or county council is deprived of popular support, stemming from the will of the derived legislator, who did not take into account the constitutional provisions contained in Articles 121 and 122 and the popular vote. As the Constitutional Court emphasized in its jurisprudence[1], "the essential feature of any mandate gained through the suffrage of voters' political will is its representativity". Local and county councils are, by excellence, deliberative and representative authorities of local communities. These bodies are deliberative by their functioning mode and representative by the way of composition. A local or county administrative body set up without popular support, even if under the law, is an illegal and unconstitutional body. This body, unfortunately, has the same competence, according to the law, with a local or county council resulting from elections. From this perspective, we wonder how relevant is the sanction of the lawful dissolution of a council, as long as

[1] Decision of the Constitutional Court of Romania no. 782 of 12 May 2009, published in the Official Gazette of Romania, Part I, issue 406 of 15 June 2009.

this body is reconstituted, therefore it is reinstated without the organization of new elections? The reason for the dissolution of a local or county council is to sanction the respective administrative body for failing to fulfill its constitutional and legal role, as a result of not meeting for two consecutive months, even if convoked under the legal provisions, or because it has not taken any decision in three consecutive ordinary sessions.

If we add to this the fact that by the reconstitution it is ignored the court decision that stated the rightful dissolution of the local or the county council has been established, we have sufficient arguments to realize the urgent need for the Parliament to eliminate the legal provisions permitting the reconstitution by alternates of a local or county council dissolved by virtue of Article 55 paragraph 1 letters a and b of the local public administration law. The Romanian Parliament must adopt an organic law to abrogate the criticized provisions. The passivity of the Parliament may be substituted by the intervention of the Government, which, in its turn, may adopt an emergency ordinance to dismantle the provisions of Articles 55^1 and 99^1 of Law no. 215/2001 of the local public administration.

REFERRAL OF THE CONSTITUTIONAL COURT BY THE PEOPLE'S ADVOCATE OR THE RAISING OF AN OBJECTION OF UNCONSTITUTIONALITY BEFORE THE COURT WITH REGARD TO THE PROVISIONS OF ARTICLES 55^1 AND 99^1

The People's Advocate is entitled, under Article 146 letter d of the Romanian Constitution, to directly refer to the Constitutional Court with an exception of unconstitutionality regarding a law or ordinance. According to Article 58 paragraph (1) of the Fundamental Act, the People's Advocate shall act as a defender of the rights and freedoms of natural persons. As a protector of the fundamental rights and freedoms[1], the People's Advocate was also given the prerogative to refer the matter directly to the Constitutional Court, by raising the exception of unconstitutionality of laws and ordinances. The regulation by law of another way of setting up a local or county council, outside of the

[1] George Girlesteanu, *Autoritati administrative autonome*, (Bucharest:Universul Juridic, 2011), 67.

elections, results in a violation of the right to vote and the right to be elected. The two exclusively political rights of the citizens can no longer be exercised by them in the situation where the solution for the local or county council reconstitution is being employed. Such a situation requires the intervention of the People's Advocate, who, under its constitutional right, may refer to the Constitutional Court with the exception of unconstitutionality, regarding the provisions of Articles 55^1 and 99^1 of Law no. 215/2001 of the local public administration. In a democratic state, respect for the fundamental rights of citizens is essential. For this reason, the cessation of the existence of a representative authority as a result of the lawful dissolution must lead to the holding of elections that allow the citizens who fulfill the legal conditions to exercise their right to vote and to be elected. As pointed out in the literature[1], "in a democratic state under the rule of law, the people must have the last word, and this becomes real through the exercise of the electoral rights by the citizens".

By its notification, the People's Advocate may bring to the attention of the Constitutional Court, in a matter of urgency, the question of the unconstitutionality of the legal provisions regulating the re-establishment by alternates of the local or county councils that have ceased to exist because they were in one of the situations stipulated by Article 55 paragraph 1 letters a and b of the local public administration law. If the Constitutional Court decides on the unconstitutionality of the criticized legal provisions, they shall suspend their applicability for 45 days, a period during which the Parliament must concord the legal provisions with those of the fundamental act. If the deadline is exceeded, the legal provisions declared unconstitutional shall cease to have legal effect.

We consider that there is a certain interest in the possibility to raise an objection of unconstitutionality regarding the provisions of Articles 55^1 and 99^1 of the Law no. 215/2001 of the local public administration in front of the court. Any manner of bringing to the attention of the Constitutional Court the issue of the unconstitutionality of the legislative solution for the establishment of a local or county

[1] Stefan Deaconu and Elena Simina Tanasescu in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, (Bucharest: C.H.Beck Publishing, 2008), 331.

council through reconstitution is welcomed, as the state of constitutionality must be restored urgently.

CONCLUSIONS

The local council and the county council are fundamental institutions of the state, regulated in Articles 121-122 of the Romanian Constitution, whose only way of designation is the election. The constitutional status of the local and county deliberative authority is developed by infra-constitutional norms, some of them, as seen, seriously at a distance from the letter and spirit of the Constitution. In order to restore the state of constitutionality, it is necessary for the legislator to abrogate the norms stipulating the possibility of the reconstitution by alternates of a dissolved local or county council, or the referral to the Constitutional Court with the exception of unconstitutionality either directly by the People's Advocate or by raising the exception within a trial before the courts.

The constitutional and legal prerogatives of the local and county councils, as well as the legal nature of these authorities, those of the local public administration with the mission to solve the public affairs at the level of the administrative-territorial units, require that these collegiate authorities with a deliberative role be the result of the will of the electorate, and not of norms lacking a constitutional foundation.

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