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CULTURE AND  
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# THE HIERARCHY OF LAW AT STATE LEVEL AND IN THE EUROPEAN UNION

Herbert SCHAMBECK<sup>1</sup>

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## **Abstract:**

*Every order is geared to an idea which defines its objective. It is not sufficient for these manifestations of the idea of law to be identified, they also need to be recognized, which can be ensured by legal certainty. Legal certainty ensures the legal effectiveness of norms. Representing the basic normative order of the state, constitutional law is designed to encompass the political forces and structures of the state and coordinate them so as to ensure that the state is established, sustained and developed. Every state has its own tradition of developing order in terms of constitutionality and legality. This is also true of European integration. The Treaty of Lisbon represents the current legal basis of the EU's community of law. Such a community is only viable if borne by a sense of responsibility informed in thought and action by a commitment to home country, state and Europe as a whole. Abiding by the hierarchy of law in the Member States and the EU can contribute to such a sense of responsibility.*

**Key-words:** *Community of law and values, Constitution, European Union, Idea of law, General principles of law, Hierarchy of norms, Treaty of Lisbon*

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## **INTRODUCTION**

Every order is geared to an idea which defines its objective. While this is also true of positive law<sup>2</sup>, the idea of law<sup>3</sup> does not directly affect those at which it is aimed, individual human beings, but it affects them through the normative propositions (*Rechtssätze*) in which the law-maker is held to comply with the idea of law wherever possible and bring about peace. It was in this spirit that AURELIUS AUGUSTUS declared "*pax*

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<sup>2</sup> See Herbert Schambeck, "Ordnung und Geltung", in: *Österreichische Zeitschrift für öffentliches Recht, Neue Folge*. XI. 3-4, (1961), Hans Kelsen zum 80. Geburtstag. Wien, reprinted in: idem, *Sein und Sollen. Grundfragen der Philosophie des Rechtes und Staates*, Ed. by Heribert Franz Köck. Cristina Hermida del Llano, Antonio Incampo, Andrzej Szmyt (Berlin, 2014), 29 et seq.

<sup>3</sup> Cf. Gustav Radbruch, *Rechtsphilosophie*, 8<sup>th</sup> edition, (Stuttgart, 1973), 120 et seq. and 164 et seq.

*est ordinate concordia*"<sup>4</sup>, i.e. peace is orderly concord. Every subject matter for which an order is to be devised is entitled to shape this order. This is true both of the state and of the European Union which the German Constitutional Court described as a *Staatenverbund*<sup>5</sup> (association of sovereign states).

## I. THE IDEA OF LAW

The idea of law becomes manifest in various forms<sup>6</sup>: justice, a ranking of values, generally accepted principles of law, and the principle of legal certainty.

Justice denotes a relationship. In a formal sense, it represents the conformity of a legal provision with a superior legal norm. In a material sense it refers to the fact that the law-maker recognizes a material *a priori*, an example being the recognition of freedom and human dignity stipulated in the fundamental rights.

The ranking of values instills justice with meaningful content. Values may be enshrined in legal provisions not only to establish norms but also to motivate those governed by them, which is of relevance for the effectiveness of an existing legal norm.

It was in the light of this doctrine of law that identical legal principles were adopted in different legal systems, such as the *bona fide* principle or the corresponding ban on any abuse of the law.

It is not sufficient for these manifestations of the idea of law to be identified, they also need to be recognized, which can be ensured by legal certainty. Legal certainty ensures the legal effectiveness of norms.

A state governed by the rule of law provides such predictability and calculability through valid legal norms and their hierarchy.

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<sup>4</sup> Aurelius Augustinus, *De Civitate Die XIX*. 11-13, 14.

<sup>5</sup> BVerfGE89, 155.

<sup>6</sup> Cf. Herbert Schambeck, *Ethik und Staat, Schriften zum Öffentlichen Recht*, Vol. 500, (Berlin, 1986), 70 et seq.

## II. THE HIERARCHY OF THE LEGAL SYSTEM

The legal system of a state consists of a tiered system of norms both conditioned and conditional in the sense that the respective higher norm imposes conditions on the lower norm and is itself conditioned by norms at a higher level. Constitutional law, the highest echelon, only imposes conditions without being conditioned, which invests it with single instead of dual character. In this sense, the lowest ranked norm also has single character since it only serves to execute a decision taken at higher level.

The sequence of echelons in the legal system of a state may consist of constitutional law, simple-majority laws and regulations as general abstract norms, followed by individual concrete norms such as administrative rulings, court rulings and enforcement orders.

The rank assigned to a norm within this hierarchical structure is informed by its derogatory power. The higher-ranking norm derogates the lower ranking norm, and when two norms occupy the same hierarchy level, the later norm derogates the earlier norm.

This tiered structure of legal norms is based on the principle of delegation which places every legal act in the service of the Constitution. From this point of view, every legal body is duty-bound to concretely enact the Constitution, and every tier of the legal system needs to act towards concretizing the law. These acts must in turn be subject to judicial control through a system of appeals.

Within the context of the Vienna School of Jurisprudence, this doctrine of the hierarchy of the legal system within a state was first developed in several treatises<sup>7</sup> by ADOLF MERKL. HANS KELSEN

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<sup>7</sup> Adolf Merkl, *Das doppelte Rechtsantlitz, eine Betrachtung aus der Erkenntnistheorie des Rechts*, (Juristische Blätter, 1917), 425 et seq., 444 et seq. and 463 et seq., reprinted in: *Die Wiener rechts theoretische Schule*. Schriften von Hans Kelsen and Adolf Merkl. Alfred Verdross, ed. By Hans Klecatsky, Rene Marcic, Herbert Schambeck, Vol.1. Wien 2010, 893 et seq.; idem, *Das Rechtmlicheseiner Anwendung. Deutsche Richterzeitung 2018*, 56 e tseq. Reprinted in: *Die Wiener rechtstheoretische Schule*. Vol. 1, 955 et seq.; idem: *Prolegomena einer Theorie des rechtlichen Stufenbaues* in: *Gesellschaft. Staat und Recht, Untersuchungen zur Reinen Rechtslehre*, ed.by Alfred Verdross (Wien, 1931) 252 et seq. Reprinted in: *Die Wiener rechts*

subsequently added it to his *Pure Theory of Law*<sup>8</sup> thereby giving it a more dynamic nature.

### III. THE CONSTITUTION AND ITS FUNCTION

Representing the basic normative order of the state, constitutional law is designed to encompass the political forces and structures of the state and coordinate them so as to ensure that the state is established, sustained and developed. Constitutional law must also respond to the need for freedom and security of the individual and society as a whole as well as their public interests in a way that creates a stable normative order on which the entire polity rests.

In the fulfillment of these functions of representation, rationalization, integration and providing a response, the Constitution is continuously confronted with political concerns and with using constitutional functions for the fulfillment of state purposes.

A modern-day state has multiple purposes-including such as relate to law and power, culture and welfare - which aim at cultural progress, economic growth and social security.

The purposes of the state have to be fulfilled along the echelons of the legal system as provided by the constitutional state. In a democratic constitutional state this presupposes that the 'will of the state' is established in a democratic manner based on representative and plebiscitary criteria. Depending on the democratic awareness of the individual citizens and their willingness to be politically active, a democratic constitutional state requires the participation of citizens in reflections, appraisals and decision-making in order to ensure congruence between rulers and ruled.

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theoretische Schule, Vol. 1, 1071 et seq. and idem, *Allgemeines Verwaltungsrecht*, (Wien and Berlin 1927), reprinted (Darmstadt 1969), 157 et seq.

<sup>8</sup>Hans Kelsen and *Reine Rechtslehre*, *Einleitung gindirechtswissenschaftliche Problematik* (Leipzig und Wien, 1934), 62,73-75.

#### **IV. THE DEMOCRATIC CONSTITUTIONAL STATE**

In a democratic constitutional state whose order is supported and informed by the hierarchy of positive law, the legal norms established by qualified law-making and its promulgation represent the Constitution in the formal sense of the term. This formal Constitution can be laid down in a single law, such as the German Basic Law of 1949, or in several constitutional norms such as the Austrian Federal Constitutional Act (B-VG) of 1920. In Austria, the formal Constitution comprises the constitutional laws adopted at Federal and Länder levels as well as constitutional provisions contained in simple-majority laws.

The content of these constitutional norms is determined by a political decision. As constitution in the material sense, these norms address the exercise of sovereign powers in the legislative, judiciary and executive branches, the granting of basic rights and, occasionally, the definition of state purposes. In a state whose formal and material constitutions are congruent, in the sense that constitutional law governs the exercise of state authority, its aims, purposes and limits, constitutional awareness may arise which underpins political responsibility within the state. The scope of this political responsibility was extended by European integration.

#### **V. EUROPEAN INTEGRATION**

Every state has its own tradition of developing order in terms of constitutionality and legality. This is also true of European integration, whose beginnings date back to the search for peace after two World Wars that originated in Europe. Aiming at first at uniting the German and French coal and steel industries, the first step of integration led to the Treaty of Paris of 1951 which established the European Coal and Steel Community with its six members France, Germany, Belgium, Luxembourg, the Netherlands and Italy.

Over time, integration has progressed greatly and resulted in the European Union with its current 28 Member States.

Given that each of the 28 EU Member States looks back on its own history and conditionality, each has its own structure of normative constitutions<sup>9</sup>.

Different circumstances motivated states to join European integration and flanked this process. France and Germany, for instance, were motivated by the desire to end old enmities that had led to two World Wars. In Greece, Spain and Portugal it was the end of a period of authoritarian regimes that permitted them to become a part of democratic Europe in political and economic terms. The same can be said of the post-Communist states in Central and Eastern Europe<sup>10</sup>, which joined the European Union during the phase of Eastern enlargement.

The different histories of development of today's EU Member States come to play in the continuous evolution of integration and the circumstances attending the political, economic and social life of these states. Unlike the process in a nation state, the development of European integration<sup>11</sup> is not prompted by the decision of a constitutional body of popular representation, but by treaties concluded by representatives of the individual governments. Hence, European integration has always been marked by a focus on the executive branch of government and treaties rather than a focus on law.

This said, the representatives of the executive are required to seek ratification of their national parliaments for the treaties, and they are politically accountable to these parliaments. In this way, the individual steps of European integration have always involved the bodies of popular representation and are thus invested with democratic legitimacy via the constitutional law of the individual EU Member States.

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<sup>9</sup>Art.6(3) TEU, see Adolf Kimmel (Ed.) *Verfassungender EU Mitgliedstaaten, Textausgabe mit einer Einführung*, 6th edition, 2005

<sup>10</sup>See Herbert Schambeck, *Politik und Verfassungsordnung postkommunistischer Staaten Mittel und Osteuropas*, in: idem, *Zu Politik und Recht, Ansprachen, Reden, Vorlesungen und Vorträge*, ed. By the Presidents of the National Council and Federal Council, (Wien, 1999), 121 et seq.

<sup>11</sup>See Peter Hscher and Heribert F. Köck and Margit Karollus, *Europarecht*, 4th edition, (Wien, 2002), 26 et seq. and Rudolr Streinz, *Europarecht*, 9th edition, (Heidelberg, 2012), 4 et seq.

## VI. GENERAL PRINCIPLES

Informed awareness of the different systems and histories of constitutional order of European states is not only relevant for these states and their population, but also for the European Union<sup>12</sup>. Article 6 of the Treaty of the European Union of 7 February 1992, in the version of the Lisbon Treaty of 1997, explicitly mentions "the constitutional traditions common to the Member States "and specifies that they" shall constitute general principles of the Union's law "together with the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>13</sup>.

In this context, one must also point out the decisions of the European Council of June 1993 in Copenhagen<sup>14</sup>, which stipulated, for the first time, certain prerequisites and criteria of an economic and political nature that had to be fulfilled if a state wanted to become a member of EU. The economic criteria call for a functioning market economy and the capacity to cope with competition and market forces in the EU. The political criteria stipulate that a state wishing to accede needs to have stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. In addition, candidates have to transpose the *acquis communautaire*<sup>15</sup>.

In respect of these principles and requirements of the EU, comparison with a state is inadmissible. The EU is not a state and can never become one. In the wording of the German Federal Constitutional Court, the EU is a *Statenverbund*<sup>16</sup> (an association of states). It is a *sui generis* legal community based on the will of its Member States and in constant development. Although a ruling by the German Federal Constitutional Court designated the Member States as *masters of the treaties*<sup>17</sup>, this phrase must not be misunderstood: it does not refer to each

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<sup>12</sup>*Der Staatenverbund der Europäischen Union*, ed. by Peter Hommelhoff and Paul Kirchhof (Heidelberg, 1994).

<sup>13</sup>See *Europarecht*, Textausgabe mit einer Einführung von Claus Dielet Classen. 18th edition, (München, 2003), 5.

<sup>14</sup> Copenhagen European Council, 21 and 22 June 1993; OJ 1993. C194.

<sup>15</sup> Cf Fischer and Köck and Karollus, *Europarecht*, 52.

<sup>16</sup> BVerfGE 89, 155.

<sup>17</sup> *Beachte Europa als politische Idee und als rechtliche Form*, Ed. By Josef Isensee,

individual state being *master of the treaties*, but only to the Member States in their entirety if they act in unanimity. By unanimous decision they can amend EU law or even transform or dissolve the EU without being bound by the procedures foreseen in the treaties. In contrast, no individual Member State can unilaterally disregard EU law based on the argument that it was one of the "masters of the treaties".

Constituted on the basis of law, the European Union also developed its own law. In its legislation, the European Union is bound to the so-called primary Community Law as it was adopted by the Member States in the establishment and development of the Union. This law establishes the Community, authorizes its bodies, defines their competences and prescribes the procedures to be followed<sup>18</sup>.

A comparison between the primary Community law of the EU and the constitutional law of a state<sup>19</sup> reveals two main differences: constitutional law at state level includes principles of unrestricted general applicability for the entire state, while primary Community law is subject to the principle of conferral, i.e. restricted, albeit extensive, individual competences voluntarily conferred on the Union by its Member States<sup>20</sup>.

According to modern-day understanding, constitutions are the result of a democratic process in which the will of the state is established by a constitutive parliament and, if the need arises, a subsequent referendum. EU Law is established on the basis of treaties and was introduced by government representatives<sup>21</sup>. It was, however, ratified in

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(Berlin, 1993), particularly Paul Kirchhof, *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland*, 63 et seq.

<sup>18</sup> On the European Union as a community of law see Bea Verschraegen in: *Heinrich Neisser*, Bea Verschraegen, *Die Europäische Union, Anspruch und Wirklichkeit*. (Wien, 2001), 245 et seq.

<sup>19</sup> See Friedrich Koja and Allgemeine Staatslehre, (Wien 1993), 105 et seq.; Peter Pernthaler, *Allgemeine Staats- und Verfassungslehre*, 2nd edition, (Wien-New York 1996) and Anna Gamper, *Staat und Verfassung*, 3rd edition, (Wien, 2014)

<sup>20</sup> Cf Dieter Grimm, *Braucht Europa eine Verfassung?*, (München, 1995), 28 et seq. 20 For more details cf Fischer and Köck and Karollus, *Europarecht*, 303 et seq.

<sup>21</sup> Cf. *Die Europäische Union als Rechtsgemeinschaft*, ed. by Wolfgang Blomeyer and Karl Albrecht Sehahtschneider, (Berlin, 1995) and Manfred Zuleeg, *Die Europäische Gemeinschaft als Rechtsgemeinschaft*, (Neue Juristische Wochenschrift, 1994), 545 et seq.

the individual Member States according to their respective constitutional provisions and thus approved by each national parliament.

On the basis of law, Europe has embarked on this path of integration towards a new way of living together to replace what used to be mere co-existence and, quite frequently, antagonism. Community law has established a 'community of law'<sup>22</sup>.

## **VII. THE EUROPEAN UNION AS A COMMUNITY OF LAW**

Adopted at the Conference of European Heads of State and Government on 18-19 October 2007 in Lisbon and signed on 13 December 2007, the Treaty of Lisbon represents the current legal basis of the EU's community of law<sup>23</sup>.

The Lisbon Treaty comprises the Treaty on European Union (TEU)<sup>24</sup>, the Treaty on the Functioning of the European Union<sup>25</sup> and the Charter of Fundamental Rights of the European Union (ChFR)<sup>26</sup>. These two treaties and the Charter, which enjoys equal rank as the treaties, constitute the primary law of the EU which represents the standard of review for the EU's secondary and tertiary law. The legal acts of the Union are issued on the basis of its primary law. Pursuant to Article 288, TFEU, the institutions shall adopt regulations, directives, decisions, recommendations and opinions to exercise the Union's competences.

A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A Decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

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<sup>22</sup> See Streinz, *Europarecht*.

<sup>23</sup> OJ C83/13 of 30 March 2010.

<sup>24</sup> OJ C83/47 of 30 March 2010.

<sup>25</sup> OJ 2007, C303/1.

<sup>26</sup> Art.51 para. 1 ChFR.

Recommendations and Opinions shall have no binding force.

Apart from these legal acts in accordance with the Lisbon Treaty, one has to take note of the various value statements contained in the Lisbon Treaty which are indicative of the Union's development. As an economic and monetary community, the EU gears its legal order to recognized values. Pursuant to Article 2 TEU, these values are the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Under Article 3 TEU, the Union aims to promote peace, its values and the well-being of its peoples. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States and it shall ensure that Europe's cultural heritage is safeguarded and enhanced.

In order to uphold these values and achieve its aims, Article 5 TEU specifies that the EU shall observe the principle of conferral, which means that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out there in.

The use of Union competences is governed by the principles of subsidiarity and proportionality. The national parliaments ensure compliance with the principle of subsidiarity. Competences not conferred upon the Union in the Treaties remain with the Member States.

The Charter of Fundamental Rights of the EU has the same legal value as the treaties; it recognizes human dignity, the right to life and the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labor, freedom rights, civil rights and rights relating to justice, as well as solidarity in social fundamental rights. The provisions of the Charter are addressed to the Member States only when they are implementing Union law.

## **VIII. THE EUROPEAN UNION AS A COMMUNITY OF VALUES**

A comparison of EU law with the legal order of its Member States demonstrates that both are based on a hierarchical system. The constitutional law of the EU Member States is the prerequisite for their accession to the EU. In the Lisbon Treaty<sup>27</sup>, the fundamental norms of EU law are manifestly congruent in formal and material terms compared with constitutions at state level, thereby revealing the EU as a community of laws and values. This becomes obvious even in the preambles of the Lisbon Treaty. Both the EU treaties and Charter of Fundamental Rights include preambles, which is not the case for all constitutions of EU Member States, Austria being a case in point.

A community is only viable if borne by a sense of responsibility informed in thought and action by a commitment to home country, state and Europe as a whole. Abiding by the hierarchy of law in the Member States and the EU can contribute to such a sense of responsibility.

In the introduction, the preamble of the TEU refers to the cultural, religious and humanist inheritance of Europe, "from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law"; the preamble also expresses the desire for solidarity between the peoples and the respect of the subsidiarity principles a wail as of the rights "as they result, in particular, from the constitutional traditions and international obligations common to the Member States"<sup>28</sup>.

## **CONCLUSION**

Respecting the EU not only as an economic and monetary union, but also as a community of law and values, presupposes a sense of responsibility informed in thought and action by a commitment to home country, state and Europe as a whole. Abiding by the legal hierarchy of law in the Member States and the EU can contribute to achieving this objective.

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<sup>27</sup> See Rolf Schwanmann, *Vertrag von Lissabon*, 4th edition, (Heidelberg, 2011).

<sup>28</sup> PreambleChFR.

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# THE PRESENT REFUGEE PROBLEM IN EUROPE

Heribert-Franz KOECK<sup>1</sup>

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**Abstract:**

*The wave of refugees flooding Europe since 2014 calls for an adequate regime that respects international and European obligations and does justice to the people seeking shelter from persecution and war. Recent actions taken by Member States of the European Union raise the question of their compatibility with the just-mentioned obligations and the limits of the latter from the point of view of the principles of impossibility and unreasonableness.*

**Key-words:** *asylum, beneficiaries of international protection, Geneva Convention 1951, Dublin regime, implicit limits of international obligations, refugees (eligibility for status), subsidiary protection.*

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Migration is a constant element of man's history. This has to do with population growth and food shortage. In the hunter and gatherer period, groups had to split up and to spread in the search for foodstuff. When man started with crop cultivation and animal husbandry, he was in constant search for arable and grazing land. For agriculture, he first settled in fertile valleys and oases, like on the Nile River or in Mesopotamia.<sup>2</sup> For livestock breeding, he kept a nomadic life seeking pastures according to the season. (In many developing countries, this tradition still persists, notwithstanding attempts to reduce its extent.<sup>3</sup>)

In the process of man's settlement, the formation of centres of power led to urbanisation, to city states dominating (as well as

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<sup>2</sup>Peter Bellwood. *First Farmers: The Origins of Agricultural Societies*, (Oxford: Blackwell Publishers, 2004)

<sup>3</sup>Roger Blench. „You can't go home again.“ *Pastoralism in the new millennium*, <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6329.pdf>, 2001

protecting) the surrounding country, and later, by subjugation of the smaller of them by more powerful ones, to the emergence of territorial states. This is well known from ancient history and need not be dwelled upon here at length.<sup>4</sup>

However, the process of state formation lasted for several thousand years thousand years and took place in various continents and regions at quite different times; and it was only in the twentieth century that the allocation of earth's entire dry surface to different states was completed.<sup>5</sup>(The only exception is the Antarctic which by agreement is not subject to any particular state and open for scientific exploration by researchers from all countries. The Antarctic Treaty of 1959<sup>6</sup> has been the model for the Outer Space Treaty of 1967.<sup>7</sup>)

In the course of the last two thousand two hundred years Europe experienced several waves of migration. The Cimbric and Teutonic incursion (113-101 BC)<sup>8</sup> and the Marcomannic and Sarmatian Wars (166-180)<sup>9</sup> were only the prelude to the Great Migration which in the course of two centuries (375-568)<sup>10</sup> changed the character of great parts of what has been the Western Roman Empire in Europe and North Africa and transformed it into what historians have come to denote the Romania of the West.<sup>11</sup> Efforts by the Eastern Roman Empire to re-establish

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<sup>4</sup>See Mark Nathan Cohen, *The Food Crisis in Prehistory: Overpopulation and the Origins of Agriculture*, (New Haven and London: Yale University Press, 1977)

<sup>5</sup>Guy Ankerl. *Coexisting Contemporary Civilizations: Arabo-Muslim, Bharati, Chinese, and Western*, (Geneva: INUPRESS, 2000)

<sup>6</sup>402 U.N.T.S. 71.

<sup>7</sup>610 UNTS 205.

<sup>8</sup> See R. Ernest Dupuy and N. Dupuy Trevor. *The Encyclopedia Of Military History: From 3500 B.C. To The Present*. (2nd Rev. Ed.) 1986, 90-91.

<sup>9</sup>See Frank McLynn. *Marcus Aurelius, Warrior, Philosopher, Emperor*, (London: Vintage Books, 2009)

<sup>10</sup>See Guy Halsall, ().The Barbarian invasions, in Fouracre, Paul (Ed.), *The New Cambridge Medieval History, Vol. 1: c. 500 – c. 700*, (Cambridge: Cambridge University Press, 2006).

<sup>11</sup>Guy Halsall. *Barbarian migrations and the Roman West*. (Cambridge: Cambridge University Press, 2007), 376–568

Roman supremacy in the sixth century were of no lasting effect;<sup>12</sup> and the Islamic-Arabic expansion in the seventh and eighth century extended from Persia in the East through Syria, Palestine, Egypt, and North Africa to the Iberian Peninsula in the West.<sup>13</sup> In the tenth century, the Hungarian incursion threatened both the Eastern Franconian and the Byzantine Empire;<sup>14</sup> and hardly had the Hungarians been forced to settle down in the Danube and Tisza region when the Mongolian invasion occupied parts of Europe and threatened the rest of it in the course of the thirteenth century.<sup>15</sup> This was followed by the Turkish expansion; and the Ottoman Empire (1299-1922) not only put a final end to the Eastern Roman (Byzantine) Empire in 1453<sup>16</sup> but also occupied great parts of Eastern and Central Europe<sup>17</sup> and established its supremacy over great parts of the territories ruled by the Arabas in the Near East, Egypt and North Africa.<sup>18</sup>

In Western Europe, the period of religious wars during the sixteenth and the seventeenth century not unfrequently also resulted in the forced migration of people who rejected the principle of *cuius region eius religio* (i.e. that the religion or confession is determined by the respective ruler).<sup>19</sup>

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<sup>12</sup>James Allan Evans. *The Emperor Justinian and the Byzantine Empire* (Westport: Greenwood Press, 2005)

<sup>13</sup>Fred Donner. *The Early Islamic Conquests*. (Princeton: Princeton University Press, 2014)

<sup>14</sup>Laszlo Makkai. "The Hungarians' Prehistory, their Conquest of Hungary, and their Raids to the West to 955", in Peter F. Sugar, Péter Hanák, Tibor Frank (eds.), *A History of Hungary*, Indiana University Press, (1990): 13.

<sup>15</sup>Timothy May. *The Mongol conquests in world history* (London: Reaktion Books, 2013)

<sup>16</sup>Michael Angold. *The Byzantine Empire, 1025–1204: A Political History* (London: Longman, 1997)

<sup>17</sup>Colin Imber. *The Ottoman Empire, 1300–1650: The Structure of Power* (Basingstoke: Palgrave Macmillan, 2002)

<sup>18</sup>Patrick Balfour Baron Kinross, and John Patrick Douglas Balfour Kinross. *The Ottoman Centuries: The Rise and Fall of the Turkish Empire*. (London-New York: Morrow, 1977)

<sup>19</sup>Mack Walker, *The Salzburg Transaction: Expulsion and Redemption in Eighteenth-Century Germany* (Ithaca: Cornell University Press, 1992); Barbara Dölemeyer, *Die Hugenotten* (Urban-Taschenbücher; 615). (Stuttgart:Kohlhammer, 2006).

World War I and the Bolshevik revolution in Russia generated a considerable number of refugees<sup>20</sup> who, together with the population exchange between Greece and Turkey following the Peace Treaty of Lausanne 1922,<sup>21</sup> resulted in the first migration wave of the twentieth century. Flight and expulsion during and immediately after World War II brought about the second migration wave.<sup>22</sup> Establishment of communist rule in Central and Eastern European States occupied by the Red Army initiated a third migration wave, of which the refugees after the forceful suppression of the Hungarian uprising in 1956<sup>23</sup> and of the Prague Spring in 1968<sup>24</sup> were only dramatic peaks of a continuous exodus from the Eastern bloc, especially from the Eastern Germany where the government took to the construction of the Berlin Wall in order to stop their freedom-seeking nationals from continuing to leave the country in large numbers.<sup>25</sup>

Apart from this kind of forced migration, voluntary migration has also been a constant element of European history, mostly for economic reasons. But this was hardly considered a threat by those countries migrants turned to, because they relied on the flexibility and the diligence of those who were ready to move in the pursuit of a better life. Moreover, during the nineteenth century Europe was a continent of emigration rather than of immigration; and Europeans were welcome almost

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<sup>20</sup>François Bauchpas, (), *L'émigration blanche*, (Paris: Schlögel, Karl(ed.) 1968).*Der große Exodus. Die russische Emigration und ihre Zentren 1917–1941*, (München: Beck; Schlögel, Karl (ed.) (1995), *Russische Emigration in Deutschland 1918–1941. Leben im europäischen Bürgerkrieg* (Berlin: Akademie-Verlag).

<sup>21</sup>Erden, Mustafa Suphi. “The exchange of Greek and Turkish populations in the 1920s and its socio-economic impacts on life in Anatolia”, *Journal of Crime, Law & Social Change*, (2004): 261–282; Norman M.Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, (Cambridge, Ma.:Harvard University Press, 2002)

<sup>22</sup>R. M. Douglas, *Orderly and Humane. The Expulsion of the Germans after the Second World War*. (New Haven, Conn., Yale University Press, 2012).

<sup>23</sup>Ferenc Cseresnyés., “The 56 Exodus to Austria, The '56 Exodus to Auustria”, *The Hungarian Quarterly*, Vol. XL (154), (1999): 86–101.

<sup>24</sup>Kieran Williams, *The Prague Spring and its Aftermath: Czechoslovak Politics, 1968–1970* (Cambridge: Cambridge University Press, 1997)

<sup>25</sup>Gareth Dale. *Popular Protest in East Germany, 1945–1989: Judgements on the Street* (London: Routledge, 2005)

everywhere, whether in the New World, in Africa or in Australia and New Zealand.<sup>26</sup>

It was only with the economic reconstruction after World War II and the ensuing economic miracles in Western Europe that European countries needed additional labour, especially in low-wage sectors. This situation attracted workers from the South of Europe, predominantly from Southern Italy, Spain and Portugal, to the North, especially to Germany, the Benelux-countries, and to Scandinavia. At the same time, Austria – then not a Member State of the European Communities – admitted workers from the then Yugoslavia. However, all these countries were not able to satisfy the growing demand for labour; and so, in a second step, the doors were opened for workers from Turkey.<sup>27</sup>

Originally, workers from Yugoslavia and from Turkey were termed “guest workers”. It was envisaged that they would stay for a certain time and would afterwards return to their home country. However, there were no fixed time periods for their stay; rather, the length of stay was made dependent on employment. That means that as long as business firms needed labour force from Yugoslavia and Turkey and therefore confirmed their employment, guest workers were permitted to stay.<sup>28</sup>

When guest workers could stay for a long(er) period of time, the question came up whether they could be expected to live here without their families and whether it was acceptable to their families to be separated from them for an unlimited time. Since such separation was considered inhumane, the issue of family reunion presented itself and led to the admittance of family dependants. Originally, the members of guest worker families were expected to sooner or later leave the country at the time when the guest worker’s employment came to an end. But when

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<sup>26</sup> European Migration and Imperialism, [http://web.archive.org/web/20101122193228/http://historydoctor.net/Advanced%20Placement%20European%20History/Notes/european\\_migration\\_and\\_imperialism.htm](http://web.archive.org/web/20101122193228/http://historydoctor.net/Advanced%20Placement%20European%20History/Notes/european_migration_and_imperialism.htm).

<sup>27</sup>See, inter alia, Rita Chin, *The Guest Worker Question in Postwar Germany* (Cambridge: Cambridge University Press, 2007).

<sup>28</sup>Michael Jandl and Albert Kraler, *Austria: A Country of Immigration? Profile*. March 1, 2003, The Online Journal, <http://www.migrationpolicy.org/article/austria-country-immigration>

employment proved to be indefinite and when the children from guest worker families started to attend schools in the host countries and completed their education and training there, they arguably were sufficiently integrated, and thus the issue of applying for, and obtaining, citizenship in the host country arose.

At the time, this was not considered a particular problem. Migrant workers, whether from Yugoslavia or from Turkey, were considered sufficiently integrated when they had a certain basic command of German that would enable them to take up employment. And it was believed that immigrants would be happy to adopt themselves to the Western way of life. This might have very well been so, had the Islamic world not begun to radicalise.

Bin Laden, the head of Al-Qaida, was inspired by the Palestinian Sunni scholar Abdullah Azzam who preached a relentless jihad until either all jihadist fighters were dead or the Muslim world empire would have emerged. His theories were first applied by Arab volunteers who fought against the Soviet invasion in Afghanistan; but afterwards served as the basis of terrorist attacks all over the world.<sup>29</sup> In his paper *Join the Caravan*, Azzam called upon all Muslims to rally in defence of Muslim victims of aggression and to restore Muslim lands from foreign domination. Azzam emphasized the violence of religion, preaching that, "those who believe that Islam can flourish [and] be victorious without Jihad, fighting, and blood are deluded and have no understanding of the nature of this religion." He was opposed to any kind of compromise, stating "Jihad and the rifle alone: no negotiations, no conferences and no dialogues." The Islamic State in Syria and the Iraq is rooted in this tradition, as are the terrorists presently threatening the capitals of Europe and the cities of the United States. As early as 1994, a video showed Azzam exhorting his audience to wage *jihad* in America (which Azzam explains "means fighting only, fighting with the sword"); and his cousin,

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<sup>29</sup>Avner Falk, *Islamic Terror: Conscious and Unconscious Motives* (Westport, Connecticut: Praeger Security International, 2008).

Fayiz Azzam, says "Blood must flow. There must be widows; there must be orphans."<sup>30</sup>

Successful terrorist attacks like those on the World Trade Centre in 2001 provided Muslims all over the world with a new self-awareness and self-assurance. Even those who were not prepared to join the Jihad often were ready to revive their Muslim religious and cultural customs and consequently to reject the Western way of life together with the values which form its basis. It was then that Turkish women in Western Europe started to wear the headscarf, at a time when to do so was still forbidden in Turkey herself and that forced marriages and honour killings became fashionable in Muslim social strata.

Far from pulling the ripcord, many politicians in Europe, especially from the left and the Greens, closed their eyes to this development or cultivated fantasies of a multi-cultural society without taking into account that the development was likely to undermine the political fundament of a free and democratic state. Germany gave, and continues to give, a particularly bad example by permitting double citizenship for all who have been born in Germany or had lived there for a certain period of time and fulfilled certain additional requirement,<sup>31</sup> a measure that will result in young Turks keeping their Turkish passport and their allegiance to Turkey, using their German citizenship to partake in the advantages of the German social and legal system without identifying with it.

While Austria did not follow the German example and requires people applying for Austrian citizenship to give up their previous one,<sup>32</sup> Turks can easily again obtain a Turkish passport when visiting Turkey; and while Austrian law provides, in such a case, for the automatic loss of Austrian citizenship, this law is hardly enforced.

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<sup>30</sup>For an official summary see Islamic State, Australian Government, Australian National Security, <https://www.nationalsecurity.gov.au/Listed-terroristorganisations/Pages/IslamicState.aspx>

<sup>31</sup>Naomi Conrad, *Dual citizenship law takes effect in Germany*, DW, 19 December 2014, <http://www.dw.com/en/dual-citizenship-law-takes-effect-in-germany/a-18143002>

<sup>32</sup>Austrian Federal Ministry for Europe, Integration and Foreign Affairs, *Austrian Citizenship*, <http://www.bmeia.gv.at/en/embassy/consulate-general-new-york/practical-advice/austrian-citizenship.html>

Great Britain and France are facing similar problems, the former because of the great number of immigrants that had come there during the period where all holders of a passport “United Kingdom and colonies” could freely enter the country,<sup>33</sup> the latter because Algeria was considered part of metropolitan France until reaching independence in 1962, and all Algerians had been given French citizenship in 1947 in the vain attempt to thwart the Algerian independence movement. In addition, France has a great number of immigrants from other former French colonies, especially in Africa.<sup>34</sup>

In none of the European countries which face an immigration and integration problem attempts have even been made to ascertain, either at the time of entry or (at least) at the time of obtaining citizenship, whether the people coming in and wanting to stay here were prepared to accept the basic conditions of our society and its political form of organisation, the state and supranational communities, namely the values embodied in Art. 2 of the Treaty on European Union which states: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.“ The presumption that people coming to Europe are ready to accept the European values has been maintained by many leading European politicians; and though it turned out in the meantime that it is a mere fiction, it continues to be maintained, contrary to good faith, by politicians who shy away from taking necessary action.

Under this circumstances, the creeping infiltration of Europe by people who are either indifferent or hostile towards European values might go on for more years unless the present immigration wave forces European politicians to finally face the problem, if not on their own initiative then because of the opposition from the man in the street who has the feeling that the rug is pulled out from under his feet by permitting

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<sup>33</sup>Statista. *Ethnicity in the United Kingdom*, <http://www.statista.com/statistics/270386/ethnicity-in-the-united-kingdom/>

<sup>34</sup>See Alec G. Hargreaves, *Multi-Ethnic France* (New York, N.Y.: Routledge, 2007).

security, freedom and welfare being washed away by a flood of migrants who do not care.

The political turn around so dearly needed does not mean that the borders of Europe have to be closed to migrants in general and to refugees in particular. Moral duties as much as human rights embodied both in national, supranational and international law – especially the Geneva Convention relating to the Status of Refugees of 1951,<sup>35</sup> together with the Protocol of 1967,<sup>36</sup> Directive 2011/95/EU of the European Parliament and 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<sup>37</sup> and the Dublin Regime of the EU,<sup>38</sup> based on

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<sup>35</sup>United Nations General Assembly Resolution 429 (V) of 14 December 1950, <http://www.unhcr.org/refworld/docid/3b00f08a27.htm>

<sup>36</sup>The Protocol of 1967 is attached to United Nations General Assembly Resolution 2198 (XXI) of 16 December 1967, <http://www.unhcr.org/refworld/docid/3b00f1cc50.htm>

<sup>37</sup>Official Journal of the European Union L 337/9.

<sup>38</sup>The Dublin regime was originally established by the Dublin Convention, which was signed in 1990, and came into force 1997/1998. Norway and Iceland concluded agreements with the EC to apply the provisions of the Convention in their territories. The Dublin II Regulation was adopted in 2003, replacing the Dublin Convention in all EU member states. The Dublin III Regulation (No. 604/2013) was approved in June 2013, replacing the Dublin II Regulation, and applies to all member states except Denmark. It came into force on 19 July 2013. It is based on the same principle as the previous two, i.e., that the first Member State where finger prints are stored or an asylum claim is lodged is responsible for a person's asylum claim. One of the principal aims of the Dublin Regulation is to prevent an applicant from submitting applications in multiple Member States. Another aim is to reduce the number of "orbiting" asylum seekers, who are shuttled from member state to member state. The country that the asylum seeker first applies for asylum is responsible for either accepting or rejecting asylum, and the seeker may not restart the process in another jurisdiction. Together with the EURODAC Regulation, which establishes a Europe-wide fingerprinting database for unauthorised entrants to the EU, the Dublin Regulation aims to "determine rapidly the Member State responsible [for an asylum claim]" and provides for the transfer of an asylum seeker to that Member State. Usually, the responsible Member State will be the state through which the asylum seeker first entered the EU. However, since Greece started to wave refugee through without taking their fingerprints, it has become more

Regulation No. 604/2013<sup>39</sup> – do not allow for such a measure. At the same time, however, it is clear that no state and no region, Europe not excluded, can do the impossible or what cannot reasonably be expected from it. Even in this case, the fundamental legal principles of *bona fide* and *ad impossibilia nemo tenetur* may be invoked and have to be respected.

If countries have started to set an upper limit for accepting refugees and other migrants,<sup>40</sup> such a ceiling is not illegal per se. It only becomes illegal if the ceiling is set so low that it is evidently a circumvention of the obligations under the European and international refugee system. This is a factual question which must be decided on the basis of the circumstances.

One objection against setting an annual upper limit for the number of refugees is based on the argument that it would be unfair to those who apply at a time when the limit has been reached, regardless of the fact whether their application is equally well-founded than that of those who were accepted before the upper limit had been reached.

In order to avoid such inequities or at least reduce their number, there is only one way out. First, „true“ refugees must be separated from so-called economic refugees or other categories of migrants not qualifying for the refugee status. Second, „true“ refugees who are ready to accept European values have to be separated from those who do not. It is very likely that the number of „true“ refugees worthy of European

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difficult to establish the country of entry into the EU, especially if refugees, on their way to Austria, Germany or Sweden, have to cross the territory of states not Members of the EU, like Macedonia and Serbia.

<sup>39</sup>Regulation (EU) No 604/2013 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 (recast), Official Journal of the European Union L 180/31 of 29.6.2013.

<sup>40</sup>When it turned out that Germany, the preferred country of asylum seekers, would not be able to swiftly take all of them and that, therefore, the number of refugees remaining in Austria and seeking asylum there also rose dramatically, the Austrian government decided to limit the number of refugees who would be granted asylum to 37.500 in 2016 (which is half of the number of 2015) and then to reduce it continuously, restricting it for the years 2016 to 2019 to a maximum of altogether 127.500.

asylum will be much smaller than the number of those who have so far entered Europe in an uncontrolled process, and that Europe will be able to satisfactorily cope with the refugee problem if all European countries cooperate in this matter on the basis of the principle of solidarity.

It is now up to the leading European politicians whether they want to adopt procedures which do justice to those deserving asylum or whether they will have to stay with the unintelligent method of just setting upper limits for refugees.

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# CONSTITUTIONAL PRINCIPLES - SOME REFLECTIONS ON THEIR STRUCTURE AND FUNCTIONS IN A EUROPEAN CONTEXT

Rainer ARNOLD<sup>1</sup>

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**Abstract:**

*Constitutional orders consist of rules and written or unwritten principles. They form a hierarchically structured coherent normative body. In democratic States constitutional principles are the principle of freedom as the basis of fundamental rights, a necessary result of human dignity as the supreme value for State and society. Dignity, autonomy and freedom of the individual are the anthropocentric elements, the core elements of the constitutional order.*

*The principle of freedom is not absolute but relative; freedom has to be shared with the other individuals, and therefore has to be limited for legitimate common goods, always in correspondence to proportionality and never allowed to conflict with dignity. Rule of Law is the basic principle which emphasizes, in its modern form, that the Constitution is the true sovereign; constitutionality of all public power, in particular of the legislator, is the contemporary approach; however it is not a formal hierarchy of norms but a substantial, material hierarchy:*

*Rule of Law unites fundamental rights, democracy (as the political self-determination of the individual), equality and even, to some respect, social welfare as the basic constitutional principles of the democratic order. These principles normally appear as written principles in the constitutional orders of today, their function and interdependence mainly flows from unwritten principles. This statement is not only valid for internal State orders but also for multinational orders exercising public power as the European Union. In a certain way, these constitutional principles also appear at the level of the European Convention of Human Rights.*

**Key-words:** *European context, principles, constitutional, rule of law, fundamental rights*

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## I. CONSTITUTIONAL PRINCIPLES

The Constitution is the fundamental legal order of a State. It has normative character and consists of rules and principles. The distinction between these two phenomena of law has been, since long, a matter of

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dispute.<sup>2</sup> As it is well known, rules are considered to be normative orders which directly apply to a determined situation, with a strict legal consequence. Principles, in contrast to rules, do not entail a clearly determined legal consequence but are normative elements which encounter other elements with a different, even contrasting content. These elements have to be weighed out, a process whose final result is the legal consequence.

Fundamental rights, as an important part of a Constitution, are seen, in the light of this doctrine, as principles<sup>3</sup> which have to act together as elements of a process of evaluation to end up in the normative result.

The question arises whether the fundamental characteristics of a Constitutional order – democracy, rule of law, freedom, openness towards external law – are elements of a weighing out process or have determined legal consequences such as rules have in the above mentioned theory.

First, it has to be underlined that principles are not normative programs which have no binding force. They are of normative character and therefore binding and have a basic content. It results from this latter characteristic that they entail specific rules which embody concrete legal consequences and are rules in the above sense. These rules are either of constitutional rank, even formally part of the text of the Constitution, or they are of legislative character concretizing the constitutional principles at an inferior level.

Constitutional principles can be written or unwritten. Unwritten principles result from the written principles or even from written rules or, more generally, from the basic type of the constitutional orientation which reflects, in so far as the modern and only adequate orientation is concerned, from the general idea of a democratic and liberal constitutional order.

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<sup>2</sup> See recently Lucca Mezzetti, *Teoria Costituzionale* (Torino: G.Giappichelli, 2015), 1 – 162.

<sup>3</sup> See Robert Alexy, *Theorie der Grundrechte* (Frankfurt.a.Main: Suhrkamp, 2nd ed.,1994)

It has also to be mentioned that constitutional law as well as constitutional theory cannot be fully conceived from a purely national standpoint. Today, at least in the Europe of the 28 member States of the European Union, supranational law and, what is valid for the 47 members of the Council of Europe, the text of the ECHR as interpreted by the European Court of Human Rights have to be considered as an integral part of a European constitutional order.

National fundamental rights and moreover principles which are value-based, such as democracy or rule of law, have to be understood in a European perspective as they form a “bloc de constitutionnalité européen”.

Furthermore, constitutional principles can be *general* (even *universal*): democracy, dignity and freedom of the individual or *specific*: federalism, regionalism, parliamentary monarchy, republic, a parliamentarian or referendum-based system.

It should also be outlined that principles are not only to be found in the parts of the Constitution which directly refer to values but also in those parts which concern institutions. Institutions are either connected with general or specific constitutional principles. These principles have to be taken into consideration when institutions are at issue.

## **II. CONSTITUTIONALISM AT VARIOUS LEVELS AS A “FUNCTIONAL UNIT”**

Constitutional law is, in great parts, no longer purely national. The emergence of constitutional patterns at the extra-state level has had considerable impact on internal constitutional law. Also the issue of constitutional principles must be considered under this perspective

This is evident particularly in the field of values, however also visible in the area of institutions. Constitutional values predominantly are expressed in fundamental rights and also in “institutional values” such as rule of law and democracy. These basic values are institution – related as they appear in structure and functions of Parliament and in the organization and functioning of the judicial system. Rule of law as a value has importance for all institutions, also for the executive and its institutional structure as well as for the legislator which has to act in

conformity with the Constitution. Rule of law also applies to the territorial organization of a State which reflects, in regional and particularly in federal States, systems of vertical separation of power, one of the fundamental elements of this value. However, type and shape of institutions as such develop autonomously in a determined political context whereas their functions have basically to correspond with these values.

Values have increasingly been made matters of international law. The main reasons were the need for guarantees additional to national protection systems and the emerging value orientation of international activities. Spreading the idea of human rights worldwide was only possible by international instruments. Universal security and peace as envisaged by the UN system could only be upheld if based on the respect for human rights. Collective peace and the guarantee of individual rights are complementary. It is therefore consequent that the UN Charter joins these two purposes in its preamble.

The more multinational relations consolidate to an integration system the more they will formulate values as the ideological basis of their emerging common legal order. If this system is not only states-related but includes individuals as subjects of the legal order submitted to institutional power, as in the EU, the existence of fundamental rights is indispensable.

There are two questions connected with the issue of constitutional principles: are there principles at the level of the supranational EU legal order, and are they *constitutional* principles?

The second question shall be answered first. The term Constitution which is traditionally the term for the basic legal order of the State has been enlarged and extended to the State-like legal order of the EU, a step which has been promoted by the jurisprudence of the European Court of Justice itself<sup>4</sup> and by the political process to create a Constitution for Europe, more precisely a Constitution for the member States of the EU, a project which has failed. Nevertheless, the doctrine has rightly qualified

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<sup>4</sup> See ECJ, Case 294/83, *Les Verts*, Reports 1986,1339/ 23. ECLI:EU:C:1986:166

the primary law of the EU as constitutional in a functional sense<sup>5</sup>. This is a consequence of various aspects: primary law of the EU as the same functions as a State Constitution, that is to establish an institutional order capable to exercise public power by a government system and to determine values in the sense of fundamental rights for the protection of the individual concerned by this power.

It is evident that these two dimensions, characteristic for national Constitution, are also present at the supranational EU level. Furthermore, it must be duly taken into consideration that the fields of the exercise of public powers by the EU correspond, at the European level, to those powers which have been exercised at the national level in a national dimension before they had been transferred to the supranational organization. As a result, it seems to be justified to extend the term of constitutional law to the basic provisions and principles of the EU legal order.

If we distinguish between formal and substantial or functional constitutional law we can qualify this type as functional constitutional law. With regard to the EU Charter of fundamental rights we even could call this document formal constitutional law. It is evident that the denomination as a charter does not hinder the qualification as a formal constitutional text; the word Constitution or constitutional must not be directly used as we see this at the Charter of fundamental rights of the Czech Republic (*Listinazákladnýchpráv a svobod*) or even at the name of the German constitution as Basic Law or similar as the Dutch *Grondwet*.

With regard to the European Convention of Human Rights (ECHR) we also can state its constitutional character, no matter whether formal or functional. The Strasbourg court itself has qualified the Convention as a "constitutional instrument of the European public order"<sup>6</sup>. Of course, the function of the ECHR is different from the function of the EU primary law. The Convention is a text of a value guarantee addressed to the

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<sup>5</sup>See Rainer Arnold, "Begriff und Entwicklung des Europäischen Verfassungsrechtes", in: *Staat – Kirche – Verwaltung, Festschrift für Hartmut Maurer*, M.-E. Geis/D. Lorenz (eds.), (München:C.H. Beck, 2001), 855 - 868

<sup>6</sup>Loizidou (Preliminary objections) ECtHR 23.3.1995 Serie A 310, Z. 75

member States of the Council of Europe with the aim to safeguard rule of law and human rights as a basis for liberal democracies while the EU primary law constitutes a political entity, separate from the member States. EU primary law therefore demonstrates the genuine elements of a Constitution, not of a State but of a State-like or State-similar political and legal entity. While European Union law has a real constituent power establishing institutions and determining values, the Convention has no constituent force in so far but intends to guarantee a European standard of values. However, also this guarantee function can be called constitutional as it gives a binding orientation for the national constitutions and is, seen from a functional standpoint, a part of the comprehensive constitutional order of the Council of Europe member States. It is therefore a “functional part” of the national Constitution.

It corresponds to this statement that the Convention regularly is incorporated by interpretation into the national guarantees, in part by express regulation of the national Constitution itself as in article 10.2 of the Spanish Constitution, in part by practice of the constitutional justice. The latter is quite evident in Germany where the Görgülüdoctrine of the federal constitutional court clearly indicates, even as an obligation resulting from national constitutional law, to interpret national fundamental rights in the light of the Strasbourg jurisprudence<sup>7</sup>. In other countries the Convention has de facto the function of a substitute Constitution. This is the case when national legislation cannot be reviewed for unconstitutionality by national constitutional or supreme courts but can be declared as not applicable for inconvenience with the Convention (Netherlands<sup>8</sup>, in part also in France).

This shows clearly that the Convention is a “functional part” of the national Constitution despite its formal character as an international treaty. As it has developed into a European value order, according to the understanding of the Strasbourg jurisprudence, it has been integrated into the national value systems.

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<sup>7</sup> See [http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104.html/32](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html/32), 33 and 62,63

<sup>8</sup> See Art. 94 and 120 of the Dutch Constitution and Art. 55 of the French Constitution

From a functional standpoint this process of value integration (which is a parallel process to the economic integration of the EU) is in its effect much more intensive as a normal international treaty would be able to do. It is visible in this context that the value based integration is not only a legal process but a highly psychological event with a strong sociological impact. Value integration which takes place in a culturally homogeneous area is characterized by the fact that the basic ideas such as human dignity, the principle of freedom or political self-determination etc. are present in this area, and that similar or even identical guarantees exist. The integration process has the tendency to unite the concepts of various legal orders (in our specific context: the national orders of the member States of the Council of Europe which are all of them also member States of the European Union, the Convention and, as far as EU members are concerned, the EU fundamental rights charter) by assimilation which is an operation of receiving elements from another order and amalgamating them with the own order, or even by a transfer from the other order. As constitutional texts with broad, rather undetermined formulations of values are object of this process, integration takes place mainly through interpretation.

However, in this reciprocal interaction, formal legal superiority is of importance: primacy of EU law over national ordinary and constitutional law as well as the binding force of international treaties are the reasons for admitting the leading conceptual role to the normative sources which are superior to the national constitutional orders.

We can classify this relation of conceptual superiority and inferiority in the field of values as a vertical impact relation as it takes place between the Convention and the signatory States as well as between the EU constitutional order and the EU members.

There is also a horizontal relationship in the fields of values between the supranational order of the EU and the Convention. Up to present-day, the EU has not ratified the Convention *though* an intensive attempt has been made for accession. The EU treaty itself establishes the obligation to accede to the Convention; however, the agreement elaborated during a long time to effectuate the accession has been declared incompatible with the EU primary law by the EU Court of

Justice. The consequence is that the relationship between EU and Convention is not vertical but horizontal; the Convention is not superior to the EU, the Strasbourg court has no power to review directly EU legal actions. This does not hinder the practice of the Strasbourg court to acknowledge the binding force of the Convention for the member States of the EU implementing EU law at the national level. The Bosphorus doctrine<sup>9</sup> is still applicable before the Strasbourg court and will lose its importance only in the moment of the accession.

It corresponds to the horizontal relationship mentioned above that the EU law itself integrates the Convention and with it the jurisprudence of the Strasbourg court into the supranational concepts. Since the very beginning of the thinking in values the Convention has been leading, to a great extent, in shaping the value contents. As it is well-known, in the first period of absence of written fundamental rights the Luxembourg jurisprudence has made reference to the common European constitutional tradition as expressed by the Constitutions of the member States as well as by the Convention, also an important expression of this common constitutional culture. The origins of the fundamental rights idea within the supranational order go back to the fundamental rights catalogues in the member States' Constitutions and to the Convention.

After an initial State Constitution - related period the Luxembourg court mainly referred to the Convention for filtering out a general principle of community law as a fundamental rights guarantee or an element of rule of law. The Convention grew up into the role of the leading instrument in the European field of fundamental rights protection. It seems entirely consequent that the first treaty on the European Union constitutionalized this horizontal reference to the Convention by inserting a clause into the primary law confirming the obligation of the EU to act in compatibility with the Convention. The elaboration of a written charter of fundamental rights took this into consideration; those parts of the Charter which are taken from the Convention have to be interpreted in the light of the Strasbourg jurisdiction, a strong sign for a harmonization of the supranational and the conventional concepts of fundamental rights. This correspondence is

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<sup>9</sup>Application no. [45036/98](#)

particularly significant in chapter 6 of the EU Charter which introduces guarantees of justice by inspiration from articles 6 and 7 of the Convention.

The obligation to act in conformity with the Convention is a unilateral, EU law based obligation which opens the door for the concepts of Strasbourg but does not submit the EU courts decisions to the control of the European Court of human rights.

The described vertical and horizontal impacts and influences between the different constitutional orders in Europe are mutual in the sense that national concepts contribute to the evolution of supranational and, in a less intensive manner, of conventional concepts.<sup>10</sup>

Amidst the normative complexity of three constitutional orders which apply to the same issue it seems evident that the three orders get increasingly interdependent and lead to a functionally combined order, especially in the field of values, specifically of fundamental rights and institutional values, in particular in the area of rule of law.

Constitutional principles in so far as they are of the general character (fundamental rights and institutional values) and not expressions of specific constitutional orientations are also involved in this three level system and have to be regarded, as to these levels, as a “functional unit”. Insofar as specific constitutional principles and constitutional rules are influenced by general constitutional principles, the same perspective has to be applied. In reference to the terminology used in French constitutional law for the totality of various constitutional law sources acting together despite their varying historical origins the above-mentioned three level perspective can also be called a European” bloc de constitutionnalité” (Garlicki<sup>11</sup>).

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<sup>10</sup> See Rainer Arnold, FN 4

<sup>11</sup> See Rainer Arnold, *Principi comuni nel costituzionalismo europeo*, Speech at the Accademia delle Scienze dell’istituto di Bologna, in Honor of Giuseppe De Vergottini, April 8, 2016 (in print)

### **III. SOME ASPECTS OF THE NATURE OF CONSTITUTIONAL PRINCIPLES**

Constitutional principles can be substantive and instrumental: the first indicate values as such or institutional values that means values such as rule of law or democracy which are institutionalized and therefore realized by determined institutions such as Parliament or judicial organs.

Instrumental principles are principles which have importance for the contents and for the functioning of the constitutional order: the principle of efficiency of values, specifically in the form of substantive and functional efficiency; the principle of coherence of the normative system; the principle of the unity of the Constitution; the principle of proportionality of interventions into the freedoms of the individual; the principle of solidarity (which impacts on the mutual behavior of member states of the Federation in financial matters), the principle of loyalty; and many others.

Organizational principles in constitutional law are those which refer to the organization of the State power, for example the principle of subsidiarity, the principle of the federal law supremacy, the principle of primacy of supranational over national law, the principle of national and constitutional identity, etc.

Some basic questions arise: are principles normative and binding? The answer must be positive. Constitutional principles are part of the constitutional order, they are not only programmatic orientations of political character but have normative force.

A further, even more important question is: is there a difference between principles and rules? It is commonly known that differences are made between the two types of norms, particularly with reference to fundamental rights. Principles do not give a strict, definite answer in contrast to a rule which is characterized by a strict legal consequence in case that the presuppositions of the rule are fulfilled. Principles have to be weighed out and have a result which is not a strict consequence of one principle but the relative consequence corresponding to an adequate realization of two or more principles in collision.

The relative consequence of the application of principles is due to the fact that the relevant situation is complex either because two or more

persons are involved or several principles, not only one principle are applicable. The application of the principle can be limited, for example by public order, if this is permitted by the Constitution itself directly or by the fact that another constitutional value is conflicting. A balance has to be found.

Is there really a difference in so far between constitutional principle and constitutional rule? The application of the rule is also limited by the principle of proportionality or by the principle of legal certainty as an important element of rule of law. The application of the principle by balancing it against another principle can be understood as the restriction of the principle by the right of another person who invokes the own right, the own principle.

A principle can be a basic rule, called principle for its general importance for the system, however with a strict binding force, limited by the rights of others being expressed by principles.

#### **IV. EFFICIENCY AND COHERENCE AS BASIC INSTRUMENTAL PRINCIPLES IN CONSTITUTIONAL ORDERS**

A Constitution is a coherent body of basic principles and rules with a determined general orientation. The contemporary orientation which is the only one adequate for the finality of law is the finality to protect and promote, directly or indirectly, the individual, is the liberal and pluralistic democracy based on human dignity and freedom.

Constitutional principles are general by nature, oriented towards a type of Constitution, namely the liberal democracy. If we apply the rigor of the historic French declaration of 1789, one of the most fundamental documents for human rights and democracy developments, we would say that a basic text can be qualified as a Constitution only if it aligns with this orientation.

Constitutional principles are written and unwritten, referring to freedom and to the establishment of institutions. Institutional provisions are normally expressed by rules, however they are directed and complemented by institutional principles as well as by value based principles. As already mentioned, the institution of Parliament is

connected with the value principle of democracy, and is in itself structured by specific principles, for example the principle of the free mandate, the principle of efficiency of the deputy's function with many aspects formulated in the standing orders, the principle of efficient control, etc. Rule of law is reflected in the efficient and comprehensive organization of courts, the independence of justice, the various guarantees for an impartial and fair trial, etc.

It can be said that there is a hierarchy of principles, with the basic general principles based on values at the top and specific principles as expressions of these values all over the Constitution. These are principles which are *substantive* in their character.

The basic *instrumental* principles refer to the efficiency and coherence of the totality of constitutional law. These instrumental principles result from the basic intention of the Constitution-makers to create an order which functions efficiently. The aim of the constituent power is to give effect to a basic order which is coherent in itself and efficient as an instrument for the realization of a determined type of this basic order, namely the liberal democracy.

The Constitution consists of written and unwritten principles and rules. The principle of efficiency requires that the basic orientation of the Constitution and the general principles connected with this orientation are normatively existent in totality, in the written text but also as unwritten parts of this text.

The principle of efficiency as a basic instrumental principle of every constitutional order authorizes and even obliges the institutions, namely the judges, to formulate the unwritten principles and rules and to adapt them to the fundamental social changes of the society in the course of time. Constitutions are “living instruments”<sup>12</sup> for a long period of time which shall be due instruments for a “good governance” during the existence of the Constitution. Constitutional reform and interpretation are the means to realize this adaptation.

We can say that the Constitution must be an efficient and completely functioning instrument which has normative character but is

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<sup>12</sup> See for the ECHR (what is transferable to Constitutions) ECtHR, Loizidou (Preliminary Objections), Sér. A310, Z.71.

open for major social changes. Efficiency and completeness is inherent in the Constitution as a basic legal order. This is particularly significant for fundamental rights. The general constitutional principle in this field is the principle of freedom, closely connected with human dignity, which requires a complete protection of the individual by fundamental rights (substantive efficiency of the principle of freedom) and a protection which cannot be eliminated or unduly restricted by public power (functional efficiency of the principle of freedom).

Constitutional principles result from the concept of the *type of Constitution*, namely from the liberal democratic constitution which is characterized in its nature by determined essential elements. These essential elements must be either expressed by written provisions in the text of the constitution ( or in various constitutional texts as in Austria or Czech Republic) or understood as unwritten part of the constitutional order, in form predominantly of principles, possibly also in form of rules, inherent in this constitutional system.

It is manifest that the *type orientation* of a constitutional document only comprises those unwritten principles which are inseparable from the nature of this type. As far as various implementations of the system are possible, the stringent conclusion from type to implicitly existing but unwritten principles is not allowed. The type of the liberal democratic constitution does not imply a clear orientation in the sense of a strictly representative democracy or a democracy which combines parliamentary legislation and referenda. Perhaps the continuous tradition can give a hint what the creators of the Constitution wanted to decide. However, such a conclusion is on an unstable basis and needs other aspects which give urging arguments for a determined solution in one or the other sense.

The basic constitutional principles of a liberal, democratic constitutional order are the principle of freedom of the individual including collective political self-determination as an expression of individual freedom, rule of law, social justice and “open statehood”. It will be shown later that rule of law in its contemporary anthropocentric concept is the primary principle connecting all other essential principles of the constitutional order.

The Constitution as an efficient instrument cannot be contradictory in itself. It forms a unit, a normative and by this a functional unit. All principles and rules must be in harmony with the basic type of the Constitution, with the possibility for divergences within the framework which this basic type leaves open.

When speaking of a certain variability within this framework we have to mention that this variability is reduced or even eliminated by more specific principles of the constitutional order which form *sub-types* within the general type orientation of the Constitution. Liberal democracy can appear, as in the German Federation as the subtype of a strictly representative democracy. Specific principles are connected with this subtype which are again the basis for further specific principles and even rules which, themselves, form and have to form a harmonious and coherent, non-contradictory subsystem. We can therefore distinguish between specific constitutional principles of first and of second degree.

In this way we can affirm the existence of a *chain of principles* in the constitutional order which are the basis for concrete rules. If we deny that a principle is different from a rule in its application we can define rules as norms which are the product of principles but have not the nature of principle and therefore have no ability to produce further rules.

As a coherent order the Constitution is a *complete order*. What is not complete is the written text. It has to be complemented by interpretation in compliance with the above-mentioned chain of principles. Interpretation has also to promote the coherence of the constitutional order, e.g. by harmonizing fundamental rights restrictions with rule of law. It is even not excluded that the constitutional court declares invalid a constitutional rule for its incompatibility with a constitutional principle. This seems to be accepted at least by the German doctrine while the doctrine of a part of other countries hesitates to submit constitutional law to judicial review.

Constitutional principles also exist at the levels of the *supranational* and *conventional* orders. In supranational law the jurisprudence of the ECJ was decisive in developing unwritten principles for the protection of fundamental rights and rule of law (“Community of law”). They have been constitutionalized in the course of time by

inserting them into the written text of the fundamental rights charter (in force only from end 2009 on) after having expressed in primary law the obligation to apply the law principles which have been developed by European jurisprudence. It is remarkable that the early jurisprudence of the ECJ has developed principles called general principles of community law but has not elaborated a theory of principles and rules. The use of different terms such as objectives, values, principles and rights, freedoms etc. in EU primary law is not based on a clear theoretical distinction.

It seems more useful to transfer the idea of a chain of principles, starting with the general type, progressing to general principles and subtypes determined by specific principles with the result of rules also to the supranational level. As to the constitutional structure of the EU the transferability of this consent can be affirmed for the reason of similarity to a State and to the affinity of the general principles at the national and supranational level.

A similar statement can be made for the EHRC which focuses on freedom but includes also other general principles of the liberal and democratic constitutional orientation, rule of law and democracy. The principle of equality is connected with the freedoms (see Art.14 ECHR and more general the 12th additional protocol). The general principle of social justice which appears in the EU Charter together with the principle of freedom is separated from the Convention and concentrated in the European Social Charter.

As already mentioned, the principles of the Convention have a strong impact on the principles in national constitutional orders while the principles in the EU Charter are applicable alternatively to the national constitutional orders of the EU member states (see Art. 51 of the Charter). However, the interpretation of the EU Charter is also influential conceptually on the national field even if both domains, the supranational and the national rights protection, are separated in application.

## **V. RULE OF LAW AS BASIC CONSTITUTIONAL PRINCIPLE**

Rule of law is the very basis of the constitutional order of the State, it submits public power and society to law as a hierarchic body of binding norms, of principles and rules. Rule of law is not limited to legality, the respect of legislation, but comprises, as the foundation of law, the duty to comply with the Constitution as the supreme law of the land. Constitutionality is the modern perspective which, in most countries, aligns with the review of legislation on its compatibility with the Constitution, frequently by specific tribunals. Constitutional review is rightly seen as the “perfection of the rule of law system” (Dominique Turpin).

Rule of law is not satisfied by the formal respect of the hierarchy of norms, it requires in fact the superiority of substantive issues, in particular of values. The substantive settings determined by the Constitution are either of institutional or procedural character or lay down rules or principles for the public power’s behavior. The guarantee of values expressed by fundamental rights on the ideological basis of human dignity is the very nucleus of constitutional norms, values which have also an irradiation effect on the institutional determinations of the Constitution.

Rule of law reflects all general principles of the liberal constitutional order which is founded on individual freedom and democracy; rule of law is therefore value oriented.

The principle of freedom of the individual is axiomatic and inseparably linked with dignity. This principle is the foundation of law and demonstrates that the exclusive finality of law is the protection and promotion of the individual. Law is individual oriented in its direct or indirect finalities. Rousseau’s statement is trivial and basic together *l’hommeest né libre*, an exhorting statement to protect and actively promote this freedom.

If law has the human person as its ultimate reference, rule of law is clearly anthropocentric. It comprises the protection of freedom and autonomy of the individual as a result of dignity, with its specific expressions of fundamental rights.

Rule of law is therefore freedom oriented, however strictly based on equality. Dignity and freedom are inherent in every individual; freedom cannot be unlimited, it must be shared with all others. The indispensable pursuit of the “common wealth” demonstrates the necessity to share freedom in an adequate and proportionate way. While dignity is a quality which cannot be limited or weighed out with other values though they have constitutional character, freedom has to be shared. How to distribute freedom and find an “optimum” for each individual is mainly a question of procedural instruments such as in particular proportionality.

Democracy as the fundamental key to the “realms of earth” is unthinkable without rule of law and is part of it. Democracy is the collective expression of the individual self-determination in political matters and therefore intrinsically linked to fundamental rights and even to dignity. This has been rightly expressed in the recent jurisprudence of the German Constitutional Court.<sup>13</sup> The value oriented rule of law concept evidently embraces this crucial aspect of the general principle of freedom.

Rule of law is also important for the principle of social State insofar as it comprises the guarantee of the minimum of existence, as a necessary consequence of dignity.

Equality and nondiscrimination are also inseparably linked to dignity and the principle of freedom. As stated above, freedom is a shared freedom and dignity is the attribute of every individual. Nondiscrimination for reasons of individual attributes given by birth or being fundamental for every person such as religion or a self-determined political opinion clearly results from dignity.

Rule of law is therefore only conceivable as a “functional unit” of the basic general constitutional principles. Freedom and dignity, equality, democracy and social justice are reflected by rule of law.

Rule of law is therefore the constitutional requirement to fulfill the finalities of law - the direct or indirect protection and promotion of the individual - in conformity with law in its hierarchical order. Politics is

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<sup>13</sup>[http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html)

essentially realized by majority vote in parliament; politics is transformed by this into law in form of legislation. The democratic process of lawmaking in Parliament by the political majority or, in exceptional cases, by referendum directly by the people is complementary to the basic democratic act, the creation of the Constitution. Constitution and legislation are not contradictory, they correspond one to the other. Modern rule of law recognizes the superiority of the Constitution which admits the political process within its framework. The trespass of the limits established by the Constitution is sanctioned by the verdict of unconstitutionality. The elimination of unconstitutional legislation by constitutional courts is consequent as a means of repairing the legal order.

Rule of law is the very basic norm in the Constitution giving legitimation for its binding force. It prescribes the respect of law as a hierarchical body of norms, internal as well as binding external law, and goes beyond the formal law respect by establishing the duty to accomplish the fundamental finalities of law as they find their expression in the constitutional system. Rule of law requires the law to be stable, clear and understandable, solid, enforceable by courts, coherent and not contradictory *in se* (in particular legislation to be in conformity with the Constitution). Rule of law, furthermore, requires the protection of the individual, of the individual's dignity, autonomy and freedom which entails equality and nondiscrimination. It also requires democracy enabling the political majority to make law, in consistency with the Constitution. Rule of law comprises not only the conformity of legislation and other public power acts with the Constitution but also the separation between daily politics which leads to legislation and basic orientations to be made by the Constitution. The Constitution has to leave sufficient space for politics, for the changing majorities and is not entitled to constitutionalize what is by nature a matter of politics. Also this is rule of law.

It has been stated that the constitutional principles which are fundamental for a liberal democracy focus in and are confirmed by rule of law. Specific constitutional principles which are typical for a determined order such as principles establishing a certain form of

government or determining the territorial organization have binding force, what rule of law prescribes to respect. However, the specific principles do as such not belong to the substantive sphere of rule of law.

## CONCLUSION

General constitutional principles are the basis for specific constitutional principles and constitutional rules. They are interconnected with the basic type of the constitutional orientation which is, in contemporary constitutionalism, the liberal democracy based on human dignity and individual freedom. These principles are embedded into European integration system which consists of three levels, the national, the supranational and conventional level. There is also functional constitutional law outside the State. Constitutional principles are convergent at the three mentioned levels. European constitutionalism can only be conceived as a "functional unit". The leading constitutional principle, the heart of constitutionalism, is rule of law in its anthropocentric orientation.

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# REFLECTION ON THE ROLE OF REASON IN THE CONFIGURATION OF HUMAN RIGHTS

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## **Abstract:**

*The present study starts from the idea that human rights are idealized human representations and aims to prove that when we are talking about the idealization of representations, we put in play the meaning and, thus, the symbol. This thing does not mean the suppression of reason, but its completion by a not insignificant area of the human culture. The symbolism of human rights, together with reason, gives meaning to the action of legislating of the power legitimizing it.*

**Key-words:** *human rights, reason, symbolism of human rights, free will, fundament.*

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## **I. INTRODUCTION**

In order to discover the role of reason in the configuration of human rights, it is absolutely necessary to relate ourselves to the Enlightenment, given the fact that the philosophers are those who discovered reason and raised it at the rank of founding principle.

The conviction of rationalists of the 17<sup>th</sup> and 18<sup>th</sup> centuries is that “by using the reason it is possible to achieve a knowledge superior to that derived from the sense”<sup>3</sup>. Though there have been voices contesting the reason and trying to emphasize its weaknesses, the unconditioned trust in the power of reason shall be at the base of the subsequent development of modernism.

The motto of Enlightenment *Sapere aude* (“*Dare to think*”) is equivalent with the Socratic motto “know thyself” written on the frontispiece of the Temple of Delphi. What characterizes the

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<sup>3</sup> John Cottingham, *Raționaliștii: Descartes, Spinoza, Leibnitz* (Bucharest: Humanitas, 1998), 17.

Enlightenment is the fact that “all energies of the spirit shall remain closed in a central point of force. The heterogeneity and diversity of figment is just a separate location and an unfolding of a force in its essence, unitary and creative. When the 18<sup>th</sup> century aims to rename this force, when it wants to capture the essence in a single word, it uses the name of Reason”<sup>4</sup>.

## II. REASON – FUNDAMENT OF HUMAN RIGHTS

Regardless of the circumstances, of religious or moral beliefs, something remains constantly the same, namely reason. This is why, when we are talking about this element founding the entire human existence, namely reason which belongs to all humans. We rediscover in this statement the indispensable connection between individualism and universality because the reason belongs to each individual and in the same time transcends the individualism and transposes itself in the common ground of all individuals. In this regard, Kant stated that through reason, the human person reaffirms himself and, in the same time, beyond himself: individualism and universalism are two faces of a unique reality: reason<sup>5</sup>. Thus, this location in the area of the pure ideality, leads us to the thought that human’s natural rights belong to an ideal area based only on reason<sup>6</sup>. This ideal of human rights, based on reason, is distinguished from the creation of a right sourcing from will. In other words, the natural law based on reason distinguishes itself from the positive law based on the will of the political power. If the natural law is common to all rational beings, it is immutable, the positive law is relative and depends on the time and place in which the political power unfolds its prerogatives.

The relativity of the positive law is imposed by tradition and culture, being different from one state to another. In this case, the connection between individual and universality remains unfulfilled. In

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<sup>4</sup> Ernst Cassirer, *Filosofia luminilor* (Pitești: Paralela 45, 2003), 21.

<sup>5</sup> Gheorghe Dănișor, *Filosofia drepturilor omului* (Bucharest: Universul Juridic, 2011), 58.

<sup>6</sup> Dănișor, *Filosofia drepturilor omului*, 59.

order to fulfil it, any positive law must tend as much as possible to the achievement of the reason's ideal founding the human rights.

From what is noticed, we are talking about the fundament, in other words, of principle. Is the reason a principle? It is obvious that it is a principle expressed as: *Nihil est sine ratione*, namely: *nothing is without reason*. Heidegger states that this principle is so clear, that it does not need explanations, because it imposes itself without a special effort from the intellect. "From that always and everywhere, at every time or place to practice, human intellect itself researches immediately, at all levels, the reason"<sup>7</sup>. Thus, the intellect, directly relates to its own fundament: the principle of reason. Heidegger goes even further and states that "the principle of reason is the principle of all principles"<sup>8</sup>. *Nihil est sine ratione* not only aims the humans, but everything that exists.

### **III. THE CRITICS OF FOUNDING THE HUMAN RIGHTS BASED ONLY ON HIS INNER REASON**

Thinkers of the 17<sup>th</sup> and 18<sup>th</sup> century have taken as sure this principle, though at a deep analysis it is not without certain ambiguities, which have been used many times by the reason's adversaries.

Calling to reason is equivalent with emphasizing what is necessary for humans to exist in a universal vision. The separation between reason and will is equivalent with the separation between the natural law and the positive law, and the subordination of the latter to the first. The legitimacy of the political power insures its foundation on this subordination. The ideal of reason expressed as human rights is materialized, descends from the abstract area into humans' lives, it effectively materializes through the political will. In this way, human rights have a specific application, and the political power becomes legit<sup>9</sup>.

On the other hand, this separation between the natural law and the positive law, namely between the reason and will, is not

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<sup>7</sup> Martin Heidegger, *Le principe de raison* (Paris: Gallimard, 1957), 44.

<sup>8</sup> Heidegger, *Le principe de raison*, 50.

<sup>9</sup> Dănișor, *Filosofia drepturilor omului*, 60-61.

characterized only as being opposed, but as well as a unity of contrasts. If the reason is universal (belongs to all individuals) and in the same time particular (belongs to each individual), means that the individual and the collectivity have the same base and, as consequence, in both cases the natural rights of humans must prevail, and the political will must treat equally both the individual natural right, as well as the natural right founding the collectivity. Actually, this is the ideal of uniting people between them and in relation to power, so plastically stated by Rousseau in *The Social Contract*, which tends to totally preserve the individual natural rights. “The force and freedom of every individual, according to Rousseau, being the first two elements of his preservation, how could he be able to engage them without hurting himself and without neglecting the concern he owes to him?”<sup>10</sup> At this question, he will be able to give the following answer: “finding a form of association that would defend and protect with all its common force the person and the assets of every associate and within which each of them being united, to listen only to himself and to remain as free as it was before”<sup>11</sup>.

It is obvious that such view is based on the human reason, which, in its turn, is the same for association. We cannot speak of a certain person’s freedom unless we consider everyone’s freedom, because their reason is common. The individual inner reason must be concordant with an acceptance of exterior reason. This is equivalent with an acceptance of the world, as conversely the world can accept us. Human rights must be treated as an integrating vision in which reason is under the human aspiration to freedom. If human rights are based on reason and reason is universal, it means that these rights address to an individual transgressing the affiliation to a certain culture, ethnicity etc. and it is placed above the positive law, which is characterized by peculiarity<sup>12</sup>.

The social contract, as legal procedure created to protect individuals, it is not exempted from certain ambiguities; this is why its

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<sup>10</sup> Jean J. Rousseau, *Contractul social* (Bucharest: Scientific, 1957), 89.

<sup>11</sup> Rousseau, *Contractul social*, 89.

<sup>12</sup> Dănișor, *Filosofia drepturilor omului*, 62.

enemies attack the rationalism. Thus, are placed under the question mark the theoretical foundations of modernism itself. The individualism, a classic concept of the modern theory, it not foolproof, because the modernity did not understand that an individual related only to him and denying the exteriority is devoid of the reasonable foundation of universality and likely to die in his inner arrogance foundation. This is why, during the modern history, founding the human rights only on the inner reason of individuals as *subjectum* has been debated and, this generating the second and third generation of human rights which are trying to assimilate the exteriority in an integrative vision.

Boundless confidence in reason is criticized in the meaning that “reason is an inadequate term to fully understand the forms of the cultural life of humans in all their wealth and variety. But all these forms are symbolic ones. This is why, instead of defining the individual as rational animal, we should name him *animal symbolicum*. Through this, we can designate its specific difference and understand the new road open for individuals – the road to civilization”<sup>13</sup>.

#### IV. CONCLUSIONS

As a conclusion, human rights are human idealized representations and we can say that when talking about the idealization of representations, we put at stake the meaning, and thus, the symbol. This does not mean that the reason has been suppressed, but complemented by a not inconsiderable area of human culture. The symbolism of human rights, together with rationality, gives meaning to the action of legislation of the power and legitimizes it.

Not least, we must mention the fact that both the representatives of the School of natural law, as well as the contractarianism followers, when talking about the natural right do not follow anymore the directions set by Aristotle and Thomas Aquinas. Their natural law aims the individual and his rational nature. The essence of the human being is reason, which means that for them the natural law is based on

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<sup>13</sup> Ernst Cassirer, *Eseu despre om. O introduceere în filosofia culturii umane* (Bucharest: Humanitas, 1994), 45.

reason. From here it results the directing of all human actions by reason. The classic natural law is spontaneous and it imposes itself through the transcendence of directing through reason. The modern natural law is placed at the base of human rights (later on protected by the history), the other one not.

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# PRIVILEGES – CAUSES OF PREFERENCE IN THE REGULATION OF THE NEW ROMANIAN CIVIL CODE

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## **Abstract:**

*Since 2009, the Romanian Civil Code has established the principle of equality of creditors, founded on their joint guarantee, Article 2326 of the Civil Code providing that “the price of the debtor’s assets will be divided among the creditors in proportion to each one’s amount of the debt (...)”.*

*The law has equally created an exception from the principle of the equality of creditors by regulating the legal causes of preference, which entitle their owner to be paid with priority over other creditors in the case of enforcement of assets. According to Article 2327 of the Civil Code, causes of preference are privileges, mortgages and pledges.*

*The privilege is defined by law as a cause of preference on payment granted by law to a creditor in consideration of the quality of its debt [Article 2333 paragraph (1) of the Civil Code]; by quality of debt we understand its grounds. The Civil Code divides privileges into two categories: general privileges, on all movables and immovables of the creditor (Article 2338 of the Civil Code) and special privileges, on particular, individually determined, movables (Article 2339 of the Civil Code).*

**Key-words:** *the principle of the equality of creditors, legal causes of preference, privilege, creditor, quality of debt, general privileges, special privileges.*

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## **PRELIMINARY ASPECTS**

According to Article 31 paragraph (1) of the Civil Code, “any natural or legal person is owner of a patrimony that includes all rights and obligations which can be monetarily assessed and which belong to them.” In other words, a person’s patrimony has an active side which

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includes all their patrimonial rights, and a passive side which entails all their monetarily assessable debts.

Referring to the active side of the patrimony, Article 2324 paragraph (1) of the Civil Code provides that a person's present and future movables and immovables will serve as "joint guarantee of their creditors." Therefore, this guarantee includes both those assets in the debtor's patrimony at the time at which the obligation arises, as well as those assets at the time of its payment, i.e. future assets. Non-seizable assets are not part of the "creditors' joint guarantee", either as a result of provisions, or as a result of the will of the parties partaking in the legal obligation relationship [Article 2324 paragraph (2) of the Civil Code]; in this latter case, opposability conditions provided by Article 628 of the Civil Code must be met.

In the case of patrimony division into several patrimonial masses, the creditors' joint guarantee is of specialised nature due to the fact that it aims a particular patrimonial mass in connection with which a particular creditor's debt has arisen; the creditor will firstly have to seize the assets which are part of the respective patrimonial mass. We speak however of a joint guarantee, as it does not regard a determined patrimonial element, and, in so far as the assets which form part of the patrimonial mass in connection with which the obligation has arisen are not plentiful to satisfy the debt, the other patrimonial assets which are part of other patrimonial masses can be seized as well, as a result of the unity of patrimony<sup>3</sup> [Article 2324 paragraph (3) of the Civil Code].

Starting off from the rule according to which creditors whose debts have arisen in relation to a particular patrimonial division can seize the debtor's other assets, if the assets which are the object of that specific patrimonial mass are insufficient to satisfy their debts, an exception is made as regards debts arisen in relation to the exercise of a profession; according to Article 2324 paragraph (3) of the Civil Code those assets which form part of the patrimonial mass affected to the exercise of

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<sup>3</sup> V. Stoica, *Drept civil. Drepturile reale principale*, 2<sup>nd</sup> Edition (București: C.H. Beck, 2013), 29; L. Pop et al., *Tratat elementar de drept civil. Obligațiile* (București: Universul Juridic, 2012), 756.

profession authorised by law can be seized only by creditors whose debts have arisen in relation to the respective profession; equally, these creditors cannot seize the debtor's other assets<sup>4</sup>.

Traditionally, the creditor's right over all assets pertaining to their debtor's patrimony (or the "creditors' joint guarantee," in the terminology employed by the New Civil Code) is named in doctrine "the creditor's right of general pledge"<sup>5</sup>. Those creditors who have no other guarantee for satisfying their debts are called in doctrine "normal creditors" or "unsecured creditors", and these creditors' debts are called "normal debts" or "unsecured debts".

The creditors' right of general pledge must not be confused with the right of pledge-movable real guarantee, included by the legislator in the category of causes of preference<sup>6</sup>; the right of general pledge has as object the debtor's entire patrimony, regarded as a legal entity; it does not confer on the creditors a right of seizure or a preference right; on the other hand, the right of pledge-real guarantee has as object one or more determined assets and confers on the creditor a right of seizure and a preference right, in case of a debtor's willing non-performance of the obligation<sup>7</sup>.

The debtor's patrimony represents joint guarantee both for unsecured creditors, as well as for privileged creditors (with general or special privileges) and for creditors with real guarantees. If creditors with special privileges or real guarantees cannot satisfy their debt by seizure of the asset which forms object of the special privilege or guarantee, they

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<sup>4</sup> For an ampler approach regarding the free-lancers' patrimony, please see E. Chelaru, *Drept civil. Drepturile reale principale în reglementarea NCC*, 4<sup>th</sup> Edition (Bucharest: C.H. Beck, 2013), 18-20.

<sup>5</sup> With regard to inconveniences concerning the use of the term 'general pledge', please see V. Stoica, *Drept civil*, 27. T.R. Popescu justifies the name 'general pledge' as follows: "the name 'pledge' demonstrates its guarantee function, as concerns the enforcement of assumed obligations, and the qualification 'general pledge' evinces the fact that (...) it designates the creditor's right to enforce any of the debtor's assets" in T.R. Popescu et al., *Teoria generală a obligațiilor* (Bucharest: Științifică, 1968), 343.

<sup>6</sup> L. Pop, *Tratat de drept civil. Obligațiile. Volume I. Regimul juridic general*, (București: C.H. Beck, 2006) 338.

<sup>7</sup> V. D. Zlătescu, *Garanțiile creditorului* (Bucharest: Academiei, 1970), 148-164.

have the right to seize the remaining assets pertaining to the debtor's patrimony due to the fact that the debtor's entire patrimony constitutes their joint guarantee as well; equally, creditors with general privileges can both seize the debtor's entire patrimony, as well as have preference over the other creditors; consequently, "the difference between unsecured creditors and privileged creditors or with real guarantees is grounded not on the object of seizure, but on the order of seizure"<sup>8</sup>.

Article 2326 of the Civil Code institutes the principle of equality of creditors, founded on their joint guarantee, providing that "The price of the debtor's assets will be divided among the creditors in proportion to each one's amount of the debt (...)".

The law has equally created an exception from the principle of the equality of creditors by regulating the legal causes of preference, which entitle their owner to be paid with priority over other creditors in the case of enforcement of assets. According to Article 2327 of the Civil Code, causes of preference are privileges, mortgages and pledges; in the category of causes of preference, the doctrine includes by extension the retention right as well<sup>9</sup>. Moreover, the principle of the equality of creditors cannot be applied when there are conventions with regard to the order of the creditors' satisfaction.

Causes of preference (which include privileges and real guarantees), together with personal guarantees (*fidejussio*, letter of guarantee and the comfort letter) are called in doctrine special guarantees or actual guarantees, due to the fact that they confer on the creditor particular supplementary rights additional to those acknowledged to the normal creditor, who only has a general guarantee of its debt. The two categories of guarantees (personal and real) are different, due to the fact that only real guarantees make an asset be especially affected to payment, it being capitalised as matter of priority upon enforcement of the debt

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<sup>8</sup> V. Stoica, *Drept civil*, 27.

<sup>9</sup> Considering debts in view of their accompanying guarantees, the doctrine has established three categories: unsecured debts, sub-unsecured debts or subordinated debts (which are paid subsequent to the unsecured debts, being disadvantaged due to their cause, as are debts by gratuitous title) and privileged debts or by real guarantee (P. Vasilescu, *Drept civil. Obligații* (Bucharest: Hamangiu, 2012), 95.

that it stands guarantee for, while personal guarantees add to the debtor's general pledge other persons' general pledges, thus increasing the unsecured creditor's chances to enforce the debt<sup>10</sup>.

## **THE NOTION OF PRIVILEGE. REGULATION**

By making reference to the notion of privilege, the legislator shows that the privilege is a cause of preference granted by law to a creditor in consideration of the quality of their debt [Article 2333 paragraph (1) of the Civil Code]. By quality of debt we understand the cause or legal act out of which it has arisen<sup>11</sup>, i.e. the ground, or source of the debt. Consequently, the creditor whose debt is privileged will be preferred before all other creditors, in spite of them being mortgage creditors.

The New Civil Code has regulated privileges in Article 2333-2342 entailed in Title XI ("Privileges and Real Guarantees") of Book V ("On Obligations").

## **LEGAL CHARACTER OF OBLIGATIONS**

According to doctrine, privileges have the following legal character:

a) only the law is the source of privileges<sup>12</sup>. Given the fact that privileges are strictly of law and of strict interpretation, legal subjects

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<sup>10</sup> Șt. Scurtu, *Drept civil. Regimul juridic general al obligațiilor. Garantarea obligațiilor în reglementarea NCC* (Bucharest: C.H. Beck, 2014), 196.

<sup>11</sup> L. Pop, *Drept civil. Teoria generală a obligațiilor. Tratat*, 2<sup>nd</sup> Edition (Iași: Fundației "Chemarea", 1996), 427.

<sup>12</sup> Professor Vasilescu sheds light on the fact that, although privileges are strictly of law, the reason that justifies their existence is not entirely legal. The law regulates privileges with the scope of favouring particular categories of creditors who will recover their debt before those creditors with whom they come in concurrence, out of ethical, social and economic imperatives; thus, the privilege of the funeral claim is justified by moral imperatives, the recovery of funeral expenses made by a common creditor of the deceased debtor, these expenses being advanced out of ethical reasons; the privilege of trial expenses is based on equity, because the seizure initiated by the creditor who has advanced them has been profitable to all creditors; the privilege of asset conservation expenses is based on economic and equity reasons – if these expenses had not been incurred, the asset would have been damaged or had become extinct and the other creditors would have been left with nothing to seize, thus being equitable that whoever

cannot, by means of civil conventions, “create privileges, modify their ranking, waive *a priori* the benefits that they offer, or change the order of payment that they institute”<sup>13</sup>;

b) privileges are simple causes of preference that accord the creditor only the right to be paid with priority out of the price obtained from the sale of an asset; the privilege has meaning only in a situation where there simultaneously exist several creditors who simultaneously issue debts for payment<sup>14</sup>; the privilege does not confer a seizure right of the asset, as real guarantees do; consequently, the privileged creditor will be able to solicit the sale of an asset for the realisation of their debt only as long as the asset is part of the debtor’s patrimony<sup>15</sup>; in case of special movable privileges, the disposal of the asset to a good-faith third party has the effect of terminating the privilege;

c) privileges are accessory due to the fact that the scope of the existence of this particular form of guarantee is the realisation with priority of a particular debt. Consequently, privileges become extinct with the guaranteed obligation (Article 2337 of the Civil Code), on the basis of the principle *accessorium sequitur principale*; similarly, the submission of the guaranteed obligation has as effect the submission of the privilege as well, just as the criminal clause is passed on with the main contract;

d) privileges are indivisible [Article 2333 paragraph (2) of the Civil Code]; such a provision is rendered by the legislator in the case of mortgages (Article 2344 of the Civil Code), with the mentioning, equally valid in case of privileges, of the fact that, as a result of its indivisible character, the mortgage “completely regards all encumbered assets, each and every one of them and each of their parts.” Therefore, the privilege is not divisible, it continues to exist even if part of the debt has been paid, much as the remaining part of a partially disposed asset is intended to

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has made these expenses is entitled to their recovery before other concurrent creditors; salaries are privileged debts and will be paid with priority because employees do not take part in the risk of the employer’s enterprise etc. (P. Vasilescu, *Drept civil*, 140).

<sup>13</sup> P. Vasilescu, *Drept civil*, 140.

<sup>14</sup>P. Vasilescu, *Drept civil*, 142; I. Dogaru, and P. Drăghici, *Drept civil. Teoria generală a obligațiilor*, 2<sup>nd</sup> Edition (Bucharest: C.H. Beck, 2014), 764.

<sup>15</sup> L. Pop et al., *Tratat elementar de drept civil*, 801.

guarantee the entire privileged debt; equally, the privilege is indivisible in case of the debtor's decease;

e) privileges are in principle occult, in the sense of Article 2334, which provides that privileges are opposable to third parties, without their entry into publicity registers being necessary (Land Registers in case of immovables, or Electronic Archive in case of movables), except as otherwise provided; therefore, privileges are opposable *de jure*, because they exist as a result of the legislator's will<sup>16</sup>;

By exception from this rule, on the basis of Article 2342 paragraph (2) of the Civil Code, publicity formalities are necessary so that the privileges be opposable in the following cases: i) when the special privilege is in concurrence with the perfect movable property mortgage, the first is preferred before the latter if the privilege is registered with the Archive before the mortgage has become perfect; ii) when the special privilege is in concurrence with the immovable property mortgage the first is preferred before the latter if the privilege is registered with the Land Register before the mortgage has been registered. With regard to these exceptions, it has been said that in their case "the publicity formalities are not rank constitutive, but rather rank conservatory"<sup>17</sup>.

## CLASSIFICATION OF PRIVILEGES

If we consider the provisions of the Civil Code, we must divide privileges into two categories: general privileges, on all debtor's movable and immovables (Article 2338 of the Civil Code) and special privileges, on particular, individually determined movables (Article 2339 of the Civil Code).

From the law (Article 2338 of the Civil Code) equally results that, depending on the nature of the asset that is to be sold, for its price to be intended to the payment of the privileged debt, general privileges can be movable or immovable, and special privileges can be movable.

The doctrine suggests further classifications of privileges<sup>18</sup>:

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<sup>16</sup> P. Vasilescu, *Drept civil*, 142.

<sup>17</sup> P. Vasilescu, *Drept civil*, 142.

<sup>18</sup> P. Vasilescu, *Drept civil*, 144-145; I. Adam, *Drept civil. Teoria generală a obligațiilor*, 2<sup>nd</sup> Edition (Bucharest: C.H. Beck, 2014), 765.

a) depending on their legal nature, privileges are divided into legal causes of preference (category within which general privileges are framed as well) and privileged real guarantees (such as privileged movable property mortgages, regulated by Article 2425 of the Civil Code). The two types of privileges differ due to the fact that each one of them enjoys a different legal regime, as well as due to the fact that privileged movable mortgages accord the creditor not only the right of being paid with priority from the price obtained as a result of the sale of the asset (as general privileges), but also the seizure right of the asset;

b) according to the legal texts, a distinction is made between general law privileges (regulated by the Civil Code and the Code of Civil Procedure) and privileges regulated by special laws (such as those pertaining to the Code of Fiscal Procedure, the law of bankruptcy etc.). The distinction between them is essential because, according to Article 2336 paragraph (2) of the Civil Code, general law privileges are preferred before privileges created through special laws, if these laws do not expressly mention that the privilege they create ranks higher than those under general law;

c) according to the criterion of publicity to which privileges are subjected, a distinction is made between occult privileges, which represent the rule and are directly derived from law, in the absence of the fulfilment of any formality for their efficiency, and public privileges, in whose case the inclusion in the register is, by way of exception, required. Thus, according to Article 153 of Law no 71/2011, preference accorded to the state and administrative-territorial units for their debts will be opposable to third parties and will acquire priority rank from the moment that the entry into the publicity registers has been made public. Furthermore, the condition of publicity is equally required in case of the privileged movable property mortgage, regulated by Article 2424 of the Civil Code, as well as in case of the special movable privilege when it is concurrent with a mortgage, regulated by Article 2342 paragraph (2) of the Civil Code.

## **GENERAL PRIVILEGES**

These privileges have as object all debtor's movables and immovables and are characterised by the fact that the privileged creditor can seize any of the debtor's assets for realisation of their debt, and if several creditors exist, the order according to which the debts are paid is the one established by law, the privilege thus being exercised on the price obtained from the enforced sale of the asset. The perishing of the asset seized by the privileged creditor does not result in the termination of the privilege, because the general privilege "regards a universality of assets, and the perished asset will be replaced by another from the debtor's patrimony"<sup>19</sup>.

The Civil Code does not identify general privileges and does not establish the order of preference and their principles of exercise, referring instead to the Code of Civil Procedure.

In case of a plurality of privileged creditors, whose debts have the same order of preference, the principle of equality of (privileged) creditors is applied and consequently, the price obtained from the sale of the debtor's assets is divided among creditors in proportion to the value of each one's debt.

## **SPECIAL MOVABLE PRIVILEGES**

These privileges have as object particular movables, established by law, which the creditors of particular debts can sell in order to satisfy with priority their debts.

The Civil Code regulates two special movable privileges: the privilege of the seller of movables and the privilege of the person who exercises a retention right. Thus, according to Article 2339 of the Civil Code, privileged debts on particular movables are the following:

a) the debt of the unpaid seller for the price of the movable asset sold to a natural person is privileged with regard to the asset sold, with the exception of the case in which the buyer acquires the asset for the service or exploitation of an enterprise. When the buyer sells the asset as well, the privilege of the seller of movables is removed (therefore, by way of exception, the owner of the privileged debt has a right of seizure

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<sup>19</sup> P. Vasilescu, *Drept civil*, 145.

as far as their debtor's asset is concerned) and can be exercised on the resold asset, even if the price of the second sale is yet unpaid by the second seller, with preference as concerns the privilege which the first seller would enjoy (Article 2341 of the Civil Code).

With regard to the justification of the unpaid seller's privilege, the doctrine establishes that this privilege is founded on reasons of equity, because "it would be unfair for the buyer or a third party to profit from the seller's impoverishment, who has not received payment of the price for the transferred asset." Privileges being of strict interpretation, this privilege cannot extend, by analogy, to the co-contracting parties, the annuitants, the unpaid balancing payment creditors, the unpaid movable sellers etc.. The movables seller's privilege favours only the price-debt and its accessories<sup>20</sup>;

b) the debt of whoever exercises a retention right is privileged with regard to the asset on which the retention right is being exercised, for as long as this right subsists. The justification of the retainer's privilege is founded on the idea of pledge or the idea of asset conservation: "the retainer's privilege constitutes the only exception from the rule according to which privileges are guarantees without dispossession, as well as from the rule according to which, in this matter, the cause of the favoured debt counts"<sup>21</sup>.

Unless otherwise provided, the special privilege becomes extinct through the disposal, transformation or perishing of the asset, because these privileges as well, like general privileges, ensure only a preference right, and not a right of seizure as well, as real guarantees do. Furthermore, unless otherwise provided, special privileges become equally extinct with the guaranteed obligation (Article 2340 of the Civil Code).

Privileged movable privileges bear similarities with privileged movable property mortgages, regulated by Article 2425 of the Civil Code; these mortgages are the following:

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<sup>20</sup> P. Vasilescu, *Drept civil*, 147; in the same respect, please also see I. Adam, *Drept civil*, 767.

<sup>21</sup> P. Vasilescu, *Drept civil*, 147.

a) the mortgage constituted in favour of an asset seller or a creditor who has offered loan for the purchase of the asset. This mortgage has priority over a previous mortgage, if the following conditions are cumulatively fulfilled: i) before the debtor (the buyer of the asset or the borrower) can obtain possession of the mortgaged asset, the notice must be registered with the Electronic Archive; ii) the seller or, where applicable, the creditor informs the mortgage creditor in writing beforehand with regard to the sale and the registration of the mortgage [Article 2425 paragraph (1) of the Civil Code];

b) the mortgage on crops or the products which will be obtained through its exploitation, constituted with the scope of obtaining the necessary amounts for producing the crop, as well as the mortgage constituted during the period of plant growth or in the course of a six-month period before the harvest. These mortgages are preferred from the moment of their registration with the Electronic Archive before any other mortgage [Article 2425 paragraph (2) of the Civil Code].

The text of Article 1425 paragraph (2) of the Civil Code corresponds to Article 33 letter b) of Title VI of Law no 99/1999 (title repealed by Law no 71/2011). With reference to this article, the mentioning, also valid for the current regulation, has been made in doctrine, that in the absence of a period provided by law, within which the guarantee should be registered with the Electronic Archive, the fact must be admitted that such a guarantee can be made public at any time and that, from the moment of the registration of the guarantee with the Electronic Archive, it acquires priority rank over any other real encumbrance which burdens the crop or its products<sup>22</sup>;

c) the mortgage on flocks and their products, constituted with the scope of ensuring the funds that will enable whoever has constituted the mortgage to purchase forage, medicine or hormones, necessary for feed or animal treatment. This mortgage has priority over any other mortgage constituted on the same asset or its products, other than the forage, medicine or hormone seller's mortgage. Given that the legal text makes reference to two mortgages, it is clear that in case of concurrence among

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<sup>22</sup> R. Rizoiu, *Garanții reale mobiliare. Legislație comentată și adnotată* (București: Universul Juridic, 2006), 223.

them, the forage, medicine or hormone seller's mortgage takes priority over the other one [Article paragraph (3) of the Civil Code].

These privileged movable property mortgages cannot be confused with special movable privileges which are simple causes of preference awarded by law to a creditor in consideration of their debt. Privileged movable property mortgages "ensure priority to the privileged mortgage creditor on a previous mortgage"<sup>23</sup>.

By way of exception from the rule according to which the rank of perfect mortgages is determined according to the order of mortgage registration, privileged movable property mortgages, regulated by Article 2425 of the Civil Code, will have priority over normal movable property mortgages already registered with the Electronic Archive. On the other hand, according to Article 2342 of the Civil Code, privileged movable property mortgages (and any mortgage) will rank second in case of concurrence with privileged debts on particular movables (special privileges provided by Article 2339 of the Civil Code).

Privileged movable property mortgages and special movable privileges differ considerably. Thus, mortgages dispose of seizure right, whilst privileges do not; the privileged creditor is preferred by law before the other creditors (including the creditor of a privileged movable property mortgage), even if their rights have arisen or have been registered beforehand (Article 2335 of the Civil Code). Mortgages are founded on party convention, whilst privileges are the legislator's work exclusively<sup>24</sup>.

Privileged movable property mortgages bear similarities with normal movable property mortgages in that they are both founded on a contract of guarantee and both give rise to a real movable mortgage right. They differ nonetheless in that the law accords priority to creditors who own privileged movable property mortgages over those who own only normal mortgages<sup>25</sup>.

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<sup>23</sup> P. Vasilescu, *Drept civil*, 147; in the same respect, please also see I. Adam, *Drept civil*, 768.

<sup>24</sup> P. Vasilescu, *Drept civil*, 180.

<sup>25</sup> P. Vasilescu, *Drept civil*, 176.

## **CONCURRENCE OF CAUSES OF PREFERENCE**

Legal references in this matter are either the Code of Civil Procedure (which establishes the order of priority of general privileges), or the Civil Code (which provides the rules of exercise concerning the remaining causes of preference).

**A.** With regard to the order of priority of general privileges, therefore with regard to the release and distribution of the amounts obtained through legal seizure, the Code of Civil Procedure establishes the following rules:

a) if there is just one seizing creditor, upon withholding of enforcement expenses, when appropriate, the amount of money obtained through legal seizure is released to the creditor until full coverage of their rights, and the remaining available amount is handed to the debtor (Article 863 of the Code of Civil Procedure).

b) if there are several creditors who benefit from general privileges, who do not have order of preference, i.e. in case the legal seizure has been commenced by several creditors or when, until release or distribution of the amount resulted from enforcement, other creditors have submitted their titles, unless otherwise provided by law, the bailiff proceeds to the distribution of the amount according to the order of preference established by Article 864 of the Code of Civil Procedure, namely:

i) debts representing trial expenses, for precautionary measures or enforcement, for assets conservation whose price is distributed, any other expenses incurred in the creditors' common interest, as well as debts arisen against the debtor for expenses incurred on fulfilment of conditions or formalities provided by law for obtaining the right to the awarded asset and its registration with the register;

ii) debtor's funeral expenses, in relation to their fitness and state of health;

iii) debts representing salaries and other debts equated to those, pensions, sums awarded to the unemployed according to law, aids for children care, as well as for maternity, temporary work incapacity, sickness prevention, health recovery or strengthening, decease aids paid

under social insurances, and debts representing the obligation of death caused damage repair, personal or health injury;

iv) debts resulting from the legal support obligation, alimony or the obligation to pay other regular amounts for livelihood securement;

v) fiscal debts from taxes, contributions and other legally established amounts, state budget, national social insurance, local budget and special funds budget indebtedness;

vi) debts resulting from state loans;

vii) debts representing compensation for repair of damage to public property due to illicit deeds;

viii) debts resulting from bank loans, product delivery, service supply or execution of works, as well as from rents and rural leases;

ix) debts representing fines granted to state or local budget;

x) other debts.

Provisions of Article 1596 of the Civil Code concerning legal subrogation are applicable for the benefit of whoever pays any of the debts provided by Article 864 paragraph (1) of the Code of Civil Procedure;

c) in case of debts which have the same order of preference the amount raised is divided between creditors in proportion with each one's debt, unless otherwise provided [Article 864 paragraph (3) of the Code of Civil Procedure], i.e. the rule of the equality of creditors is hereby applied, as consecrated by Article 2326 of the Civil Code.

**B.** For other concurrence situations in case of causes of preference, the Civil Code provides the following rules of exercise:

a) if privileged debts come in concurrence with unsecured debts, the privileged creditor is preferred before all other creditors, even if their rights have arisen or have been inscribed in the publicity registers beforehand (Article 2335 of the Civil Code). According to Article 156 of Law no 71/2011, which entails transitory and application provisions concerning Book V "On Obligations" of the Civil Code, "Provisions of Article 2335 of the Civil Code do not also apply to mortgage creditors whose mortgage has been perfected prior to the registration of the privilege."

b) if there is a conflict between general and special privileges, special privileges will have priority. Professor P. Vasilescu considers that this rule, unwritten in the Civil Code, is justified either by the application of the legal principle *specialia generalibus derogant*, or by reasons of equity, since the unsecured creditor can enforce any of the assets included in the debtor's patrimony, and the special creditor can only enforce a particularly determined asset<sup>26</sup>.

c) in case of concurrence among the two movable special privileges [provided by Article 2339 paragraph (1) of the Civil Code], the privilege of the seller for payment of the price has priority over the retainer's privilege; any provision to the contrary is deemed unwritten [Article 2339 paragraph (2) of the Civil Code].

d) privileges regulated by the Civil Code (both general and special privileges) will be preferred, if they become concurrent with privileges created by special laws, if the latter do not specify the rank of the privilege which they create, due to the fact that, in the absence of an exception from general provisions with regard to the order of privileges, general provision will be applied [Article 2336 paragraph (2) of the Civil Code].

e) privileged debts can become concurrent with guaranteed debts with real guarantees; in such cases, the doctrine has proposed the following rules<sup>27</sup>:

i) if there is a conflict between special movable privileges (which have not been registered with publicity registers) and mortgages or pledges (which have not been registered with publicity registers), special privileges will have priority because, by definition, they ought not be inscribed in publicity registers<sup>28</sup>;

ii) if there is concurrence between general privileges and movable mortgages, mortgage creditors will be preferred before those who enjoy general privileges;

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<sup>26</sup> P. Vasilescu, *Drept civil*, 148.

<sup>27</sup> L. Pop et al., *Tratat elementar de drept civil*, 804.

<sup>28</sup> B. Vişinoiu, in Fl.A. Baias, et al., *Noul Cod civil. Comentariu pe articole, art. 1-2264* (Bucureşti: C.H. Beck, 2012), 2290.

iii) if there is a conflict between special movable privileges and mortgages or pledge, the order of payment will be the following: first the debt of the seller of movables, then the debt of the retainer of movables, and then the debt guaranteed through mortgage or pledge [Article 2342 paragraph (1) of the Civil Code];

iv) the creditor who benefits from a special privilege is preferred before the owner of a perfect movable property mortgage, if they register the privilege with the Archive before the mortgage has become perfect [Article 2342 paragraph (2), thesis one of the Civil Code];

v) the creditor who benefits from a special privilege is preferred before the owner of an immovable property mortgage if they register the privilege in the Land Register before the mortgage has been registered [Article 2342 paragraph (2) final thesis of the Civil Code].

f) privileged debts can become concurrent with debts for which the enforcement within the special bankruptcy procedure is made. If the enforcement is made within the special bankruptcy procedure and several creditors are in concurrence, the regulations provided by the Civil Code and the Code of Civil Procedure do not apply, instead the general order of payment will be pointed at by the law on bankruptcy.

Thus, according to Article 161 of the Insolvency Law, debts are paid in case of bankruptcy in the following order<sup>29</sup>:

1. Taxes, stamps or any other expenses relating to the procedure instituted through the present title, including the necessary expenses for the conservation and administration of assets pertaining to the debtor's wealth, for the continuation of activity, as well as for payment of salaries to employees according to provisions of Articles 57(2), 61 and 73 of the Insolvency Law, subject to provisions under Article 140 paragraph 6 of the Insolvency Law;

2. Debts resulting from financing awarded according to Article 87 paragraph (4);

3. Debts resulting from work relationships;

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<sup>29</sup> Law no 85/2014 concerning insolvency prevention procedures and insolvency was published in the Official Gazette, Part I no 466, June 25<sup>th</sup> 2014.

4. Debts resulting from the continuation of the debtor's activity after the initiation of the procedure, owed to co-contractors according to provisions of Article 123 paragraph (4) of the Insolvency Law and those owed to third party good-faith acquirers or sub-acquirers who return to the debtor's wealth the assets or their equivalent value according to provisions of Article 120 paragraph (2), respectively Article 121 paragraph (1) of Insolvency Law;

5. Budgetary debts;

6. Debts representing the amounts owed by the debtor to third parties, on the basis of some support obligations, alimonies or payment of particular regular amounts for livelihood securement;

7. Debts representing amounts established by the syndic-judge for supporting the debtor and their family, if the latter is a natural person;

8. Debts representing bank credits, with related expenses and interests, debts resulting from product delivery, service supply or other works, from rents, debts corresponding to Article 123 paragraph (11) letter b) of Insolvency Law, including bonds;

9. Other unsecured debts;

10. Subordinated debts, in the following order of preference:

i) debts arisen in the patrimony of bad-faith third party acquirers of the debtor's assets on the basis of Article 120 paragraph (2) of Insolvency Law, as well as credits granted to the debtor legal person by an associate or a stakeholder owing at least 10% of the social capital, respectively of the voting rights in the general associate assembly or, when appropriate, by a member of the economic interest group;

ii) debts resulting from gratuitous acts.

According to Article 162 of the Insolvency Law, the amounts to be distributed among creditors who enjoy the same rank of priority will be accorded in proportion to the allocated amount for each debt, through a final, consolidated table.

Debt owners pertaining to a particular category will be distributed amounts only subsequent to the full satisfaction of debt owners pertaining to the higher hierarchic category, according to the order provided under Article 161 of the Insolvency Law, and in case of

insufficiency of necessary amounts to cover the integral value of debts of the same rank of priority, their owners will receive a bankruptcy share representing the amount in proportion to the percentage which their debt contains in the respective debt category (Article 163 of Insolvency Law).

g) privileged debts can come in concurrence with fiscal debts. If the enforcement falls under the competence of fiscal bodies and several creditors are in concurrence, the regulations provided by the Civil Code and Code of Civil Procedure do not apply, instead the general order of payment will be pointed at by the Code of Fiscal Procedure<sup>30</sup>. Thus, Article 258 of the Code of Fiscal Procedure concerning the order of distribution of amounts obtained through enforcement, provides that, in case the enforcement has been initiated by several creditors or when, until release or distribution of the amount resulted from the enforcement, other creditors have also submitted their titles, the bodies provided under Article 220 of the Code of Fiscal Procedure proceed to the distribution of the amount according to the following order of preference, unless otherwise provided:

i) debts representing any expenses, concerning asset seizure and conservation, whose price is distributed, including expenses concerning the debtors' common interest;

ii) debtor's funeral expenses, in relation to their fitness and state of health;

iii) debts representing salaries and other debts equated to those, pensions, sums awarded to the unemployed according to law, aids for children care, as well as for maternity, temporary work incapacity, sickness prevention, health recovery or strengthening, decess aids paid under social insurances, and debts representing the obligation of death caused damage repair, personal or health injury;

iv) debts resulting from legal support obligation, alimonies or the obligation to pay other regular amounts for livelihood securement;

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<sup>30</sup> Law no 207/2015 concerning the Code of Fiscal Procedure was published in the Official Gazette no 547, July 23<sup>rd</sup> 2015.

v) fiscal debts resulting from taxes, social contributions and other amounts established by law, owed to the state budget, the State Treasury, to the social insurance, local and special funds budgets, including fines owed to state or local budgets;

vi) debts resulting from loans granted by the state;

vi) debts resulting from state loans;

vii) debts representing compensation for repair of damage to public property due to illicit deeds;

viii) debts resulting from bank loans, product delivery, service supply or execution of works, as well as from rents and rural leases;

ix) other debts.

If there are several debts which have the same order or preference, unless otherwise provided, the enforcement amount is divided among the creditors in proportion to each one's debts.

Article 259 of the Code of Fiscal Procedure establishes the following rules concerning the release and distribution of the amounts obtained from enforcement:

i) fiscal creditors who have a privilege by operation of law and who fulfil the condition of publicity or movable asset possession have priority, under conditions provided by Article 227 paragraph (9) of the Code of Fiscal Procedure, as regards the distribution of the amount resulted from the sale, before other creditors who have real guarantees on that particular asset;

ii) the accessories of the main debt provided in the enforceable title follow the order of preference of the main debt;

iii) if there are creditors who have pledge, mortgage or any other real rights as regards the asset sold, which have come to the notice of the enforcement body as provided by Article 239 paragraph (6) and Article 242 paragraph (9) of the Code of Fiscal Procedure, on distribution of the amount resulted from the sale of the asset, their debts are paid before debts provided by Article 258 paragraph (1) letter b) of the Code of Fiscal Procedure. In this case, the enforcement body is required to notify *ex officio* the creditors in favour of whom those encumbrances have been conserved, in order to partake in the price distribution.

## **TERMINATION OF PRIVILEGES**

The general rule instituted by the legislator underlines that privileges become extinct with the guaranteed obligation, unless otherwise provided (Article 2337 of the Civil Code). This manner of extinguishing any privilege is consequence of the fact that privileges are accessory in relation to the guaranteed debt. Consequently, any cause which brings about the termination of the obligation (payment, compensation, remission of debt) has the effect of terminating the privilege that guaranteed it. Give that legal provisions concerning privileges are of strict interpretation, they cannot be conventionally transmitted, much as the privileged creditor cannot but indirectly relinquish the privilege granted by law to their debt, i.e. by relinquishing the execution of the debt<sup>31</sup>.

Special privileges, unlike general ones, become extinct both as a result of the termination of the guaranteed obligation, as well as through the disposal, transformation or perishing of the asset, unless otherwise provided (Article 2340 of the Civil Code). Drawn on this rule, the law has created two exceptions:

i) the seller's special privilege does not terminate through the resale of the movable by a buyer and, if the price of the second sale is still unpaid by the second buyer, the initial seller's privilege is preferentially exercised before the privilege from which the first buyer would benefit (Article 2341 of the Civil Code);

ii) in case the asset subject to a privilege has become extinct or has been damaged, the privilege does not terminate, but it is transferred upon the insurance allowance or, where applicable, upon the owed amount as indemnification (Articles 2330-2332 of the Civil Code).

## **CONCLUSIONS – TRANSITORY DISPOSITIONS REGARDING PRIVILEGES**

According to Article 155 of Law 71/2011 “The establishment, content and opposability of the privilege are subject to the legal provisions in force at the date when they arose.” In other words, all privileges constituted under the Old Civil Law remain valid after the

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<sup>31</sup> P. Vasilescu, *Drept civil*, 151.

entry into force of the New Civil Code. Furthermore, due to the fact that, by fulfilment of publicity formalities, they have become opposable to third parties and have acquired priority rank, these effects are preserved under the current law as well, because publicity formalities for opposability of privileges as concerns third parties are governed by legal provisions in force at the date of their execution, and the privileges for which publicity formalities have been performed before the entry into force of the Civil Code preserve their priority rank acquired according to the law in force at the time of their execution.

Special immovable privileges, according to Article 78 of Law no 71/2011, fall under the following legal regime:

a) all special immovable privileges (and legal mortgages) arisen under the Old Civil Code can still be registered after the entry into force of the New Civil Code either with the old Real Estate Registers, if for the encumbered immovable no new Land Registers are available under conditions provided by Article 58 of Law no 7/1996, or with the new Land Registers, according to the dispositions of the previous Law:

b) special immovable privileges, registered either with the old Real Estate Registers or with the new Land Registers until entry into force of the Civil Code or, where applicable, those privileges constituted under the Old civil Code, but registered after entry into force of the New Civil Code, convert *de jure* into legal mortgages after expiry of a one-year period from entry into force of the Civil Code or, where applicable, from the date of registration and will be subject to dispositions provided by the Civil Code;

c) likewise, from the date of entry into force of the New Civil Code, special immovable privileges provided by special laws become legal mortgages and will be subject to the regime provided by the Civil Code in case of legal mortgages.

The privilege of the state and the administrative-territorial units for their debt (occult under the old Civil Code) will not be opposable to third parties before the moment at which the registration has been made public in the registers. Such a privilege will acquire priority rank from the moment of its registration with the registers (Article 152 of Law no 71/2011).

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# CHALLENGES OF HUMAN RIGHTS INSTITUTIONS IN THE ECONOMICAL MIGRATION AND POLITICAL REFUGEE CONTEXT

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**Abstract:**

*Migration annually amounts to over 1 billion people, mostly because of economics and climate change affecting the habitat of living. The Afro-Arab area recent de-structuring of national states generated an unimaginable phenomenon of flows for political refugees to which was added a great mass of migrants, economically speaking. We are interested in seeing the person's flows target in Europe. How can the cause be resolved and how can be determined the groups, that really needs the statue of refugee versus of the economic reasons attached groups. We would like to respond to the following questions: Migrant status in relation to refugee status; Human Rights Institutions in relation with the political refugee; EU political and legal potential solutions for emigrational person's flows re-seating.*

**Key-words:** migration, refugee, European Union, national states, obligation.

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Developing of the society (Socially, Economically, Religiously) generated a specialization and a modernization of Human Rights legal institution, a real instrument of protection of human liberties. Human rights protection legislation was implemented in society, but in different moments, in different states of the world. There are states, or union of states, where the human rights are real rights guaranteed by Constitution and applied in real life. The society is developed naturally getting to high standards in connection with the fundamental human rights. Other states

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are just pretending the implementation of human rights, stipulating in Constitutions the obligations which are assumed by Treaties, but with a very few utility. Sometimes, the fundamental rights are damaged by the absolute religion influence in the society. Other situations, are telling us that dictatorial political systems have a double standard: in connection with the human rights field, for some people they are respected, but for another kind of population, which are discriminated, these rights are not just avoid, but they are not existing. We are referring to the minorities from some states, where the religion is dominating the political and administrative scene, and even the political power is represented by religious leaders. In this very study, we do not intend in developing an issue on this theme, but we need to underline some aspects. The complicated situation of recent migration to Europe has in its base elements of this philosophy.

In 2012, a group of researchers from Faculty of Law and Social Sciences, University "1 Decembrie 1918" of Alba Iulia<sup>4</sup>, concluded in a study about emigration, that the emigrants flows will use the EU frontiers from Mediterranean Sea (Greece and Italy), but not Romania. The conclusions of this study published, became actuality 3 years after. At that time, the research reflected that though Romania fulfilled the accession criteria to free circulation space – Schengen, the motivation of political refusal that we got had as a base a false anathema – the security of Black Sea Frontiers.

The geopolitical events that occurred on the map of 1989 Europe have led to in depth system changes: i.e. the political, social and economic systems in Romania. Transition from a totalitarian political system to a democratic social system took place through an evolutionary parallelism which alternated between enveloping the Romanian society and adaptation of the legislative mechanisms to build "The State of Law" with democratic meanings. In the past 20 years, Romania has almost completely changed the national legislation starting from substantial changes brought to the Constitution and ending with the rules of law

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<sup>4</sup> Ioan Ganfalean and Manole-Decebal Bogdan, *A Study on Emigration and Immigration Institutions in Romania* (Oradea: Agora, 2012), 33-43.

enforcement. The legislative framework in Romania was adapted to the standards and the EU Directives, and after integration in the European Union, in 2007, Romania has implemented the relevant Community acquis stipulated in the Schengen Agreement and Prüm Convention. The Prüm Convention, provides, among other things, setting up a DNA database and training counselors to detect fake documents of immigrants. The Convention allows direct access to databases containing information on fingerprints, DNA or on vehicles registered in each EU member state of the signatory states.

Our study from 2012 revealed that the frontiers of Greece and Italy are vulnerable. Greece and Italy are members of Schengen and Prüm Free Circulation Treaty, but they are more vulnerable than Black Sea Seaside from Romania. In 2015 the top of migration from Asia, Arabic Peninsula and Africa to Europe, determined a reorientation of migration politics for all countries, especially for European Union Countries. Economical purposes immigration<sup>5</sup> should respond to an evaluation of labor markets from EU, based on common needs, which is able to treat all levels of qualification, and all sectors to consolidate the Europe economy based on knowledge, to contribute to economical raise and to respond the requirements from the labor market.

This should be realized with the full respect of the community preference principle and of the rights of member states to establish the admission contingences, also with the respect of the immigrants' rights and through active implication of social partners and local and regional authorities. Like we find in the European Institutions documents or Lisbon Treaty, EU needs immigrants for economical reasons – to maintain the economy and the industry up. It is a reality that West countries from Europe have an older population that cannot maintain the economy in the world top. The high level of life generates big costs and reduces profitability. In conclusion, West Europe needs labor force, and the influx from East Europe from the 90's was not sufficient to fill this vacuum of labor force.

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<sup>5</sup> *A common immigration politic for Europe: Principles, Actions and Instruments*, (Brussels: 17.06.2008 {SEC(2008) 2026, 2027}).

The statistics are showing that the immigration in EU is a reality. In the present day, the immigration (by the European Community Commission, Brussels, 17.6.2008, COM(2008) 359, The Commission Communication to European Parliament, to Council, to Economic and Social and to Region Committee, *A common immigration politic for Europe: Principles, Actions and Instruments*) is referring to the nationals from third countries and not to EU citizens – it represents around 3,8% of the EU population. Beginning with 2002, in EU was registered between 1.5 and 2 millions arrivals/year. At 1<sup>st</sup> of January 2006, the number of third countries nationals in EU was around 18.5 millions.

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)<sup>6</sup> informed the press: ”Member States reported<sup>7</sup> more than 1 820 000 detections of illegal border-crossing along the external borders. This never-before-seen figure was more than six times the number of detections reported in 2014, which was itself an unprecedented year, with record monthly averages observed since April 2014. The largest number of detections was reported on the Eastern Mediterranean route (885 386), mostly between Turkey and the Greek islands in the Eastern Aegean Sea. However, few applied for asylum in Greece and instead crossed the border to the former Yugoslav Republic of Macedonia and continued through the Western Balkans, initially towards the Hungarian border with Serbia, where they applied for asylum, and then to their final destinations in the EU. As of mid-September, the flow shifted towards the Croatian border with Serbia, following the construction of a temporary technical obstacle in Hungary and the establishment of transit areas for immediate processing of asylum applicants with the possibility of return to Serbia”.

“There are no reasons for us to believe that the immigrations flws will be reduced. On the tradition, Europe has to manifest solidarity to the

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<sup>6</sup>European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established by Council Regulation (EC) 2007/2004.

<sup>7</sup> [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis,2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis,2016.pdf)

refugees and the persons who need protection. Economical differences between developed countries/regions and countries that are to develop, globalization, the commerce, political problems and origin countries instability, possibility of finding a place to work in developed countries are main factors which are influencing the international mobility of persons. In the context of a Europe which is growing old, the potential contribution of immigration to economical performance of EU is significant. The hope of life of Europeans is higher, so called “baby boom” generation is getting to be retired soon, and the nationality rate is very low. In 2007, the active population from EU, we mean the total of persons engaged on the labor market, and of the unemployed people, was situated to approximate 235 million. By the last demographical previsions, until 2060, there is estimated that the population with work age will go down with approximate 50 millions, even the immigration will be maintained to a similar level as in history, and approximate 110 millions, if the immigration will not be calculated. Previously described evolutions represent risks for pension’s system viability, of health and social protection, and means rising of public costs. Immigration is a reality which has to be efficiently managed. In an open Europe, without internal frontiers, no one of the member states can manage the immigration by its own. Immigration is a very important issue for developing of Lisbon Strategy, for raising the number of jobs and economical raise. The proper management of immigration is an essential element of competitiveness in EU, which was also a fact recognized by the European Council beginning with 2008. Next to economical potential, immigration is also able to enrich European societies, culturally speaking. In spite all of these, the positive potential of immigration, can be obtained if the integration in host societies is successful”<sup>8</sup>.

To these economical immigration causes, during 2014-2015, were added bigger flows of political asylum seekers, from states such: Syria, Iran, and Iraq, where the political and military conflicts destroyed the

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<sup>8</sup> European Community Commission, Brussels, 17.6.2008, COM(2008) 359, The Commission Communication to European Parliament, to Council, to Economic and Social and to Region Committee, *A common immigration politic for Europe: Principles, Actions and Instruments*.

homes and generated insecurity for citizens. “Arabic spring” revolutions were not able to resolve the social stability of populations from conflict zones, contrary, they amplified the citizen’s insecurity, many of them asked for political asylum. Another component, that was tolerated till some certain point by International Organizations specialized in human rights, was the appearance of some politically-religious movements, which showed another values for human liberties, than the ones that are accepted by the modern contemporary society. This political movement hoped to be accepted as a State with Islamic fundamental values. Implementing of these religious values, conducted to executions, values destroying, and generated population exodus from the areas that took the power by force.

The sum of these factors generated ample and complex moves of political and economical people migration, from south to north-west in Europe. We will represent that by the next figure:



Source: FRAN, JORA and Croatian Ministry of Interior data as of 6 April 2016. Data presented refer to the number of detections of illegal border-crossing at the external borders of the European Union. Illegal border-crossings at the external borders may be attempted several times by the same person.

The Figure, called Migratory flows to European Union, has as a source: FRAN, JORA and Croatian Ministry of Interior data as of 6 April 2016. Data presented refer to the number of detections of illegal border-crossing at the external borders of the European Union. Illegal border-crossings at the external borders may be attempted several times by the same person.

As we can observe the Arabian countries like Syria, Iran, Iraq provides the highest number of economic migrants and political asylums. Next to these, other persons have been joined, from countries like Afghanistan, Sudan, Somalia or Eritrea.

The statistics are showing us that majority are young people, men and sometimes families with small children.

We can also notice that in 2015, the balance of interests was out of control and it was produced a disequilibrium. Europe was not (and it is still not) prepared for such a large influx of immigrants. Even if countries like Germany<sup>9</sup>, are willing officially millions of immigrants, from who to select, that to redistribute them to other states, we think that the other countries from Europe does not agree this sort of politics, and the citizens from all the states does not tolerate the immigration. The main considerate for saying no, is the difference of cultural system (religions, traditions, culture, civilization, values, social behavior etc.). Such an exodus is diluting the organization and European society in its ensemble.

Practically speaking is very hard to make a distinction and to sort from the migration people. Who are the real political asylums and who are the economic immigrants? There is a very high risk of insecurity generated by the infiltration of some indoctrinated people, who can respond any time to some sort of orders from terrorist networks.

Juridical doctrine in human rights is making us to wonder: the fundamental rights have to be a facultative CARTA for some states?

1. Dictatorships and religious leaderships that run in some states by not respecting the human fundamental rights are generating emigrations and of course that people from these states are willing to move in other countries where the human rights are respected.
2. Asylum seekers, if they are too many, are generating disequilibrium in the host states and they cannot be assimilated in societies where they all want to live.
3. Differences of culture, civilization and religion are making living together to be impossible.

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<sup>9</sup> Germany established some criteria for immigrants to get them the Visa (people with university studies or qualified for certain jobs).

4. Economic immigrants and asylum seekers will become in short time minorities, who will expect, in a natural way, to have respected their fundamental rights, based on the provisions of Fundamental Human Rights Carta implemented in European Union in 2000.

In this point, the fundamental rights accorded to the newcomers are producing limitation of real fundamental rights of the persons who are already integrated in a certain cultural system, that we defined before. In a natural way, we have the following question: Who is able to manage this situation, and which is the path to follow?

We allow ourselves to make a few approaches.

Europe needs an external policy with a common agenda for all the states and not different policies based on economic and social own interests of countries with developed industry like Germany, in spite of smaller countries or East countries.

The legal immigration has to be correlated with the elimination of the illegal hiring possibility (on black labor market), a situation that generates an abuse and disrespecting of human liberties and rights.

The economic, social and international immigration problem should be included in all connect politics field. The implication of EU next to other states in the matter of conflicts settlement, which generates flows of asylum seekers and economic immigrants.

Should be taken measures for stopping the illegal migration, for dismemberment of smuggling and human traffic networks, and also measures for policy optimization for returning the people in their origin states.

Salvation of human lives and security of external frontiers: this thing involves a better management of external frontiers, especially by solidarity with the member states which are situated at external frontiers, also the improvement of efficiency of customs points.

There is the need of consolidation of common policy in asylum matter: there has to be solidarity for those who need international protection, but also between member states of EU. Applying of the common rules for it should be done by a systematic monitoring.

We think that it is very important to be developed a new policy about the legal migration: the new policy should focus on attracting qualified workers, because EU economy needs it, and especially thorough recognizing the qualifications.

## CONCLUSION

Based on the analysis of European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) which shows that: *"The EU external borders are confronted with three major challenges: an unprecedented rise in migratory pressure, an increasing terrorist threat and a steady rise in the number of regular travellers. The challenge for border-control authorities is thus to become more effective and efficient whilst maintaining the necessary quality standard"*<sup>10</sup> we say that:

1. There is a need of harmonization of Germany interests with the other states interests, essential in the immigration equation. The crisis cannot be solved by an individual approach, just by respecting the signed treaties.
2. An aspect that began to be framed on policy level is the influence on policies in origin states of immigrants, but also in transit states: at 18<sup>th</sup> of March 2016, the state's presidencies from EU and Turkey decided to put a stop on illegal migration from Turkey to EU. The treaty got in force on 20<sup>th</sup> of March 2016 and there was decided that the persons who are getting in Greece, will be returned or reestablished beginning with 4<sup>th</sup> of April 2016.<sup>11</sup>
3. It is necessary to activate an informational community (of informational services) for being able to identify the persons and to decide if they are asylum seekers or economic migrant.
4. Quotas distribution should be made just for asylum seekers, not for persons who take advantage of conflicts and they join the asylum seekers based on the wish of having a better life.

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<sup>10</sup> [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf)

<sup>11</sup> <http://www.consilium.europa.eu/fr/press/press-releases/2016/03/18-eu-turkey-statement/>

5. The principles of Human Rights Carta should be respected and enlarged for populations, but not so much to affect the population who accept the newcomers.
6. Implementation of economic embargo policy for the states who does not respect the fundamental rights, and maybe an isolation of political and religious leaders from these states (it is very interesting that these persons are admiring the European value standard, they travel free in Europe, but in their own countries they do not allow the same rules and contrary they are stopping the progress).
7. European Union should become more powerful in the context of this crisis, the only option to maintain the peace.
8. As some researchers appreciate<sup>12</sup>, the effects that immigrants as consumers exert on the demand for labor have so far received little attention in the literature and therefore warrant more rigorous analysis in the future.

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<sup>12</sup> Claudio, Labanca, *The Effects of a Temporary Migration Shock: Evidence from the Arab Spring Migration Through Italy* (March 11, 2016). SSRN: <http://ssrn.com/abstract=2746617>

# ROMANIAN CITIZENSHIP IN THE EUROPEAN FRAMEWORK

Mircea CRISTE<sup>1</sup>

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## **Abstract:**

*Citizenship represents an important part of constitutional law, establishing the ways in which you can acquire and lose this quality, as well as the rights and obligations specific to citizens. The quality of being a citizen is acquired, according to the legislation of each state, through implementation of one of these two enshrined principles, jus sanguinis or jus soli. In general Romanian law for citizenship applies the jus sanguinis principle and when this principle cannot be applied because the bloodline is unknown, the jus soli principle is applied as an exception and only until the bloodline is determined. The evolution of the concept of the European citizen is incorporated in the concept of European identity. Romanian citizens can appeal their rights before the Romanian state authorities, rights that are anchored in the Romanian Constitution and also rights given to them as European citizens.*

**Key-words:** *citizenship, fundamental rights, freedom of movement, political rights, European Union.*

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## **INTRODUCTION**

Citizenship represents the legal bond between a person, as member of a collective, and the state in which that collectivity lives. The content of this important legal institution belonging to constitutional law is given by a set of legal norms that regulate the acquirement and loss of this quality, also referring to the rights and obligations particularly meant for citizens<sup>2</sup>. From this perspective, we can define citizenship as both a legal institution that includes the regulations set for acquiring and losing citizenship, and, a legal state designed for an individual and meant to be used in the interactions with the state<sup>3</sup>. Citizenship can also be

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<sup>2</sup> Ștefan Deaconu, *Drept constituțional* (Bucharest: C.H. Beck, 2013), 118.

<sup>3</sup> George Gîrleşteanu, *Drept constituțional și instituții politice*, (Bucharest: Universul Juridic, 2012), 15, and Ștefan Deaconu, *Drept constituțional*, (Bucharest: C.H. Beck, 2013), 119.

approached from a political perspective when it is seen as an individual's way of belonging to a human collective such as a nation<sup>4</sup>, organized into a state, such as when one refers to individuals as Germans, English, French, Romanian, Moldavian etc.

Citizenship appears as a multifaceted concept that can be approached from different angles: historical, cultural, social and legal. In the last mentioned perspective, citizenship is a non-economic concept, which implies the exercise of civil or fundamental rights, and also the exercise of generic rights such as political and social rights<sup>5</sup>. The origin of the notion of citizenship can be traced back to Ancient Greece and Rome, in the concepts of *politeia* and *civitas*, in a time when the lives of common men started to move away from the familial circle and started to gravitate around the community to which they belonged through birth. The birth of modern states, extended political collectives, determines the need for a common identity, which is used between the borders that define these states.

Essential contribution comes from the 1789 French revolutionaries who promoted The Declaration of Rights of Man and of The Citizen. Placing the citizen on the same level as a political being, comes to underline, that people become free through their quality as members of the city, and, specifically that this quality is the one that guarantees and protects their natural rights: the citizen represents the free man, owner of immutable rights. Under the influence of Age of Enlightenment the 18<sup>th</sup> and 19<sup>th</sup> centuries emerge with a new notion, "state nationalism", a concept that is declining in current times and being replaced by regional nationalism.

## **I. EUROPEAN CITISENSHIP, A SUBSEQUENT CITIZENSHIP**

The quality of being a citizen is acquired, according to the law of each state, by applying one of the two principles proclaimed by law, *jus*

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<sup>4</sup> Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituțional și instituții politice*, (București: C.H. Beck, 2011), 114.

<sup>5</sup> Ralf Dahrendorf, „The Challenging Quality of Citizenship”, in *The Condition of Citizenship*, ed. Bart van Steenberg, (London: Sage, 1994), 10-19.

*sanguinis* or *jus soli*. The *jus sanguinis* principle offers priority to the bloodline connection established between the child and one or both of his parents, therefore the citizenship of the child coincides with the citizenship of his parent or parents. By applying this principle the child is connected to the state his parents belong to and shares the same education and culture as his parents. *Jus soli*, also known as *jus loci*, gives priority to the actual place where the birth occurred and doesn't take parents' citizenship into account. This is a principle applied especially in states built on immigration<sup>6</sup> (Argentina, Columbia, Brazil etc.) but also some European countries, particularly West European countries, where this principle is applied exclusively or together with *jus sanguinis*.

When it comes to acquiring citizenship, the inconvenience of applying two different systems comes from the probability that a person could acquire double citizenship when both principles can be applied, or that a person could become stateless when neither principle can be applied. However, if the state accepts the possibility of double citizenship this could help smooth the integration of European citizenship as part of national citizenship.

Stating from its first article that its purpose is to create a union among the people of Europe, in which decisions are taken as openly as possible, the Treaty on European Union opens up the way to the creation of a pan-European nation. This is a process that effectively takes into account and equally respects member states within the treaty and includes their national identities, inherent in their fundamental structures, as well as their political and constitutional rights.

We can only observe that, moving further from a common international organization meant to integrate aspects of national sovereignty, the European Union represents "a new legal order belonging to international law"<sup>7</sup>. It is the result of a lengthy process, some claiming that its beginning dates back to the early Middle Ages, when the

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<sup>6</sup> Miklos Bakk, „Cetățenia” in Gabriel Andreescu, Miklos Bakk, Lucian Bojin, Valentin Constantin, *Comentarii la Constitutia Romaniei* (Iași: Polirom, 2010), 103

<sup>7</sup> In the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62 (1963).

establishment of the Council of Europe acted as a stepping stone in working towards the Union's creation. This opened the path towards adopting the European Convention on Human Rights and Fundamental Freedoms, an essential moment in creating a European conscience and recognizing each individual as a legal entity, an entity that could represent itself on a European level.

The evolution of the concept of the *European citizen* is determined by the European construction as a whole. As a consequence, during the Common Market, the main focus was on rights that could lead to the increase of each individual's welfare<sup>8</sup>. The treaty that officially established the notion of *European citizen* was signed in Maastricht in February 1992, limiting itself to stating that "every person holding the nationality of a Member State shall be a citizen of the Union". The treaty from Amsterdam, that was signed on October 2<sup>nd</sup> 1997 and became effective on May 1<sup>st</sup> 1999, refers to a set of rights in accordance with a more traditional view on citizenship<sup>9</sup> rather than focusing on a European identity.

According to Art. 20 paragraph (1) from the Treaty on the Functioning of the European Union, Citizenship of the Union shall be additional to and will not replace national citizenship", therefore the quality of being a European citizen becomes dependent on the quality of being a citizen of a country member of the European Union. This principle cannot be inverted since European citizenship does not lead to the acquirement of a citizenship from a member state<sup>10</sup>.

The principle above stated that by losing the citizenship of a state member of the Union, one also loses the European citizenship and the

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<sup>8</sup>Nikos Prentoulis, „On the Technology of Collective Identity: Normative Reconstructions of the Concept of EU Citizenship”, *European Law Journal*, 2 (2001): 199

<sup>9</sup> Louis Dubois and Claude Blumann, *Droit matériel de l'Union Européenne*, (Paris: Montchrestien, 2006), 21.

<sup>10</sup> In the constitutional system of the United States of America appeared a type of federal citizenship according to each individual's residence, 14th Amendment from 1868, established right after the Civil War that Americans are primarily citizens of the federate state where they reside. Peter Schuck, „Citizenship in Federal Systems”, *American Journal of Comparative Law*, 48 (2000): 223

rights and protection derived from it. Although, in practice, this aspect takes more complex forms, such as the situation in which an individual acquires the citizenship of another member state, followed by the withdrawal of this last acquired citizenship. As in this situation the individual cannot go back to his previous citizenship, it means that he or she will be left without European citizenship. Past examples include that of an Austrian citizen, who, prosecuted in Austria for several criminal acts, moved to Germany and received German citizenship. Subsequently, his German citizenship was withdrawn as a sanction for the fact that he had hidden from German authorities that he was being prosecuted in Austria. The German Court of Administration had to consult with the European Court from Luxembourg regarding the following question: does the EU law exclude the loss on European citizenship once national citizenship is lost due to legal revocation? And if yes, which of the two states has to change its legislation in order to comply with this answer? The reply from the European Court reassured the freedom of national states to apply their own laws regarding citizenship, but emphasized the need to have national laws that comply with the values and laws of the Union.<sup>11</sup>

As a consequence, when faced with the loss of his or her Romanian citizenship, a person will also lose their European citizenship, if he or she doesn't own or doesn't immediately acquire the citizenship of another state member of the EU.

But, before debating the cases in which Romanian citizenship can be lost, let's first focus on the ways it can be acquired. According to Art. 4 from Law No 21, Romanian citizenship is acquired by birth, adoption or by request.

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<sup>11</sup> Case *Janko Rottman c. Freistaat Bayern*, C-135/08 (2010).

## II. THE AUTOMATIC ACQUISITION OF THE ROMANIAN CITIZENSHIP

According to Law No 21/1999, Romanian citizenship can be acquired as a result of a right, independent to an act of will by the Romanian state.

As a first case, Romanian citizenship is acquired by *birth*. By reading the first two paragraphs from Art. 5, it can be concluded that, at first sight, Law No. 21/1999 enforces the *jus sanguinis* principle, since it is stated that children born on Romanian territory from parents holding Romanian citizenship are recognized as Romanian. The same law is applied to children born with only one parent holding Romanian citizenship or in the situation where the birth took place on foreign land and one or both parents holds Romanian citizenship. Therefore, it is sufficient for a new born to have one parent who is a Romanian citizen in order to acquire Romanian citizenship, regardless of the citizenship of the other parent and regardless of the country where the birth took place.

The law regarding citizenship also regulates a particular situation, the situation of the child found on Romanian territory and with unknown parents. The law gives Romanian citizenship to the newborn that is found under such circumstances. Are we still, in this case, under the influence of the *jus sanguinis* principle?

Art. 5 from Law No. 21/1999 states: “the child found on Romanian territory is considered a Romanian citizen, unless proven otherwise, if neither parent is known”. Art. 30 paragraphs (1) and (2) from the same law, adds that the found child loses Romanian citizenship if, by the time he turns 18, his affiliation with both parents has been established and they are foreign citizens. Romanian citizenship is also lost if the affiliations have been established only towards one parent foreign citizen, the other parent remaining unknown.

A question arises concerning the principle applied when a child with neither parent known receives Romanian citizenship. Is *jus sanguinis* principle also applied in this particular case or is it *jus loci*?

The first answer, supported by the Romanian legal doctrine, states that the *jus sanguinis* principle is applied, this affirmation being supported by the following arguments<sup>12</sup>:

a) Law No. 21 creates the relative presumption that one of the child's parents had Romanian citizenship, a presumption that can be overturned when proven otherwise (according to Art. 30).

b) If the *jus soli* principle is applied, then the child would keep the Romanian citizenship regardless to the citizenship of the parent known later, since the blood relation would not be taken into consideration<sup>13</sup>.

c) The status of the found child is regulated under the title "Citizenship acquired through birth", therefore the *jus sanguinis* principle is applied.

According to others opinion, *jus soli* is the principle applied under such circumstances. This is based on the fact that the legal presumption, on which the supporters of *jus sanguinis* lean on, should be clearly stated in the citizenship law (*nulla praesumptio sine lege*), which did not happen until 2003. When it was first elaborated, Art. 5 paragraph (3) initially stated that: "The child found on Romanian territory is considered a Romanian citizen if neither parent is known. „This has been modified through No. 43 Government Emergency Ordinance from May 23<sup>rd</sup> 2003, in order to state that: "the child found on Romanian territory *is considered a Romanian citizen, unless otherwise proven*, if neither parent is known". This new draft of the law introduces a relative legal presumption, but this presumption refers to the citizenship of the child found on Romanian territory and does not refer to the citizenship of his

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<sup>12</sup> Tudor Drăganu, *Drept constituțional și instituții politice* (Bucharest: Lumina Lex, 1998), 137; Ștefan Deaconu, *Drept constituțional* (Bucharest: C.H. Beck, 2013), 133; Genoveva Vrabie and Marius Bălan, *Organizarea politico-etatică a României*, (Iași: Institutul European, 2004), 317; Bianca Selejan-Guțan, *Drept constituțional și instituții politice*, (Bucharest: Hamangiu, 2008), 107-108; Muraru and Tănăsescu, *Drept constituțional și instituții politice*, 128.

<sup>13</sup>Tudor Drăganu, *Drept constituțional și instituții politice* (Bucharest: Lumina Lex, 1998), 138.

parents, since the child is considered a Romanian citizen without having the law presume the citizenship of his parents<sup>14</sup>.

If we apply the *jus sanguinis* principle together with the presumption that one of the parents has Romanian citizenship, and exclude the *jus soli* principle, this can have certain consequences. In the event that the child turns 18 and has established the identity of one of the parents as being foreign citizenship and the identity of the other parent remains unknown, the child would still maintain his Romanian citizenship.<sup>30</sup>This is all contrary to what is stated in Art. 30. This situation is created by the fact that nothing can explain why the presumption of Romanian citizenship should stop being applied for the parent that remains unknown.

The text of the law introduces the territorial element, by mentioning the place where the child is found. This clause is similar to the one contained in Decree No 125/1948 regarding citizenship, which presumed that the children found on the territory of the former Romanian People's Republic were born in Romania, until otherwise proven.

This lead to the conclusion that the last paragraph of Art. 5 from Law No. 21/ 1991, as an exception and only with a complementary value gives power to the *jus soli* principle.<sup>15</sup> The Romanian law applies the *jus sanguinis* principle as a general rule, and when this principle cannot be applied since the bloodline is unknown, the *jus soli* principle is applied only until the bloodline remains unknown. When one of the parents becomes known, the *jus sanguinis* principle is reactivated.

An example from comparative law refers to a similar vision in Italian legal system, where it recognized as Italian citizen a found child with neither parent known. In this particular case, the Italian law applies the *jus loci* principle<sup>16</sup>.

The **adopted** child has the right to Romanian citizenship if the adoptive parents are Romanian citizens (Art. 6 from Law No. 21/1991).

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<sup>14</sup> Idea found also in Genoveva Vrabie and Marius Bălan, *Organizarea politico-etatică a României*, (Iași: Institutul European, 2004), 317.

<sup>15</sup> Mircea Criste, *Drept constituțional și instituții politice* (Timișoara: Mirton, 2004), 162-163.

<sup>16</sup> Federico del Giudice, *Diritto costituzionale* (Napoli: Simone, 2005), 20.

If over 18, the adopted person can accept or refuse Romanian citizenship. This legal state is created by the conception that the adopted child is equal to the child born from parents Romanian citizens. The laws regulating Romanian citizenship base themselves on rights derived from blood relations, since these connections imply and affective bond between parents, child and country.

A particular situation can arise when only one of the adoptive parents has Romanian citizenship. In this case, if the adopted person is underage, the citizenship is decided by the parents, and if they do not reach an agreement, the Court that consented to the adoption will choose the child's citizenship taking into account his best interest.

The adopted child who turned 14 will be asked for consent when his citizenship is changed. This consent refers to a change in citizenship and is different from the one given towards adoption (Art. 17 from Law No 273 from June 21<sup>st</sup> 2004)<sup>17</sup>. If there is only one adoptive parent, and they are Romanian citizenship, then the child also acquires Romanian citizenship.

If the adoption is invalidated or canceled, the child that did not turn 18 will be considered to have never had Romanian citizenship if he resides abroad or if he leaves the country in order to live abroad (Art. 7 from Law No 21 /1991). If the adoption is later broken, the minor will lose his Romanian citizenship from the moment adoption ceases and if the child already lives abroad or leaves the country in order to live abroad.

Another situation concerns the acquisition of Romanian citizenship when the affiliation towards the second parent is later established. In this particular situation, parents have different citizenships, one foreign and the other, Romanian. The law gives the child the right to acquire Romanian citizenship as a consequence of the established filiation.

When *a parent* without citizenship or with foreign citizenship ***decides to acquire Romanian citizenship***, the child under 18 acquires

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<sup>17</sup> Republished in *Monitorul Oficial* nr. 788 on November 19th 2009 and modified through Law No. 71/2004, published in *Monitorul Oficial* No. 409/2011.

Romanian citizenship at the same time with his parent due to the blood relation between the two (Art. 9 from Law No. 21/1991 republished). In the situation in which only one of the parents acquires Romanian citizenship, the parents will agree upon the citizenship of their child. If they do not reach an agreement, the Court under whose jurisdiction the minor finds himself will decide his citizenship. The minor who already turned 10 is considered able to express his consent in front of a public notary.

### **III. THE ACQUISITION OF ROMANIAN CITIZENSHIP AS A RESULT OF AN INDIVIDUAL LEGAL ACT**

Law No. 21/1991 regulates cases where Romanian citizenship is acquired as a result of an individual legal act coming from the state administration. The law takes into consideration two situations. When the person requesting a Romanian citizenship previously held this quality, the state administration is confronted with a case of repatriation, and, a person who receives Romanian citizenship for the first time is considered a case of naturalization.

After the president of the National Citizenship Authority communicates his dispositions, the person receiving Romanian citizenship has 3 months to take the oath of allegiance to the Romanian state. Citizenship is fully acquired only after that moment. If the person does not take the oath during those 3 months, the effects of the order to be granted or reacquire Romanian citizenship will cease for that respective person.

Art. 10 from Law No. 21/1991 states that Romanian citizenship can also be granted to persons over 18 who have lost their citizenship and *request reacquisition*, as well as to their descendants to the second degree inclusively. They can request reacquisition while maintaining the foreign citizenship and establishing their residence in the country or maintaining it abroad, if they prove loyalty towards the Romanian State through their behavior, actions and attitude, do not carry out or support actions against the rightful order or national security and declare that they has never before carried out such actions, and have legal means for a decent

existence in Romania, under the conditions stipulated by the legislation regarding foreigner status.

Under same conditions, except for the proof of legal means for a decent existence in Romania, the persons who acquired Romanian citizenship by birth or adoption and have lost it for reasons non-imputable to them or it citizenship has been revoked without their consent, can apply to reacquire or can be granted the Romanian citizenship, having the possibility to maintain the foreign citizenship and to establish residence in the country or to maintain it abroad. The same applies to descendants up to third degree<sup>18</sup>.

Reacquisition of citizenship under the above stated conditions can take place regardless if the applicant maintains his foreign citizenship or not or if they are resident of the country or not. The reacquisition of citizenship by one of the spouses has no consequence on the citizenship of the other spouse. The spouse of the person who reacquires Romanian citizenship can request Romanian citizenship under the conditions of the law regarding naturalization.

In order to acquire citizenship through naturalization, the person requesting citizenship has to comply to the following requirements: is 18, was born and resides on the Romanian territory at the date of request or have been residing legally on Romanian territory for at least 8 years or married to and living with a Romanian citizen for over 5, proves loyalty towards the Romanian State through behavior, actions and attitude, does not carry out or support actions against the rightful order or national security and never before carried out such actions, owns legal means for a decent existence in Romania, have a general good behavior and have not been convicted in the country or abroad for a crime that makes them unworthy of being Romanian citizen, knows Romanian language and acquired basic notions of Romanian culture and civilization and is

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<sup>18</sup> By Government Emergency Ordinance No. 68/2002, the conditions for the reacquisition of Romanian citizenship extended in order to include the situation of the Romanian citizens who, *before December 22<sup>nd</sup> 1989*, have lost Romanian citizenship due to various reasons, or lost it for reasons non-imputable to them or it citizenship has been revoked without their consent. Prior to this Ordinance, persons found under such circumstances if they completed a legal statement at a diplomatic mission or consulate, or in Romania, at a public notary, could request reacquisition.

integrated in society, knows the provisions of the Romanian Constitution and the national anthem.

The law also refers to *honorary citizenship*, granted to foreign citizens or to stateless individuals. The Romanian Parliament, at the request of the Government, grants honorary citizenship to persons that brought major contributions to the Romanian state. Even if it is considered an honorary title, and foreign citizens receiving it get to keep the citizenship of their country of origin, honorary citizenship offers all the rights the law gives to Romanian citizens except for the right to elect, to be elected and to occupy a position in the public office. Honorary citizenship brings with it the quality of European citizenship but without the possibility to elect or to be elected in the European Parliament and without the possibility to work as part of the public office for any of the EU institutions.

#### **IV. THE AUTOMATIC LOSS OF ROMANIAN CITIZENSHIP**

It can be noticed that, when it comes to acquiring and losing Romanian citizenship, the law follows a symmetric pattern. There is a noticeable difference between losing citizenship through the rule of law or as a result of an individual legal act. Romanian citizenship can be lost, as a rule of law, when the blood relation established between a Romanian citizen and another breaks due to a particular event.

Since *jus sanguinis* represents a general principle, any change regarding parents' citizenship is reflected in the status of the underage child. According to Art 29 from citizenship law, the underage Romanian citizen, adopted by a foreign citizen, loses Romanian citizenship if, at the request of foster parents, or foster parent, he acquires foreign citizenship under the conditions stipulated in foreign law. The underage child who turned 14 will be asked for consent.

The date when Romanian citizenship is lost is the date when the underage child acquires the citizenship of the adoptive parent. In order to protect the best interest of the child, if the adoption is annulled or declared invalid, law considers that the child who is not yet 18 never lost Romanian citizenship.

*The child found on Romanian territory with parents unknown*, loses Romanian citizenship if, by the time he turns 18, affiliation towards both parents is established and they are foreign citizens. Romanian citizenship is also lost if the affiliation is established towards only one parent foreign citizen and the other parent remaining unknown. This works as a confirmation that Romanian law applies as a rule the *jus sanguinis* principle, and the *jus soli* principle is applied in exceptional circumstances when the first principle cannot be used.

The blood relation between a minor and his *parents is* broken also when *parents acquire a different citizenship* and lose Romanian citizenship. Romanian law takes into account the best interest of the child, therefore, if both parents obtain acceptance for disclaiming Romanian citizenship, and the underage child lives with them abroad or leaves the country together with them, then the underage child loses Romanian citizenship at the same time with his parents. The underage child that leaves the country, in order to live abroad, after both parents have lost citizenship, also loses his Romanian citizenship on the date he leaves the country. The same provisions apply also in case only one parent is known or alive.

The underage child, entrusted through a court decision to the parent who resides abroad and who has disclaimed the citizenship, loses the Romanian citizenship at the same time as the parent he was entrusted to and lives with, provided he has obtained the consent of the other parent who is a Romanian citizen. The child who has turned 14 will be asked for his consent.

## **V. THE LOSS OF ROMANIAN CITIZENSHIP AS A RESULT OF AN INDIVIDUAL LEGAL ACT**

The law regulates the situations in which citizenship is lost as result of the intervention of the state authorities or when a Romanian citizen requests the procedure.

The Romanian citizenship can be withdrawn as a measure of sanction if a person:

a) commits very serious crimes outside of the country, and as a result injures the interests of the Romanian state or its authoritativeness;

enlists himself in the army of a state that Romania broke any diplomatic relations with or is at war with;

b) illegally obtained Romanian citizenship<sup>19</sup>;

c) is known for connections with terrorist groups or supported them in any way, or committed other crimes that endanger national security.

Withdrawing of citizenship has no effects on citizenship of the spouse or the children.

Anybody of authority or person aware of any reason for withdrawing a person's Romanian citizenship can notify, in written format, the Citizenship Commission, having an obligation to disclose any evidence they might have. The President of the Commission will request a statement from the competent body of authority, will discuss with the person or authority that filed the notice and will contact the accused person 6 months prior to the date when the case will be debated.

A particularly important rule is found in Art.5 paragraph (2) from the Constitution of Romania, reinforced by Art.25 paragraph (2) from citizenship law, which proclaim that Romanian citizenship cannot be withdrawn from a person who acquired it by birth. Two questions arise from this law:

Can Romanian citizenship be withdrawn, as a sanction, from the person that acquired it through adoption?

Can Romanian citizenship be withdrawn, as a sanction, from the person that acquired it through repatriation?

In the first situation, although the adopted child has the same rights and obligation as a child born in the family of the adopter, we considered the answer to be yes, since the law refers to the actual act of birth as a way to acquire inalienable citizenship. For the same reason, we believe that in the second situation, citizenship cannot be withdrawn, since the person in case was born as Romanian citizen. Being born as Romanian citizen is considered to create a permanent bond between the individual and the state.

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<sup>19</sup> Professor Tudor Drăganu considers that only through a mistake Law No 21/1999 refers to a <<withdraw>> of citizenship, since the initial acquirement had been illegal, therefore null - Drăganu, *Drept constituțional și instituții politice*, 147.

Art.27 from Law 21/1991 states that *disclaiming of the Romanian citizenship* can be accepted, for substantial reasons, in the case of a person who:

- a) turned 18
- b) is not under charge for or defendant in a criminal case or has to serve a criminal sentence;
- c) is not searched in relation to debts to the state, to certain individuals or corporate bodies from the country, or in case he has such debts, he pays them back or presents adequate guarantees that they will be solved;
- d) acquired or has applied for and has the certainty that will acquire a different citizenship.

Renouncing Romanian citizenship has no effect on the citizenship of the spouse and underage children. If both parents disclaim Romanian citizenship, and the underage child lives already with them abroad or leaves the country together with them, the underage child loses Romanian citizenship at the same time with his parents. The underage child that leaves the country in order to live abroad, after both of his parents lost Romanian citizenship, also loses his Romanian citizenship.

## **VI. THE ROMANIAN CITIZENS, HOLDER OF HUMAN RIGHTS WITH EUROPEAN ACKNOWLEDGEMENT**

The process of European integration lead to a gradual increase in the number of rights recognized to citizens of Member States. This process became visible by switch from a Common Market to the European Community and later, to the European Union. The focus moved from the economic area to the rights of European citizens regarding security and social assistance, and later moved towards political rights derived from European institutions. In this lengthy process, the Court of Justice based in Luxembourg distinguished itself with the focus on social and political aspects, especially when it came to freedom of movement of migrant workers, which the Court has determined as being a right inextricably linked to human dignity<sup>20</sup>.

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<sup>20</sup> Dora Kostakopoulou, „Ideas, Norms and European Citizenship: Explaining Institutional Change”, *The Modern Law Review*, 68(2) (2005): 238-239.

The whole second title from the Constitution of Romania proclaims fundamental rights, stating in its beginning that all citizens shall enjoy the rights and freedoms as are enshrined by the Constitution and laws, and shall be subject to the duties laid down thereby. This statement leads to the conclusion that all constitutional provisions shall be interpreted taking into account the international law regarding human rights that comes to supplement constitutional provisions. A major contribution was brought by the adoption of the Charter of Fundamental Rights of the European Union.<sup>21</sup>

As a consequence, in their interaction with the state authorities, Romanian citizens can appeal to their constitutional rights and also to rights given to them as European citizens. The two categories of rights double themselves since the Constitution of Romania was enforced at the end of the 20<sup>th</sup> century. The principles that govern these rights are similar since the Union was founded with respect towards human dignity, freedom, democracy, equality, the rule of law and consideration for human rights, including the rights of minorities. These values are general to Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (art. 2 TUE).

According to Art 18 and 19 TFUE, within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

A Europe with equal citizens is, at the same time, a Europe with citizens that support each other. Even though solidarity is not a principle mentioned in the Constitution of Romania, it becomes noticeable when the Constitution refers to the social character of the Romanian state and

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<sup>21</sup> The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

the need to ensure a certain level of social justice.<sup>22</sup> On a European level, this principle can be seen through the diplomatic and consular protection offered to all European citizens when outside the EU borders and member states are authorized to come to their help (art. 20 TFUE and art. 46 Charter).

An essential principle for all individual rights and liberties belonging to Romanian and European citizens is represented by unrestricted access to Justice, the Court of Justice of the European Union establishing the right to a judge as a fundamental legal principle in a community guided by the rule of law, such as the EU<sup>23</sup>. The Court has proclaimed a general principle by stating that any act coming from a legal entity of the Union that has legal effects for the parts must be object to a judicial review, as enforced by the decision of the Court from April 23<sup>rd</sup> 1986 *Les Verts*/European Parliament.

The first of the values mentioned in Art.2 TUE is human dignity, value enforced by the constitutions of the democratic with a supreme character and as fundament for all other individual rights and freedoms.<sup>24</sup> From this important value come the Directive 2004/38/EC on the right of citizens of the Union and their family members, regardless of their citizenship<sup>25</sup>, to move and reside freely within the territory of the Member States. In order to maintain the unity of the family in a broader sense the situation of those persons who are not included in the definition of family members, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to

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<sup>22</sup> Also to be found in Dan-Claudiu Dănișor, *Constituția României comentată, Titlul I – Principii Generale* (București, Universul Juridic, 2009), 166.

<sup>23</sup> Case *Johnston*, C-222/84 (1986); Case *Parlamentul c. Consiliul*, C – 70/88 (1990)

<sup>24</sup> Anna Yeatman, *Globality, State and Society*, Citizenship Studies, 3 (7) 2003: 279.

<sup>25</sup> "Family member" means the spouse, the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point, the dependent direct relatives in the ascending line and those of the spouse or partner.

decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen<sup>26</sup>.

Regarding the free movement of persons, Romanians, as European citizens, have the right to enter any member state of the EU and can establish residence abroad in any of the member countries, citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, as stated in Art. 20 and 21 TFUE, Art. 45 from the Charter of Fundamental Rights, and Directive 2004/38/EC<sup>27</sup>. Moreover, even a newborn child holding European citizenship has an autonomous right of residence that has effect on the right of residence of the parent in whose care the child finds himself<sup>28</sup>.

The right to free movement and to establish residency is in direct connection to the right to work and to benefit from social assistance, Art 15 paragraph (2) of the Charter stating that every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. This right is exercised with some legal restrictions meant to protect public health and order<sup>29</sup> and to stop individuals from bringing damage to the system<sup>30</sup>. The access to social assistance has been extended through the jurisprudence of the Court in Luxembourg in order to benefit students and people seeking for

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<sup>26</sup> Directive 2004/38/CE, Art. 3, (2).

<sup>27</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004.

<sup>28</sup> *Zhu and Chen c. Secretary of State for the Home Department*, C-200/02 (2004).

<sup>29</sup> Directive 2004/38/CE, Chapter VI.

<sup>30</sup> Case of *Bonsignore*, C-67/74(1975).

a job<sup>31</sup>, leading to a real social dimension concerning the status of European citizen.

A new right with a particular importance in contemporary democracies is represented by the right to a good European administration, where distinguishes itself each person's right to be heard before taking any individual decision that can lead to damages, the person's right to have access to his or her own personal file with respect towards confidentiality, professional secrecy and trade secrecy. According to the same set of rights, the European administration has the obligation to sufficiently justify its decisions since the Court of the European Union does not shy away from calling off acts of the EU institution based on insufficient reasoning.

The rights to information and to have access to the documents of the European institutions combined with the right to petition represent rights given to Romanian citizen as European citizens. The European institutions may refuse to disclose a particular document if this is justified by an overriding public interest. Applications for access to a document must be made in written form, including electronic form, in one of the languages of the EU. The applicant is not obliged to state reasons for the application. In the event of total or partial refusal, the applicant may make a confirmatory application asking the general secretary of the commission to reconsider its position. If the request is rejected, the applicant can take legal action against the commission in accordance with Art. 230 CE. Only the measure taken by the commission's general secretary can result in legal consequences that can damage the interests of the applicant and can form the object of an appeal.

Political rights given to citizens of the Union represent the main support for the European construction. All citizens have the right to vote and to run for office at the elections held for the European Parliament and at local elections. Not all these rights can be exerted by European citizens in a state different to the state of provenience. For example, they could be

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<sup>31</sup> Paul Craig and Gráinne de Búrca, *Dreptul Uniunii Europene* (Bucharest: Hamangiu, 2009), 1067-1068.

excluded from exercising a role in state authority if the host state does not recognize this right<sup>32</sup>.

Rights regarding the election for the European Parliament do not depend on the right to free movement and the right to establish residency in a country member of the EU. In the cases of *Gibraltar* and *Aruba*, the European Court recognized the citizens' right to vote during election for the European parliament- right given to them as European citizens- with no connection to the right to free movement<sup>33</sup>. Member states have the political authority to regulate and restrict the rights of their own citizen, who have not established residency.

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests, as stated in Art12 paragraph (1) of the Chart of Fundamental Rights. According to Romanian law, European citizens residing in Romania have the right to assembly and to register in political parties the same way as Romanian citizens do. (Art 54 from Law 14/2003).

Every citizen of the EU is to have the right to participate in the democratic life of the Union by way of a European citizens' initiative. The procedure affords citizens the possibility of directly approaching the Commission with a request, inviting it to submit a proposal for a legal act of the Union, for the purpose of implementing the Treaties<sup>34</sup> - right conferred on the European Parliament under Article 225 of the Treaty on

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<sup>32</sup> Regulation (EU) No 492/2011 of the European Parliament and of the council of 5 April 2011 on freedom of movement for workers within the Union and with Art. 51 TFUE, together with provisions of Art. 15 (4) TFUE.

<sup>33</sup> Opinion of Advocate General in cases C-145/04 *Spain vs. United Kingdom*(Gibraltar) and C-300/04 *Eman și Sevinger vs. College van Burgemeester en wethouders van Den Haag* (Aruba).

<sup>34</sup> Art. 2 of Regulation (EU) No. 211/2011The signatories of a citizens' initiative shall come from at least one quarter of Member States. In at least one quarter of Member States, signatories shall comprise at least the minimum number of citizens set out, at the time of registration of the proposed citizens' initiative, in Annex I. Those minimum numbers shall correspond to the number of the Members of the European Parliament elected in each Member State, multiplied by 750. - Art. 7 Regulation (EU) No. 211/2011

the Functioning of the European Union (TFEU) and on the Council under Article 241 TFEU. The Commission has 3 months to examine the initiative. During this time, the Commission meets with the organizers who have the opportunity to present the initiative at a public hearing in the European Parliament. The Commission presents a formal response explaining what it intends to do and the reasons for that decision.

The protection of fundamental rights at EU level is accomplished the same way constitutional rights are protected on a national level. The European Court of Justice based in Luxembourg (resembling a constitutional court) represents the main guardian of fundamental rights. The European Ombudsman completes its intervention. Every citizen of a Member State of the Union or reside in a Member State, as well businesses, associations or other bodies with a registered office in the Union, can make a complaint to the European Ombudsman. Within the framework of the Treaties and the conditions laid down therein, the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role, and make recommendations with a view to putting an end to it. No action by any other authority or person may be the subject of a complaint to the Ombudsman.

## CONCLUSION

Our conclusion resembles the view of the EU Court of Justice when it presented European citizenship as destined to become the fundamental defining status for citizens of Member States<sup>35</sup>. This will lead to a nation formed from nations<sup>36</sup>, a nation build around common core values that transcend nationality<sup>37</sup> in its original sense. A European citizen will represent a member of a new political community, a new type

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<sup>35</sup> *Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve*, C-184/99 (2001).

<sup>36</sup> Jos de Beus, „Quasi-national european identity and european democracy”, *Law and Philosophy*, 20, (2001): 283 – 311.

<sup>37</sup> Joseph H.H. Weiler, „The State überalles”, *HarvardJean Monnet Working Paper* 6, (1995): 41.

of collective identity. European citizenship adds political identity to the preexisting cultural legacy of Europe.

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# CIVIL SANCTIONS IN THE FIELD OF THE DONATION CONTRACT

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**Abstract:**

*Donation continues to remain a complex legal act within the new Romanian Civil Code system too, raising complex issues. Since it is the only contract by means of which a liberality can be made, the Romanian Civil Code provides a special legal regime to it, including provisions that not only do they underline the contextual and formal conditions meant to protect the donor's will, but they also acknowledge the ultimate irrevocable character of a donation. It is precisely in relation with these provisions how we identified the issues related to the sanctions triggered by not observing them.*

**Key-words:** liberality, donation, nullity, revocability, irrevocability.

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## INTRODUCTION

According to article 985 of the Civil Code, donation is the contract by means of which, out of his intention to reward, a party called donor makes irrevocable provisions on behalf of the other party called donee. The current study shall commence with defining the donation contract, with a definition that evokes the main features of it: the intent to reward and the irrevocability of the act. Donation is a liberality, as it irreversibly diminishes the donor's patrimony.

Like any other contract, a donation must comply with the general validity conditions provided for by article 1179 paragraph (1) of the Civil Code, but also with a specific formal condition, provided by article 1011 paragraph (1) of the Civil Code: the condition of the authentic form.

At the same time, an important character of any donation is irrevocability. Thus, besides the irrevocability principle imposed to

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contracts in general, the law also acknowledges a special irrevocability principle in terms of donations, which is instituted by the provisions of article 1015 of the Civil Code. The special character of the irrevocability of donations is provided by the fact that a donation concerns not only the effects, but also the “essence itself of the contract, being a validity condition for that contract to be constituted (2<sup>nd</sup> degree irrevocability)”<sup>2</sup>.

These features of the donation contract are also reflected in the field of the sanctions which intervene both in the framework of the valid conclusion of a contract, but also afterwards, when the contract is enforced.

## **1. THE SANCTION OF ABSOLUTE NULLITY FOR NOT COMPLYING WITH THE FORM TYPICAL TO DONATIONS**

By derogation from the principle of mutual agreement, which governs the conclusion of the legal civil acts, in order for a donation to be validly concluded, the consent of the parties must be expressed in an authentic form. The base of the field is represented by the provisions of article 1011 of the Civil Code which, at their first paragraph, provide for the authentic form as a requirement for the conclusion of a donation contract, by clearly specifying at the same time the type of the applicable nullity when the form provided for by the law for a contract to be valid is not complied with – the absolute nullity. Also, their text restates article 813 of the 1864 Civil Code, both regulations instituting solemnity as a caution measure, meant to protect the donor who, by means of the contract concluded, “transmits a right related to his patrimony in an updated and irrevocable manner, without receiving any equivalent in exchange...”<sup>3</sup>As a consequence, a donation generates legal effects only if the will of the parties was expressed at its conclusion in an authentic form. The absence of the solemnity of the contract makes for the legal act

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<sup>2</sup> Francisc Deak, *Tratat de Drept civil. Contracte speciale* (Bucharest: Actami, 1998), 104 – 105, Gabriel Boroï and Carla-Alexandra Anghelescu, *Curs de Drept civil. Partea generală* (Bucharest: Hamangiu, 2011), 201.

<sup>3</sup> Ion Dogaru (coordinator), *Drept civil. Teoria generală a actelor cu titlu gratuit*, (Bucharest: All Beck, 2005), 227.

to be absolutely void, nullity which can be invoked at any moment, by any interested person, including by the court *ex officio*. When it comes to donations, the authentic written form is required as an essential element of the contract, and not as an evidence mean, the formal vice not being covered by the voluntary execution or confirmation. The solemnity of the act, as a validity requirement, regards the entire content of the contract, so that if a donation is under a task or condition, these two must also be stipulated in an authentic form.

Since a donation is not validly concluded unless in an authentic form, the proof of its existence cannot be made neither with the witnesses proof nor in the presence of an incipient written document<sup>4</sup>.

A new formality consists in registering the authentic donation in the national register of notaries, according to the provisions of article 1012 of the Civil Code, but without this formality replacing those related to the real estate register.

If a contract is concluded between absent parties, both the offer to donate and its acceptance must be made in an authentic form; on the contrary, they will not generate legal effects, being absolutely null. The acceptance of a donation must be made too in a solemn form and must be notified to the donor, during his life and before becoming incapable. Both the donor's death before the acceptance and his potential incapacity trigger the nullity of the donation offer. Since the agreement of wills takes place only when the offer is accepted, the donee too must be alive at that moment. For this purpose, article 103 paragraph (2) of the Civil Code clearly states that if the offer is not accepted while the donee is alive, then it can no longer be accepted by his heirs; this idea has also been expressed by the previous legal literature, on the basis of the character *intuitu personae* of the donation contract, so that the heirs could not benefit from any transferred right<sup>5</sup>.

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<sup>4</sup> Sache Neculaescu and al, *Instituții de drept civil. Curs selectiv pentru licență*, II edition – revised and updated, (Bucharest: Universul Juridic, 2013), 376.

<sup>5</sup> Deak, *Tratat de Drept civil. Contracte speciale*, 97.

The solemn form will also have to be respected when it comes to a promise to donate, regulated for the first time by the provisions of article 1014 of the Civil Code. Thus, according to article 1014 paragraph (1) of the Civil Code, under the sanction of absolute nullity, the promise to donate is subject to the authentic form. It must be mentioned that the authentic form is seen as a validity condition for an act to be concluded, including for the donations which are not subject to the formality of the authentic act.

As a consequence, when it comes to donations, it is absolutely mandatory for a legal act to be authenticated, while the lack of authenticity will trigger the nullity of the convention<sup>6</sup>.

Article 1011 paragraph (2) of the Civil Code regulates the exceptions from the condition to conclude a donation by means of an authentic act, represented by indirect donations, disguised donations and handed-in gifts.

According to article 1011 paragraph (3) of the Civil Code, the movable assets constituting the object of a donation must be listed and assessed in a written document, even under private signature, otherwise the contract will be void. Thus, the formality to list and assess the assets is provided for movable assets, under the sanction of the absolute nullity of the donation; hence, this formality is *ad validitatem*. The provision of the Civil Code currently in force ends the controversies within the legal literature regarding the sanction of not complying with the requirements for drafting the estimative act; thus, the opinions expressed see in this either a validity condition or a requirement *ad probationem*, the absence of which does not affect the validity of the donation<sup>7</sup>.

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<sup>6</sup> Eugeniu Safta-Romano, *Contracte civile*, (Iași: Graphix, 1995), 154.

<sup>7</sup> For this matter, see Dogaru (coordinator), *Drept civil. Teoria generală a actelor cu titlu gratuit*, 234.

## **2. SANCTIONS TYPICAL TO THE DONATIONS MADE TO FUTURE SPOUSES FOR THE PURPOSES OF MARRIAGE OR TO THE DONATIONS BETWEEN THE SPOUSES**

The validity of the donations made to future spouses or to only one of them is recognized by the Civil Code, but under the condition of the marriage being concluded. For this matter, article 1030 of the Civil Code provides that the donations made to future spouses are null if this condition is not met, meaning if the projected marriage is no longer concluded. The legal text regulates a particular case of the donation affected by a mixed termination condition, consisting in the marriage not being concluded. When this condition is not met, the annulment of the donation takes place.

As for the donation between the spouses, the Civil Code regulates the sanction affecting the nullity of this contract, as a novelty element, at article 1032. According to the latter, the nullity of a marriage also triggers the relative nullity of the donation made to the ill-faith spouse. In this case, the annulment reason is connected to the vitiating of the consent, as a result of the error in which the donor was found regarding the qualities of the donee's person – *error in personam*, given the character of the act donation, made by taking into consideration the person of the donee. More precisely, the ill-faith spouse is the one who knew about a cause for which the marriage was null. The Civil Code clearly regulates this annulment reason, taking into account that it limits the revocability of the donations between the spouses only during marriage, unlike the former regulations.

Another special legal provision related to the donation between spouses concerns simulated donations. For this matter, article 1033 of the Civil Code regulates the simulation when it comes to the donation between spouses, by stating that is affected by nullity any simulation in which the donation represents the secret contract, with the purpose of avoiding the revocability of the donations between spouses. According to law, not any simulated donation is affected by nullity, but only that regarding a person pretending that it must be proven the fact that the donation was made with the purpose to avoid the revocability of the

donations between the spouses. The simulation can take place both in disguise and by interposition of persons. When it comes to the simulation made by the interposition of persons, it is relatively presumed that they are the relatives of the donee, to whose inheritance he would be entitled when the donation is made, except for the descendants (children, grandchildren) of the two spouses [article 1033 paragraph (2)].

### **3. CAUSES FOR WHICH A DONATION BECOMES INEFFICIENT AFTER IT WAS VALIDLY CONCLUDED**

As already pointed out, in the field of the donation contract the irrevocability principle is double-faced. On the one hand it can be identified a general irrevocability of the donation, deriving from the fact that it has the legal nature of a contract, while on the other hand the irrevocability of a donation is also a typical special one, resulting from the fact that the donation is a liberality, being an essential condition for constituting a contract<sup>8</sup>. Consequently, any clause or condition which can be accomplished only based on the donor's will is incompatible with the essence of the donation, triggering its absolute nullity<sup>9</sup>.

Although donations are irrevocable in principle, they become revocable in certain cases strictly and limitedly provided for by law. The revocability of donations produces legal effects which are almost identical with the ones encountered in the case of synallagmatic contracts termination, with the mention that, if when it comes to termination, the dissolution of the contract is based exclusively on the contractor's guilt, when it comes to donations, the revocation is based on both the donee's guilt or of his successors when it comes to complying with the duties provided for by law or stipulated in the contract, but also on the donor's will (when the donor is the donee's spouse). Precisely these distinctions

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<sup>8</sup> Bujorel Florea, *Contractul de donație în noul Cod civil* (Bucharest: Hamangiu, 2014), 73.

<sup>9</sup> Florin Moțiu, *Contractele speciale în noul Cod civil*, II edition revised and updated, (Bucharest, 2011), 144.

justify the use by the lawmaker of the term revocation and not termination in the field of the donation contract.

Acknowledging at article 1015 the principle of the irrevocability of donations, the lawmaker establishes at article 1020 of the Civil Code the cases in which a donation can be nonetheless revoked: the ingratitude of the donee shown to the donor and the fact that the former does not comply with the tasks taken over. Unlike article 829 from the former regulation, the new Civil Code no longer provides for the possibility to revoke the donation in case of the birth of a baby.

The two cases related to revoking donations do not represent in fact exceptions from the irrevocability principle, as the revocation intervenes independently from the donor's will<sup>10</sup>.

According to article 1021 of the Civil Code, revoking a donation for ingratitude and non-compliance with the tasks does not operate de facto, there being necessary for these two to be established by the court. Therefore, the revocation of donations in these cases has a judicial character.

Although the revocation of a donation does not operate de facto, the promise to donate is instead revoked by law in the same situation. This provision can be found at article 1022 of the Civil Code; the first paragraph of it states that the revocation will operate by law in the case of a promise to donate, if prior to its enforcement one of the revocation cases provided for ingratitude appears. Moreover, the law also provides for two special situations in which the promise to donate can be revoked by law, in connection to the promissory party's material situation. Thus, according to article 1020 paragraph (2) of the Civil Code, the promise to donate is revoked by law also when, prior to its enforcement, the material situation of the promissory party was damaged to such extent that the maintenance of his promise became excessively demanding for him or the promissory party became insolvent. Hence, the damaged material condition of the promissory party or his insolvency must take place

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<sup>10</sup> Deak, *Tratat de Drept civil. Contracte speciale*, 130, Dogaru (coordinator), *Drept civil. Teoria generală a actelor cu titlu gratuit*, 270.

before the donation contract is concluded, while the damage to his material situation must have a certain gravity<sup>11</sup>.

### **3.1. The revocation of a donation for ingratitude**

The gratitude duty belonging to the donee imposes him to refrain from any unsuitable deed in respect to the donor. In order for the situation of a donation or a promise to donate not to depend exclusively on the donor's will, the lawmaker established the ingratitude clauses which can be strictly interpreted. These revocation cases are provided for by article 1023 of the Civil Code and are the following:

- a) Endangering the donor's life or that of some close persons or not letting him know about others' intentions to put in danger his life or that of a close person;
- b) Committing criminal deeds, cruelty acts or serious offences in regard to the donor;
- c) Refusing without justification to provide food to the donor in need.

The revocation of a donation for ingratitude is ordered by the court, the action filed for revocation having the character of a civil punishment, more sanctioning than the action for termination. As the legal literature suggestively points out, gratitude does not transform donation in a synallagmatic contract<sup>12</sup>. In relation to the legal provisions regulating it, we should mention the following features of the action filed for revoking a donation on the basis of ingratitude.

- It is a strictly personal action, having as author, in principle, only the donor. By exception, the action can be also filed by the donor's heirs – article 1024 paragraph (3) of the Civil Code.

- It is an action subject to the statute of limitations, which can be filed within the year starting to pass from the moment when the donor knew not about the fact that a deed was committed, but about the fact that the donee committed it.

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<sup>11</sup> Sache Neculaescu and al, *Instituții de drept civil. Curs selectiv pentru licență*, 376.

<sup>12</sup> Eugeniu Safta-Romano, *Contracte civile*, 181.

- The revocation action for ingratitude can only be filed against the guilty donee.

- The revocation action for ingratitude is a restitution action with a sanctioning character, so that its acceptance does not generate retroactive effects in regard to third parties.

- Deeds must be fully proven and have a certain gravity<sup>13</sup>.

### **3.2. The revocation of a donation for not complying with a task**

The donation with a task is a variety of the donation contract, characterized by the fact that the donor imposes to the donee the compliance with a certain obligation, a certain task<sup>14</sup>. From the moment when he accepts the donation, the donee must comply with his task. If he fails to do it, the donor can choose between executing the contract and revoking the donation; if the donor does not comply with these tasks, then his action is not considered an ingratitude act. The Civil Code regulates the revocation of a donation for not complying with a task at articles 1027 – 1029. The revocation action has both a judicial and a patrimonial character, making so that the revocation action for not complying with a task can be promoted by both the donor and his heirs or creditors, against the donee or his heirs. Revocation produces effects not only for the future, but also for the past. By being a termination action, the effects of the action filed for revoking a donation in case of the non-compliance with a task are different from those of the action filed for ingratitude. The main effect consists in the fact that the asset donated goes back to the donor's patrimony, free of any potential right constituted in the meanwhile upon it. Nonetheless, if an alienation of an asset has taken place, the restitution action can also be exerted against the third party acquiring it, by considering certain conditions (the rules within the

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<sup>13</sup> The Appeal Court of București, III civil sentence, December, No. 542 from 22<sup>nd</sup> May 1995, in C.P.C.J. 1993 – 1998, p. 17, apud Ionica Ninu, *Efectele contractului. Practică judiciară și reglementarea din noul Cod civil* (Bucharest: Hamangiu, 2015), 146.

<sup>14</sup> D. Chirică, *Drept civil. Contracte speciale*, apud. Bujorel Florea, *Contractul de donație în noul Cod civil*, 106.

real estate register or of the effect of acquiring in good faith the movable assets or, according to the case, the rules regarding usucapio), provided by article 1648 of the Civil Code, regarding the effects of the performances restitution in regard to third parties.

### **3.3. The revocation of a donation between spouses**

The donations between spouses are allowed by the law, but they can be revoked by the spouse-donor. According to article 1031 of the Civil Code, any donation concluded between the spouses is revocable only during marriage. The text radically modifies the old regulation, meaning that, in order for the exception regarding the donations irrevocability principle to be applied, not only the donation must be concluded during marriage, but also its revocation must take place during that same time. When a marriage is ended, the donations between the spouses become in their turn irrevocable.

The regulation above is an exception from the principle regarding the irrevocability of donations and not from the provisions of article 1020 and the next ones of the Civil Code; thus, spouses can demand the revocation of a donation based on the ingratitude or the lack of compliance with a task also after their marriage ends, if the conditions related to the statute of limitations are met.

In order for a donation to be revoked, it is not necessary either to file an action to court or for the court to step in, but only the simple manifestation of one's will, which must not take a special form<sup>15</sup>.

The revocation of a donation takes place by the unilateral will (*ad nutum*), clearly expressed or tacit, of the spouse-donor; this is also a derogation from the principle of the compulsory force of contracts – *pacta sunt servanda*. The donation concluded between the spouses can be revoked only by the spouse-donor, and not also by his heirs or creditors. Since no legal provision conditions the revocation on a certain term, the

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<sup>15</sup> The Appeal Court of Bucharest București, civil section IV, December, No. 1831 from 18<sup>th</sup> December 1997, in C.P.C.J. 1993 – 1998, p. 17, apud Ionica Ninu, *Efectele contractului. Practică judiciară și reglementarea din noul Cod civil*, 146.

spouse-donor can revoke his donation at any time during marriage, without any formality and without justifying his revocation decision. Here is why, if when it comes to the other donations, certain conditions clearly provided for by law must be met in order to decide the revocation, when it comes to the donation between spouses, no condition must be met; the spouse-donor simply manifests his will to revoke it. Consequently, any irrevocability clause provided by the contract is null and produces no effect. The revocability of the donations between spouses regards all donations, including the handed-in gifts, simulated donations or indirect donations.

## CONCLUSIONS

In the way it was rethought, in the context of the new social realities, the legal institution of the donation contract imposes its specificity also in regard to the civil sanctions triggering the termination of the effects of such contract. The current analysis does not put any end to the complex issues related to civil sanctions in the field of the donation contract, but we would like to stress the initiative of the lawmaker regarding the clarification of some aspects which generated various conflicts in the past within the legal literature and practice, the interventions within the application area of some reputed institutions for the contract discussed, but also some novelty regulations as compared to the ones of the 1864 Civil Code. All the aspects above shall continue to represent an inspiration source for both the legal literature and practice which have not been constituted in the field discussed.

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# RIGHT TO PETITION IN THE LEGAL ORDER OF THE REPUBLIC OF POLAND

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## **Abstract:**

*The right to petition has been expressly mentioned in the Constitution of the Republic of Poland adopted in 1997. However, for a long time it had only a facade character as there was no statutory regulation providing the rules and procedures of submitting petitions to state authorities. The Act on petitions was adopted only in 2014 and it came into force on 6 September 2015. However, the institution still causes a lot of doubts even when it comes to defining its definition*

**Key-words:** *petition, Polish Constitution, constitutional right*

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## **INTRODUCTION**

Art. 63 of the current Polish Constitution of 2<sup>nd</sup> April 1997<sup>3</sup> provides that “everyone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person - with his consent - to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by a statute”. However, for a long time people could not take advantage of their constitutional right to petition as there were no statutory basis specifying the procedures of submitting and responding to petitions. Despite the fact that the Constitution explicitly obliged the parliament to regulate the right to petition in a statute in

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<sup>3</sup> The Official Journal of Laws “Dziennik Ustaw”, No 78, item 483, with later amendments.

1997, the Law on Petitions was finally adopted on 11 July 2014<sup>4</sup> and came into force on 6 September 2015, so for 18 the constitutional provision on petitions was actually suspended.

It should be mentioned that it has been the first statutory regulation of that issue in the history of the Polish political system. However, the right to petition has not been entirely new in Poland as it was regulated in the interwar period by the Constitution of 21 March 1921<sup>5</sup>. Its art. 107 stipulated then that citizens had the right to lodge petitions individually or collectively to all representative bodies and public authorities of state and local government. Afterwards, neither the Constitution of 23 April 1935<sup>6</sup> nor the Constitution of 22 July 1952<sup>7</sup> provided the right to petition. However, in the period between 1945 and 1952 the right to petition formally could be realized on the basis of the maintained art. 107 of the Constitution of 1921. The right to petition was also mentioned in the Declaration of the Legislative Sejm of 22 February 1947 on the Implementation of Citizens' Rights and Freedoms.

## **LEGAL REGULATION OF PETITIONS IN POLAND**

After the adoption of the current Constitution in 1997 the first legislative step that was undertaken by the parliament was the amendment of the Code of Administrative Procedure. Since 1960 the Code has regulated in section VIII the simplified procedure of receiving and considering "complaints and requests". The amendment of 29 December 1998<sup>8</sup> introduced the term "petition" to art. 221 of the Code but - unlike it was in relation to a complaint (art. 227) and a request (art. 241) - the legislature did not define its subject matter. The lack of a clear definition caused difficulties for administrative courts and gave rise to

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<sup>4</sup> The Official Journal of Laws "Dziennik Ustaw" 2014, item 1195.

<sup>5</sup> The Official Journal of Laws "Dziennik Ustaw", No 44, item 267, with later amendments.

<sup>6</sup> The Official Journal of Laws "Dziennik Ustaw", No 30, item 227.

<sup>7</sup> The Official Journal of Laws "Dziennik Ustaw", No 33, item 232, with later amendments.

<sup>8</sup> The Law of 29 December 1998 on the Amendments of Certain Laws in Regard to the Implementation of the Reform of the Political System of the State, The Official Journal of Laws "Dziennik Ustaw", No 162, item 1126.

the demand a new comprehensive statutory regulation of petitions. A series of legislative initiatives in this respect resulted in the adoption of a new law on 11 July 2014. The statutory provisions have been specified by resolutions – the Standing Orders of the Sejm adopted in 1992<sup>9</sup> and the Standing Orders of the Senate adopted in 1990<sup>10</sup>.

The three concepts used in the Constitution (petitions - requests - complaints) do not have clear internal demarcation borders which would represent the legislator's image of each of these three legal institutions. That is why only a general interpretation of the concepts is possible, based more on previous rules, practice, doctrine and case law. This situation is well reflected in the "Commentaries" to the Constitution<sup>11</sup>. The way of understanding the right to petition in our legal culture has been developing very slowly through comparative legal studies. As indicated in the literature, the institution of petition has been regulated by the constitutional provisions of more than 30 European countries<sup>12</sup>. However, it does not mean that differences between the three concepts referred to in art. 63 of the Constitution are clear<sup>13</sup>.

In the doctrine of constitutional law, there are visible differences in the understanding of the institution of petition. On the one hand - some authors clearly distinguish the institution of petition from traditionally understood complaints and proposals (for example because of their subject, purpose or the scope of recipients)<sup>14</sup>. On the other hand, some

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<sup>9</sup> The Official Journal of Laws "Monitor Polski" 2015, item 31, with later amendments.

<sup>10</sup> The Official Journal of Laws "Monitor Polski" 2014, item 529, with later amendments.

<sup>11</sup> Winczorek, Piotr. *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa, 2008, 151-152; Banaszak, Bogusław. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2012, 378-381.

<sup>12</sup> Wójcicka, Ewa. „Petycje w prawie konstytucyjnym państw współczesnych”, *Ius Novum* 2 (2008), 24.

<sup>13</sup> Rytel-Warżocha, Anna. *Instytucja petycji w Polsce oraz w krajach europejskich – stan obecny i perspektywy*. Warszawa: „Opinie i Ekspertyzy” (OE-238) Biura Analiz i Dokumentacji Kancelarii Senatu (August 2015), 9, where it is expressly stated that „the differences between these three instruments are still very unclear”.

<sup>14</sup> Zięba-Załucka, Halina. „Prawo petycji w Rzeczypospolitej Polskiej”, *Przegląd Prawa Konstytucyjnego* 4 (2010), 18; Działocha, Kazimierz. *Prawo petycji w obowiązującym ustawodawstwie i proponowane kierunki zmian [in:] Prawo petycji w ustawodawstwie*

authors hold the view that petitions should be understood broadly as a concept which include collective petitions (petitions in the narrow sense) as well as individual complaints and requests<sup>15</sup>. The new law on petitions<sup>16</sup>, which determines the rules and procedures of the submission and consideration of petitions (art. 1) also raises many doubts.

According to art. 2 of the law, a petition may be submitted by a natural person, a legal person, an organizational entity which is not a legal person or a group of entities (hereinafter referred to as an “entity submitting a petition”) to a public authority, as well as to an organization or a social institution in connection with the performance of their duties prescribed by law within the field of public administration (para. 1). The petition may be submitted in the public interest, the interest of the petitioner, and finally also in the interest of a third party, with his consent (para. 2).

The law also specifies that the subject of the petition may take the form of a request concerning, in particular, the amendments of current law. It can also be a demand to take decisions or other actions in cases which concern the petitioner, social life or values that require special protection in the name of the common good and are within the scope of tasks and competences of the recipient of the petition (art. 2 para. 3). In case of doubts whether the submitted document is a petition or not, it is its content that matters more than its external form (art. 3). The wording of the above mentioned provisions indicates that the subject of a petition has been defined broadly, not always with the necessary precision. The terms such as “settlement”, “collective life”, “values requiring special protection” or “common good” will certainly require interpretation. The

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*polskim*. Warszawa: „Opinie i Ekspertyzy” (OE-85), wyd. Kancelarii Sejmu, 2008., 2-4; Winczorek, Piotr. *Komentarz...*, 151.

<sup>15</sup> Sokolewicz, Wojciech. *Uwagi do art. 63 [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, v. V. Edited by Lech Garlicki, Warszawa, 2007, 4; Orłowski, Wojciech. *Prawo składania petycji, wniosków i skarg [w:] Wolności i prawa polityczne*. Edited by Marek Chmaj, Wojciech Orłowski, Wiesław Skrzydło, Zdzisław Witkowski and Andrzej Wróbel, Kraków: Zakamycze, 2002, 159.

<sup>16</sup> For the complex analysis of the Law: *Teoretyczne i praktyczne aspekty realizacji prawa petycji*. Edited by Ryszard Balicki and Mariusz Jabłoński, Wrocław, 2015; Wójcicka, Ewa. *Prawo petycji w Rzeczypospolitej Polskiej*, Warszawa, 2015.

style of their wording is more appropriate for the language of the Constitution than ordinary legislation which must be more specific.

According to the Act, the petition shall be submitted in writing or by means of electronic communication. The petition must include information concerning the entity submitting the petition and his place of residence, the recipient of the petition, the indication of the subject of the petition and the signature of the person submitting the petition. Petitions submitted in the interest of third parties must be accompanied by their agreement to submit such petition.

If the recipient of the petition is not appropriate for its consideration, he should immediately send it to the appropriate entity, notifying the petitioner immediately. The Act also determines that the failure to comply with the requirements results in leaving the petition without consideration, or in calling to supplement or clarify the content of the petition. The scan of the petition shall be posted on a website of the entity examining the petition (art. 4 - art. 8).

The petition should be dealt with without undue delay, but not later than three months from the date of its submission. In case of circumstances beyond the control of the entity examining the petition the deadline can be extended, but no longer than three consecutive months. If there are further petitions submitted to the same authority within one month which concern the same issue, the entity responsible for their consideration may decide on their joint examination (the so called “multiple petition”). In case of the “multiple petition” the entity competent to hear the petition also announces on its website that it is “waiting” for further petitions on the issue for a specified period of time but not be longer than 2 months (art. 10-11).

According to the Act, the entity competent to hear the petition can “leave without consideration” another petition submitted on the issue which has been the subject of a petition already examined if it does not refer to new facts or evidences. In such case the petitioner should be immediately informed about the decision and the way of settling the previous petition. The entity hearing the petition shall always inform the petitioner in writing or by means of electronic communication about the

way and reasons of dealing with his petition. The manner of processing the petition cannot be the subject of a complaint (Art. 12-13).

The Act also requires that entities having jurisdiction to hear petitions shall annually - until 30 June – prepare information about petitions examined in the previous year and publish it on their websites. Such information must include in particular the number, subject and the way of settling the petitions (art. 14).

The law also explicitly states that petitions submitted to the Sejm or the Senate shall be considered by these authorities, unless the Standing Orders of the Sejm or the Standing Orders of the Senate indicate their internal organs appropriate in this regard. Similarly, this applies to bodies representing local government units (art. 9). It is a sign of respect for the autonomy of these bodies. However, the Sejm, the Senate and the authorities of local self-government are also obliged to publish the annual information about the processed petitions on their websites (art. 14).

On the sidelines of the presentation of the statutory regulation of petitions in Poland, it should be pointed out that some issues have not been clearly defined by the Law on Petitions. For example, the legislator has not regulated the admissibility of the withdrawal of an individual petition, the withdrawal of the support for a collective petition, the appeal of the consent by a third party in the interest of whom the petition has been submitted, the special status of the disabled, the relationship between the right to petition and lobbying in the lawmaking process regulated by a separate law<sup>17</sup>. The admissibility of these "reverse positions" (withdrawals) can be assumed only through the interpretation. However, it should be noted that according to art. 15 of the Law on Petitions in matters not covered by the act the provisions of the Code on Administrative Procedure shall be applied respectively.

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<sup>17</sup> The Law of 7 July 2005 on the Lobbying Activities in the Lawmaking Process, the Official Journal of Laws, "Dziennik Ustaw" Nr 169, item 1414, with later amendments; see also: Wiszowaty, Marcin. *Działalność lobbingsowa w procesie stanowienia prawa. Ustawa z dnia 7 lipca 2005 r. z komentarzem*. Warszawa, 2010.

A specific regulation of petitions has been included in the Standing Orders of the Sejm and its new provisions<sup>18</sup> introduced in order to determine the “proceedings in relation to petitions” submitted to the Sejm. Petitions submitted to the Sejm shall be referred by the Marshal of the Sejm to the Petitions Committee for consideration. The Marshal may also order joint consideration of petitions in accordance with provisions and principles specified in the Law on Petitions. The Marshal shall also establish the time limit for consideration of the petition, taking into account the time limits set in the provisions of the Law. The consideration of a petition shall require presentation of the petition by a Deputy designated by the Presidium of the Committee, the debate and making decision about the way of proceeding with the petition. The Committee may address other Sejm committees to obtain an opinion on the petition under consideration. The way of proceeding with a petition may be in particular: 1) submission of a bill or a draft resolution by the Committee, 2) submission by the Committee of an amendment or a motion to the bill or draft resolution in the course of its consideration by another Sejm committee or in the course of its second reading, 3) presentation by the Committee to another Sejm committee of an opinion about the bill or draft resolution considered by it, 4) passing by the Committee a request for an inspection by the Supreme Chamber of Control, 5) non-acceptance by the Committee of the demand contained in the petition. The Committee shall inform the Marshal of the Sejm about the way and reasons of proceeding with the petition and the Marshal of the Sejm shall notify the entity submitting a petition about the way of proceeding with that petition. The relevant information shall be made accessible through the electronic Information System of the Sejm. It is important that in the event that proceedings in relation to a petition have not been concluded before the end of the term of office of the Sejm, such proceedings shall be conducted by the Committee in the next term of office of the Sejm. Therefore, the general rule of discontinuation of parliamentary works<sup>19</sup> is expressly excluded in such cases, similarly to

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<sup>18</sup> The Resolution of the Sejm of 12 June 2015 on the Amendment of the Standing Orders of the Sejm, The Official Journal of Laws „Monitor Polski”, item 550.

<sup>19</sup> Section II, Chapter 9a (art. 126b-126g) of the Standing Orders of the Sejm.

the solutions adopted in the Standing Orders of the second chamber of the Polish parliament – the Senate<sup>20</sup>.

On the sidelines of the above mentioned regulation several issues shall be emphasized: the permanent nature of the Petitions Committee, the fact that the Sejm does not have to consider petitions *in pleno*, the role of the Marshal of the Sejm which is limited only to organizational issues, the relation of the provisions of the Standing Orders of the Sejm with the principles set by the provisions of the Law on Petitions, the open directory of the ways to consider petitions - in particular, the possible role of the Commission in the legislative processes.

The specific regulation complementary to the Law on Petitions has been also provided by the Standing Orders of the Senate<sup>21</sup>. It should be emphasized that the Senate has played an important role in preparing the statutory basis for the implementation of the constitutional right to petition because it was Senate's legislative initiative to submit the draft law on petitions in 2011<sup>22</sup>. Nevertheless, the end of the term of office of the Parliament in autumn 2011 caused that the works on the draft were interrupted. The Senate used its legislative initiative again and submitted the draft on 9 January 2013<sup>23</sup>. As it has been already mentioned the new law was finally adopted on 11 July 2014.

However, it is important to emphasize that without waiting for the adoption by the parliament of the Law on Petitions, the Senate introduced in 2008 an amendment aimed at enabling citizens to use their

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<sup>20</sup> Art. 90g ust. 1 of the Resolution of the Senate of 23 November 1990 – the Standing Orders of the Senate. The exclusion of the rule of the discontinuation of parliamentary works - in both houses of the parliament – is certainly justified by the constitutional rank of petition and its nature as political rights of citizens.

<sup>21</sup> The Resolution of the Senate of 23 November 1990 – the Standing Orders of the Senate, The Official Journal of Laws “Monitor Polski” 2014, item 529, with later amendments.

<sup>22</sup> The resolution on the issue was adopted at the 74 seating of the Senate on 12 April 2011.

<sup>23</sup> On the basis of a resolution adopted at the 46 seating of the Senate on 18 December 2013.

constitutional right to petition to its Standing Orders<sup>24</sup>. First of all, they expanded the competences of the Senate Committee on Human Rights and Rule of Law in order to include issues relating to petitions, which was reflected in the change of the committee's name to the Committee on Human Rights, Rule of Law and Petitions. The procedures for considering petitions have been specified in the new section Xa "Considerations of petitions".

According to the Standing Orders of the Senate, petitions submitted to the Senate should be referred to the Marshal of the Senate, who shall promptly forward them to the Committee on Human Rights, Rule of Law and Petitions. The Chairman of the Committee shall perform the initial substantive inspection of the content of the petition in order to determine whether its subject falls within the competence of the Senate or not. Depending on the content of the petition the Chairman refers the petition for consideration at the meeting of the Committee or conveys it to the competent public authority in case the subject of the petition goes beyond the competence of the Senate, informing the Marshall of the Senate and the members of the Committee (art. 90 b para. 1 of the Standing Orders) as well as the petitioner (art. 90e of the Standing Order) about his decision. However, despite the formal transfer of the petition to another authority, the petition shall be also considered at the meeting of the Committee of Human Right, Rule of Law and Petitions at the request of a member of the Committee (art. 90, para. b. 2 of the Standing Orders)

An important role at the initial stage of considering petitions by the Senate is played by the Department of Petitions and Correspondence within the Bureau of Social Communication, which is responsible for handling the process of considering petitions by the organs of the Senate<sup>25</sup>. The Department is responsible for preparing the information about the petition, which indicates the petitioner, the demands presented in the petition and the reasons behind them, the analysis of the legal regulation in force concerning the petition's content and the information

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<sup>24</sup> The amendments were introduced in the resolution of the Senate of 20 November 2008 adopted at the 22 seating of the Senate which entered into force on 1 January 2009.

<sup>25</sup> Par. 15 of the Organizational Rules of the Chancellery of the Senate

about the ongoing legislative procedures in this respect, the case law of the Constitutional Tribunal, common courts, administrative courts and the Supreme Court in matters relating to the petition as well as the information on government activities or the activities of different interested organizations concerning the issues subject to the petition. In addition, the above information shall be accompanied by the recommendations of the Bureau with regard to further proceedings on the petition, the selected legislation, draft laws and the information about previous activities concerning the petition<sup>26</sup>.

If there is a need, in the course of considering the petition the Commission on Human Rights, Rule of Law and Petitions may request other committees of the Senate to express their opinion on the petition. In addition, the Commission or its Chairman may request that the representatives of the Council of Ministers, state and local government bodies, institutions, factories and enterprises, state and municipal commercial companies and social organizations benefiting from state budget subsidies to cooperate with the Commission, in particular to provide relevant information, explanations and opinions in written or electronic form, to present necessary documents or to take an active part in the meetings of the Committee (art. 60 para. 4 of the Standing Orders of the Senate). The Committee may also ask experts to take a position on the issues subject to the petition.

After examining the petition, the Committee on Human Rights, Rule of Law and Petitions may take the following actions: to submit a proposal to undertake legislative initiative or adopt a resolution to the Marshal of the Senate and present the draft of the proposed legislation (art. 90 d para. 1 p. 1 of the Standing Orders of the Senate), to authorize one of the members of the Committee to submit the specified legislative proposal during the discussion at the plenary meeting of the Senate (art. 90 d para. 1 p. 2 of the Standing Orders) or to advise the Marshal of the Senate to use one of the competences assigned to the Senate or its internal bodies by the Polish Constitution, statutes or the Standing Orders of the Senate (art. 90 para. d. 1 p. 3 of the Standing Orders).

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<sup>26</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2010 (Warszawa, 2011), 8.

The Committee can also refrain from any of the above mentioned activities but it has to inform the Marshal of the Senate about its decision and indicating the reasons (art. 90, para. d. 2 of the Rules of the Senate). The resolution on the petition shall be taken by the Committee by the majority of votes in the presence of at least 1/3 of the members (art. 62 para. 1 of the Standing Orders of the Senate). The Chairman of the Committee on Human Rights, Rule of Law and Petitions shall also notify the petitioner about conveying the petition to another competent public authority or taking another action and explain the reasons of its decision.

Every year the Committee submits to the Senate a report on petitions examined in the previous year. Art. 90g of the Standing Orders of the Senate provides that petitions submitted to the Senate but not considered by the end of the term of office shall be consideration by the Committee on Human Rights, Rule of Law and Petitions of the next term. The Committee of the next term of office may also decide to re-submit the proposal to undertake legislative initiative (or adopt a resolution), if the proceedings in the previous term of the Senate on this initiative has not been completed. It is an exception to general rule that parliamentary works not finished by the end of office are discontinued.

## **PRACTICE**

The Law on Petitions came into force on 6 September 2015, however, citizens were able to use this institution to some extent before, because the appropriate changes in the Standing Orders of the Senate entered into force much earlier - on 1 January 2009. In the first year, the Committee on Human Rights, Rule of Law and Petitions received eighteen petitions. It examined fourteen of them and the other four were left for consideration in the following year. Finally, the Committee decided to continue works on seven petitions, in six cases it decided not to undertake any activities and in one case, concerning changes in the education system, it decided to pass the petitioner's remarks to the Minister of Education<sup>27</sup>. In 2010, the Marshal of the Senate referred

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<sup>27</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2009, Warszawa 2010, the Senate document No 891/VII term of office, p. 4.

twenty-one petitions to the Committee, twenty of which were considered by the committee in 2010 and one introduced in December was considered in 2011. As a result of considering the petitions, the Committee prepared six draft laws and one proposal of a resolution<sup>28</sup>. In 2011 it received seventeen petitions and after their consideration prepared four draft laws and in two cases sent the petitions to appropriate ministers<sup>29</sup>. In 2012, the Marshal of the Senate referred eighteen petitions to the Committee who prepared six draft laws and two drafts of resolutions. In case of five petitions the Committee decided to refer them to the relevant ministries and bodies and prepared the recommendation to include petitioners' proposals in their works<sup>30</sup>. Also in 2013 the Marshal of the Senate submitted to the Committee eighteen petitions and the Commission prepared one draft law and one occasional draft resolution. In addition, four petitions were sent to appropriate ministers<sup>31</sup>. In 2014, as much as twenty-four petitions was submitted the Senate which resulted in four draft laws. One petition was submitted to an appropriate authority<sup>32</sup>. In 2015 there were twelve new petitions and in the first quarter of 2016 another fifteen petitions introduced to the Senate<sup>33</sup>.

The authors of petitions frequently requested the amendments in the law on war veterans and victims of oppression, law on pensions, the

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<sup>28</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2010, Warszawa 2011, the Senate document No 1298/VII term of office, p. 5 and n.

<sup>29</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2011, Warszawa 2012, the Senate document No 151/VII term of office p. 3 and n.

<sup>30</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2012, Warszawa 2013, the Senate document No 402/VII term of office p. 3 and n.

<sup>31</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2013, Warszawa 2014, the Senate document No 687/VII term of office p. 7 and n.

<sup>32</sup> See: the Rapport of the Committee on Human Rights, Rule of Law and Petitions on the petitions considered in 2014, Warszawa 2015, the Senate document No 948/VII term of office, p. 7 and n.

<sup>33</sup> See: <http://www.senat.gov.pl/petycje/wykaz-tematow-petycji/petycja.148.html> (access on 10 April 2016).

situation of persons with disabilities, electoral law and party funding, finance and taxes. Individual petitions also referred to the issues of construction law, traffic law, the Customs Service, the establishment of a National Day of Preschool Education, the adoption of occasional resolutions, tenants' rights, property rights, labor law, pharmaceutical law, removing communist patrons of streets and squares, introducing a ban on alcohol sales at gas stations, amending certain provisions of the law on the protection of nature, providing legal basis to file pleadings with the electronic signature in judicial-administrative proceedings or prohibiting the use of "in vitro" fertilization<sup>34</sup>. The last petition concerned the legislative initiative to abolish daylight saving time in the Republic of Poland.

The entry into force of the Law on Petitions and the adoption of the relevant provisions of the standing Orders of the Sejm created the legal basis for submitting petitions also to the first chamber of the Polish parliament. By the end of the first quarter of 2016, the Sejm received seventy-one petitions, wherein the first petition was submitted on 14 September 2015 so only eight days after the law entered into force. In two cases petitions were left unconsidered because petitioners' representatives were not pointed out. In twenty-five cases the proceedings were completed - in three cases the Committee for Petitions decided to bring the draft of a statute, in two cases the Committee adopted a desideratum while in other cases the resolutions rejecting the petitioners' request were adopted. The other forty-four petitions are still pending before the Committee on Petitions.

## **CONCLUSION**

The institution of petition is undoubtedly an important legal instrument guaranteed by the Constitution since 1997. However, it was the adoption of statutory regulation and its entry into force in 2015 that allowed for its real use. The petitions can be submitted to all state authorities as well as the authorities of local self-government.

However, we should be aware that the petition in its essence is a non-authoritative instrument, and therefore its efficiency is quite weak in

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<sup>34</sup> See: the above mentioned Rappports.

comparison to other forms of social participation in decision-making processes, especially local referendums or even popular initiative. The effectiveness of petitions should be perceived more in political than legal terms. In this regard an important guarantee is the transparency of the procedure concerning petitions provided by the Law. It is realized by the obligation to publish immediately on the Internet website the information on petitions (art. 8 of the Law on Petitions) and the way of their consideration. Additionally, art. 14 of the Law on Petitions imposed on entities considering petitions, including local government authorities, an obligation to prepare an annual information about the petitions considered in the previous year and to place it on their website. The universal access to this information may cause that the reaction of state authorities to demands specified in petitions will be one of the criteria important for the assessment of their activities, which may influence the results of the next elections.

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# KEY LEGAL ASPECTS OF THE NEW UPBRINGING BENEFIT IN POLISH LAW

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## **Abstract:**

*The new parliamentary majority in Poland has won elections in 2015 inter alia basing on the watchword „500 PLN for a child”. The act of 11 February 2016 on state aid in raising children (OJ 2016, item 195) introduced the new social benefit. The main change is that as a rule any family in Poland is entitiled to the new uprbgging benefit of 500 PLN for the second and next children. Authors describe main legal aspects of the new benefit – its objective and subjective scope, legal prerequisites for acquisition of the right. The paper ends with an attempt to evaluate new law.*

**Key-words:** social law, social security law, social benefits, family benefits demographic crisis, rising children, upbringing benefit

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## **INTRODUCTION**

Poland struggles with dramatically negative demographic trends since 1980's. Negative demographic situation is shaped by two main trends. The first is decrease in total fertility rate. The total fertility rate in Poland decreases systematically since 1989 and amounted 1,25 in 2013<sup>3</sup>. The fertility rate needed to preserve the population level is app. 2,10 – 2,15. The second factor is dynamic increase in average life expectancy. Throughout last 24 years (1990-2014) life expectancy has increased by 7,5 years for men and 6,4 years for women to reach 73,8 years for men and 81,6 years for women in 2014<sup>4</sup>. Those factors lead to very quick

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<sup>3</sup> Główny Urząd Statystyczny (Central Statistical Office of Poland), *Prognoza ludności na lata 2014-2050 (Population projection 2014-2050)* (Warszawa, 2014), 35, accessed March 15, 2016 [http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5469/1/5/1/prognoza\\_ludnosci\\_na\\_lata\\_2014\\_-\\_2050.pdf](http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5469/1/5/1/prognoza_ludnosci_na_lata_2014_-_2050.pdf).

<sup>4</sup> Główny Urząd Statystyczny (Central Statistical Office of Poland), *Rocznik Demograficzny Polski 2015 (Demographic Yearbook of Poland 2015)* (Warszawa,

ageing of Polish society. Other European countries have similar problems. In Poland that process is accelerated by migration of the Polish to foreign countries. Despite demographers' alarms, succeeding governing cabinets were pushing aside those problems. The lack of adequate reaction for demographic situation of governing cabinets was grounded mainly by budgetary, financial nature. Annalise of the title upbringing benefit shall be preceded by at least a brief description of former changes introduced to reverse demographic trends. Subsequently authors will refer to main legal aspects of the new upbringing benefit, try to determine the legal character of the benefit and make an attempt to evaluate new law.

**I. Changes in Polish legal system aimed to facilitate childcare.** The first change was introduced by the act of 2008<sup>5</sup>. It concerned rights of workers related to parenthood. Fathers obtained gradually right to the paternity leave – 1-week since 1 January 2010 and 2-week since 1 January 2012. Earlier, rights related to parenthood in Poland were domain of women, who were traditionally entitled to the 20-week maternity leave<sup>6</sup> (art. 180 of Polish Labour Code<sup>7</sup>). The leave is covered by the maternity benefit in the amount of 100% worker's average income. It is paid from the social security system resources. Secondly, mothers acquired the right to the 'additional maternity week' of 6 weeks<sup>8</sup>. Both rights were accompanied with the social coverage at relatively high level, as mentioned above.

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2015), 410, accessed March 15, 2016 [http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5515/3/9/1/rocznik\\_demograficzny\\_2015.pdf](http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5515/3/9/1/rocznik_demograficzny_2015.pdf).

<sup>5</sup> The act of December 6, 2008 amending the Labour Code and other acts, Journal of Laws 2008, No 237, item 1654.

<sup>6</sup> 31 weeks in the case of delivery of twins, 33 weeks – 3 children at one delivery, 35 weeks – 4 children, 37 – 5 children and more.

<sup>7</sup> The act of June 26, 1974 Labour Code, consolidated text Journal of Laws 2014, item 1502 as amended.

<sup>8</sup> It was since 2014. The right was introduced gradually 2 weeks since 1 January 2010 and 4 weeks since 2012.

Next significant changes were introduced by the act of 2013<sup>9</sup>. The total amount of parental rights with social coverage at decent level was doubled. Preexisting entitlements were supplemented by the parental leave of 26 weeks. The right was covered by ‘the maternity benefit’ at the level of 60% of worker’s average income. To sum up, standard length of parenthood leaves with relatively high social protection in Poland increased to 52 weeks (a year) since 2013. Further change was introduced by the act of 2015<sup>10</sup> and came into force on 2 January 2016. It mixed preexisting entitlements to ‘the additional maternity leave’ and the ‘parental leave’ into unified right to ‘the parental leave’ with a duration of 32 weeks<sup>11</sup> (amended art. 182<sup>1a</sup> LC). The total level of social benefits stayed at the same level (the first 26 weeks of both maternity and parental leave – 100%, further 26-weeks of parental leave – 60%). However, new law is much more flexible. It could be exercised much more elastically by both mothers and fathers and combined with part-time work. New law is not only consistent with the parental leave directive<sup>12</sup>, but also significantly strengthened labour rights related to parenthood.

Changes included also law on day nurseries and social security system. The act on care after children under 3 years old<sup>13</sup> facilitated establishing and operating of day nurseries. One of measures is new right of employers. They are entitled to finance day nurseries from company social benefit fund. An employer who employs at least 20 full-time employees is obliged in Poland to establish and operate company social benefit fund and pay an annual charge of 37,5% of average remuneration

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<sup>9</sup> The act of May 28, 2013 on change of Labour Code and other acts, Journal of Laws 2013, item 675.

<sup>10</sup> The act of July 24, 2015 amending the Labour Code and other acts, Journal of Laws 2015, item 1268.

<sup>11</sup> 34 weeks in the case of delivery of twins or more children.

<sup>12</sup> Council Directive 2010/18/EU of March 8, 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, March 18, 2010, 13-20.

<sup>13</sup> The act of February 4, 2011 on care after children under 3 years old, consolidated text Journal of Laws 2016, item 157.

for each employee to the fund. The fund resources might be used to finance company day nurseries.

The act of 2011 on care after children under 3 years old also introduced the new type of civil contract – the activating contract. The contract is addressed to parents of children under the age of 3 years old (exceptionally 4 years old) and babysitters. To legalize this sector of employment the activating contract was deducted from social insurance contributions, which are paid for a babysitter by state budget up to the remuneration at the level of national minimum (2016: 1860 PLN, app. 458 EUR<sup>14</sup>).

The last two significant changes came into force on 1 January 2016. The first was the parental benefit<sup>15</sup>. The benefit is addressed to persons who are not covered by the social insurance system, which guarantees payment of the maternity benefit. The benefit amount is 1.000 PLN (app. 246 EUR). The standard length of the benefit payment is 52 weeks. Persons who not have title to exercise social insurance benefits, as unemployed or students, gained the right, which might be called the minimum maternity leave. The second change was the mechanism called ‘penny for penny’, which was introduced to family benefits<sup>16</sup>. Crossing the threshold of income per person in household, does not mean complete loss of the right to the benefit. Referring to the principle ‘penny for penny’, the benefit amount will be gradually reduced by quote that exceeds the threshold.

**II.** All changes did not reverse negative demographic trends. New parliamentary majority in Poland won elections in 2015, *inter alia* basing on the watchword ‘500 PLN for a child’. The program of changes was called ‘the Family 500+’. Electoral promise was realized very

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<sup>14</sup> For the purposes of this paper it is used the average conversion rate EUR – PLN published by the Polish National Bank within the period of Polish membership in the EU (between May 1, 2004 and March 15, 2016) which is app. 4,06, accessed March 15, 2016, <http://www.money.pl/pieniadze/kurs/eur,978.html>.

<sup>15</sup> The act of July, 24 2015 amending the act on family benefits, Journal of Laws 2015, item 1217 as amended.

<sup>16</sup> The act of May, 15 2015 amending the act on family benefits, Journal of Laws 2015, item 995 as amended.

efficiently. The program was launched by the act of 11 February 2016 on state aid in raising children<sup>17</sup> (hereinafter referred to as: the act). It came into force on 1 April 2016, which is less than 6 months after elections. The watchword of the electoral campaign of 2015 – ‘500 PLN for a child’ was translated into legal language as the ‘upbringing benefit’.

Provisions of the act define prerequisites for acquisition of the right, the benefit amount, its objective scope, rules for granting and payment of the new benefit. Benefit amount is relatively high: 500 PLN (app. 123 EUR) monthly for each child in a family, with the exception of the first child in a family. The principle is that all families are entitled to the benefit for the second and next children. To be entitled for the benefit for the first child, a family has to fulfill the additional income criterion. The threshold is set at reasonable low level – 800 PLN of income for a person in family. If a child is disabled, the threshold is higher and amounts 1.200 PLN. The upbringing benefit is of purposeful character (art. 4 par. 1 of the act). The aim of the upbringing benefit is partial coverage of expenses related to upbringing a child, in particular with care for a child and satisfying a child’s livelihoods. It is financed from the public budget.

The first issue is legal character of the upbringing benefit. It shall be qualified to the branch of social security law<sup>18</sup>. It has complexed legal character. On the one hand, it presents features characteristic to noncontributory, obligatory benefits of social security system: budget financing and in the case of second and next children – common character, lack of further conditions to acquire the right. On the other hand, it has elements of social assistance measures, *e. g.* the income threshold, purposefulness.

In this light it is worth to mention that the act on state aid in raising children provides also for the upbringing allowance. This allowance is of almost the same legal nature alike the upbringing benefit. The main difference is the catalogue of entitled persons. The upbringing allowance

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<sup>17</sup> The act of February, 11 2016 on state aid in raising children, Journal of Laws 2016, item 195.

<sup>18</sup> Teresa Bińczycka-Majewska, ed., *Prawo zabezpieczenia społecznego w Europie i w Polsce* (Warszawa: Wydawnictwo Naukowe ”SCHOLAR”, 1997), 11.

is addressed to foster homes (surrogate families) and family orphanages. Amount of benefit is at the same level of 500 PLN (app. 123 EUR), but likewise in the case of poorer families, it is payed for each child. The benefit is called allowance, because it is projected as additional quotes payed to foster homes and family orphanages within the system of substitute custody. In this way new law covers also children in precarious situation of substitute custody.

**III.** It reveals that also axiology of the upbringing benefit is complexed. It is a kind of response to demographic problems. The act on state aid in raising without doubt promotes bigger families. The upbringing benefit is projected to encourage to decisions to have more children. The aim of new law is to increase number of families with two and more children.

On the other hand, the act institutes solid financial support for families upbringing children. It has to be remarked that the right to the upbringing benefit is not limited to families who decide for the second child only after the act entered into force. All families with at least two children might exercise new law. Thus, it will also generally help all those families to overcome financial barriers by partial satisfaction of expenditure connected with upbringing children.

The exception is families with one child. They are supported only under condition of the income threshold – if they are in need. The income threshold is more favorable to families with disabled children. Special treatment of families in poverty and having disabled children underlines social character of that benefit. If we look at the upbringing benefit from this perspective, the aim of combating with negative demographic trends is only in the background.

**IV.** The upbringing benefit's amount is a very important factor to evaluate new law. It reveals that new law introduces revolutionary change in the level of family support in Polish social security law. Benefit's amount cannot be disputed without examination of at least a few factors presenting living level of the Polish.

It has to be remarked that minimum remuneration in Poland in 2016 is 1.850 PLN monthly (app. 456 EUR)<sup>19</sup>. This fact shall be supplemented by the level of average remuneration in Poland, which was 4.066,95 PLN monthly in the last quarter of 2015 (app. 1.002 EUR)<sup>20</sup>. Poland have never ratified art. 4 par. 1 of the European Social Charter, which guarantees just remuneration. Within the European framework of this standard, it shall be at least app. 2/3 of average national remuneration. Data presented above reveal that minimum remuneration in Poland is still below 50% of national average. It has to be added that increasing group of workers who stay outside of labour law do not exercise the right to minimum remuneration at all.

The other factor are preexisting family benefits and their amounts. It shall be added that they were conditioned by income criterion. To give example the family benefit amounts depending on child's age from 89 PLN (app. 22 EUR, children until 5), 118 PLN (app. 29 EUR, children 5-18) to 129 PLN (app. 32 EUR, adult children 18-24). Other benefits and allowances are not significantly higher than given example. All above mentioned data is only insignificantly mitigated by indicators relating to living costs. The basket of goods and services counted to obtain a social minimum and subsistence level depend on number of persons in family. Thus, they are presented in a table below.

<b>Type of household</b>	1 person household	2 persons household	3 persons household (2 + one younger child)	3 persons household (2 + one older child)	4 persons household (2 + one younger child + one older child)	5 persons household (2 + one younger child + 2 older children)
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<sup>19</sup> The regulation of the Council of Ministers of September 11, 2015 on the amount of minimum remuneration in 2016, Journal of Laws 2015, item 1385. It was issued on the basis of the act of October 10, 2002 on minimum wage, consolidated text Journal of Laws 2015, item 2008.

<sup>20</sup> The Communication of the Central Statistical Office President of February 9, 2016 on the average remuneration in the fourth quarter of 2015, Journal of Laws 2016, item 148.

<b>Social minimum for household</b>	<b>1 079,53 (265,89 EUR)</b>	<b>1 784,17 (439,45 EUR)</b>	<b>2 646,94 (651,96 EUR)</b>	<b>2 811,53 (692,50 EUR)</b>	<b>3 421,56 (842,75 EUR)</b>	<b>4 198,12 (1034,10 EUR)</b>
<b>Social minimum for household per person</b>	<b>1 079,53 (265,89 EUR)</b>	<b>892,09 (219,73 EUR)</b>	<b>882,31 (217,32 EUR)</b>	<b>937,18 (230,83 EUR)</b>	<b>855,39 (210,68 EUR)</b>	<b>839,62 (206,80 EUR)</b>
<b>Subsistence level for household</b>	<b>545,76 (134,42 EUR)</b>	<b>915,57 (225,51 EUR)</b>	<b>1 323,80 (326,06 EUR)</b>	<b>1 447,24 (356,43 EUR)</b>	<b>1 856,45 (457,25 EUR)</b>	<b>2 389,11 (588, 45 EUR)</b>
<b>Subsistence level for household per person</b>	<b>545,76 (134,42 EUR)</b>	<b>457,79 (112,76 EUR)</b>	<b>441,27 (108,69 EUR)</b>	<b>482,41 (118,82 EUR)</b>	<b>464,11 (114,31 EUR)</b>	<b>477,82 (117,69 EUR)</b>

**Table 1:** Social minimum and subsistence minimum in Poland in 2015 in PLN and EUR (in brackets)<sup>21</sup> (app. 4,06 PLN = 1 EUR). A younger child means a child who is 4-6 years old, an older child accordingly 13-15.

<sup>21</sup> Author's summary on the basis of the Institute for Labour and Social Issues, *Minimum egzystencji w roku 2015 — dane średnioroczne (Subsistence minimum in*

The amount of upbringing benefit, as a rule 500 PLN (app. 123 EUR) for a child, shall be questioned taking under consideration level of remuneration, level of preexisting benefits and costs of living in Poland. The benefit is nearly at the level of 1/3 of minimum remuneration. For families with children a benefit for one child is always higher than subsistence level per person in a family. One might say that the upbringing benefit covers subsistence of a child. On the other hand, it does not cover social minimum per person in household. Nevertheless, presented data reveals that that the upbringing benefit is significant social support for Polish families. What, is more, regarding the amount, it is much higher than preexisting family benefits.

In macroeconomic terms the whole program of support for families is estimated for 1,25% of national GDP and might largely increase budget deficit and public debt<sup>22</sup>. The governing equip has not yet found resources to finance the benefit payment in longer term.

**VI.** A catalogue of persons entitled to the parenting benefit is very broad. The income criterion is employed only in the case of one child families. The subjective scope of the benefit includes all Polish nationals. The entitlement for foreign nationals is limited only to certain groups. Foreign nationals might acquire the right, if: they are covered by coordination of social security system within the EU, it results from bilateral international agreements, or they are granted certain administrative permissions for residence. Both Polish and foreign nationals as a rule have to fulfill the prerequisite of residence in Poland to acquire the right. Nevertheless, the *domicile* principle might not be

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2015 – average-annual data), accessed March 15, 2016, <https://www.ipiss.com.pl/wp-content/plugins/download-monitor/download.php?id=2142>, *Minimum socialne w roku 2015 — dane średnioroczne (Social minimum in 2015 – average-annual data)*, accessed March 15, 2016, <https://www.ipiss.com.pl/wp-content/plugins/download-monitor/download.php?id=2141>.

<sup>22</sup> Krzysztof Majak, “Nie ma pieniędzy na program 500 plus” (“There is no money for the 500+ Program”), natemat.pl, accessed April 10, 2016, <http://natemat.pl/176743,nie-ma-pieniedzy-na-program-500-plus-kolodko-ostro-to-tylko-iluzja-ktora-karmi-siebie-pani-premier-beata-szydlo>.

applied, in cases prescribed in provisions on coordination of social security systems<sup>23</sup> or bilateral international agreements. It might open the question, which has already occurred in other European countries – abuse of the EU law on coordination of social security systems.

**VII.** The upbringing benefit is operated mainly by communes. The commune is a basic unit of local self-government in Poland. It is managed by the village mayor, mayor or president (depending as a rule on commune's number of inhabitants). The act on state aid in raising children indicates exactly the village mayor (mayor or president) as the 'competent authority'. In practice the upbringing benefit is served by the commune (municipality) centres of social assistance on the basis of a proxy of the competent authority. Upbringing benefit realized within the coordination of social security systems is operated by the province marshal (the highest unit of the local self-government). It shall be also remarked that the upbringing allowance is administratively served at the level of county (at the medium level of local self-government division). Competent authorities are also entitled to control exercise of new law. In particular, they might use the environmental inquiry. In certain circumstances, competent authority decides that the benefit was payed unduly or changes financial support into tangible form or into payment for selected services.

Benefit service is based also on IT solutions. Applications with appendixes might be filled also electronically. For the purposes of the upbringing benefit the Ministry of Family, Labour and Social Policy created new electronic platforms. What is interesting, not only public administration forces, but also private entities – 18 banks has engaged for the upbringing benefit applications handling. Application shall be repeated every year. The right to the upbringing benefit will be granted for a year – since 1 September until 30 August of the forthcoming year.

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<sup>23</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of April 19, 2004 on the coordination of social security systems, Official Journal EU L 2004, No 166, 1.

## CONCLUSION

The act on state aid in raising children introduces new upbringing benefit. The legal character of the upbringing benefit is complexed. It presents features characteristic both to common, noncontributory, obligatory benefits of social security system and to social assistance measures. Social assistance character of the benefit is underlined especially in the part of regulation regarding one child families. Two legal characteristics are especially important to evaluate new law. First of all, it is catalogue of entitled (the subjective scope). Secondly, it would be – the amount of the benefit.

The subjective scope of the upbringing benefit generally justifies the thesis on common character of this right. The exception is, of course, families with one children (the income threshold). Regarding the benefit's amount, it is the most remarkable change in Polish social law since years. The act was preceded by series of changes aiming to facilitate childcare. The amount of the benefit – 500 PLN (app. 123 EUR) for a child is much higher than all other family benefits. Thus, the scale of the program launched on 1 April 2016 is large. Some economists claim that the program imposes too much burden for public finances<sup>24</sup>.

The subjective scope, amount and other above mentioned characteristics of the new upbringing benefit incline at least a few other threats. First of all, the benefit is addressed also to families, which have no financial problems. Social support will be targeted also to persons who do not need that. Secondly, there is threat of abuses of the right. Especially, in cases of divided families, whose members stay in different countries of EU. It might be difficult to prevent abuses. Thirdly, all dysfunctional families are below the income threshold, the significant part of them would surely decide for next children aiming only to acquire the right to the benefit for next children. In this way, the benefit might increase preexisting social problems.

Taking under consideration all threats and doubts, authors claim that the upbringing benefit is a step towards the right direction. What is very important, the upbringing benefit is a remarkable, legally forced change in channels and directions of redistribution of gross domestic

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<sup>24</sup> Grzegorz Kołodko, see: no 22.

product in Poland. Polish state started to visibly premium having more children. The Polish who are better financially situated also face the burden of having two and more children – their sacrifice and time spent at upbringing children is of the same value. Thus, their efforts also should be supported in the same manner. On the other hand, competent authorities have certain legal measures to prevent abuses (to promulgate the decision on unduly paid benefit or on change of the benefit form).

The most important question is whether the upbringing benefit encourage the Polish to have more children, or only facilitate life of families with children. Whether it answers the core part of its axiology. It should answer it at least partly. To what extent it will be effective, we will see in future.

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# THE PHENOMENON OF INTEGRATION AND ITS COMPONENTS: THE RECONSIDERATION OF THE ROLE OF THE CULTURAL INTEGRATION IN THE EVOLUTION OF THE PROCESS OF THE EUROPEAN UNIFICATION

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Monica BOȚA-MOISIN<sup>2</sup>

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## **Abstract**

*In his paper, the author starts from the etymology of the word “integration”, presents the economic meaning of the term “integration”, after which he approaches the issue of the international economic interdependences. Also, the author emphasizes the components of the phenomenon of integration, underlining the determinant role of the economic integration and drawing the attention on the fact that in the new geopolitical context marked by the accelerated evolution of the migration phenomenon towards Europe and of violent actions, with a terrorist nature, the cultural integration may be the solution for the revival of the European unification process.*

**Key-words:** *European unification, integration, migration*

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## **INTRODUCTION**

Etymologically, the word “integration” comes from Latin, where the “*integro*”, “*integratio*”, “*integrationis*” was used in a usual sense, meaning “*to restore*”, “*to reestablish*”, “*to supplement*” and “*to complete*”<sup>3</sup>, “*to put in one place, to reunite more parties in a complete whole; in this case the components become integrative parts*”<sup>4</sup>.

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<sup>3</sup>Fritz Machlup, *A History of Thought on Economic Integration* (The MacMillan Press Ltd., 1977), 10

<sup>4</sup>Emilian M. Dobrescu, *Integrarea economica* (Bucharest: All Beck, 2<sup>nd</sup> Ed., 2001), 1.

It appears that the term *integration* has been used for the first time in 1620, in the area of exact sciences<sup>5</sup>, precisely in mathematics, surpassing this area of use especially in the past 60 years, when it enters in the economic literature, as an effect of the evolutions registered on the European stage<sup>6</sup>, receiving a broad use in different areas of socio-human sciences, such as political economy, psychology, politics, covering a great area of processes and phenomena.

To integrate has a similar meaning (“to reunite the components of a whole) in numerous specialized papers, referential, as for instance, the Webster Dictionary<sup>7</sup>, Larousse Dictionary, Chambers Essential Dictionary, Dictionnaire de Sciences Economique etc.

In the Explanatory Dictionary of the Romanian Language<sup>8</sup>, to integrate – in the meaning of this paper – means “to include, to encapsulate, to incorporate, to harmonize in a whole” and “integration” means “the action to integrate and its result”. Therefore, the term of “integration” does not represent only the action to reunite, to encapsulate, to incorporate in a harmonious whole, but also the action of coordination, fusion and function in parallel or complementary structures<sup>9</sup>.

With the expansion of the area of use of the term of “integration”, it represents phenomena, processes, actions or situations which occur in the social, political, philosophical or structural areas. The literature primordially approaches the phenomenon of integration as an economic integration, given the fact that the “economy lives in society together with cultural, political and social, being very hard to dissociate one of the others, for as long as the real is a globality, namely what we consider to be the ensemble of the ensembles<sup>10</sup>.

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<sup>5</sup>*The Oxford English Dictionary*, apud. Fritz Machlup, *Integration*, 9.

<sup>6</sup>Ioan Rotariu et al., *Sistemul economiei mondiale si mecanismele sale de functionare* (Timisoara: Mirton2001), 127

<sup>7</sup> <sup>xxx</sup>*The New International Dictionary of English Language* (Florida: Trident Press International, 1955), 502.

<sup>8</sup>D.E.X (Romanian Academy Press, 1984), 433.

<sup>9</sup> Vasile Nechita, *Integrarea europeana* (Bacau: Desteptarea, 1997), 7.

<sup>10</sup>Fernand Brandel, *Timpul Lumii*(Bucharest: Encyclopedic, 1976)

Economically<sup>11</sup>, the term of integration has been initially used to describe the inter-sectorial combination of the units of production and sales, by concluding agreements and establishing cartels or merges between concurrent firms – as horizontal integration – and for the reflection of the combinations within the relationship supplier-customer – as vertical integration. The process of combining the economies is an economic region of large dimensions, namely of establishing customs unions or areas of free commerce, has been described without using the word integration, by using – since the 19<sup>th</sup> century – terms such as: *economic cooperation*<sup>12</sup> (in the meaning of commitment of the efforts of several partners for solving common issues, *collaboration, cooperation*). The economic cooperation does not assume a transfer of competences, and the deliberations of the partners bound the states between them in the express limits of their consent); *economic approach*, with the meaning of reducing certain gaps in the economic and social area; *unification* – with the meaning of putting in one place; *uniformity* – with the meaning of bringing to the same level, to standardize; *convergence of policies* (orientation towards the same purpose); *economic solidarity, economic fusion and unification etc.*<sup>13</sup>.

For the first time, the wording “economic integration” is used under its negative form of economic disintegration – by the Eli F. Heckscher, in his paper “Mercantilism”<sup>14</sup>, where the mercantilism is presented as being “a system of standardization oriented towards the removal of the effects of the European disintegration caused by the feudal system” and then by Alfred Weber, in his paper “The economic integration of the European production: an investigation on the interdependences created within the commercial trades between European states” (1933) where is approached – from a static perspective – the degree of interdependence of the European states from the view of supply with raw and semi-fabricated materials.

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<sup>11</sup>Mihaela Lutas, *Integrarea economica europeana* (Bucharest: Economic, 1999), 38

<sup>12</sup>Emilian M. Dobrescu, *Integrarea economica*, 6

<sup>13</sup>Mihaela Lutas, *Integrarea*, 38

<sup>14</sup>Eli. F. Hecksher, *Merkantilismen* (Stockholm : Norstedt&Soners, 1931).

Though used often in specialized papers, the term of economic integration enters the official language after the Second World War, more precisely, in the official documentation aiming the American help offered to Europe through the Marshall Plan<sup>15</sup>.

The world economy is based on a system of specific interdependences between national economies. The international economic interdependence, as form of the mutual ties, is manifested in economy and at the level of the markets and states, generating international commercial fluxes, within the single world economy. These economic interdependences are generated by a series of objective and subjective factors, such as: opening of the economies to the outside world; global division (international) of labor; changes generated in the world economy and in the relations of power; development and diversity of the commercial trades and economic fluxes; continuous development, without limitations of science, technique, technology, telecommunication and electronic information system; political, social, military, cultural factors etc.

After World War II, the international economic interdependence has had a significant development, thus stimulating the process of the economic integration and internationalization. Thus, the economic interdependences include the world economy, national economies and all branches and sectors of activity. The issue of the interdependences has begun to be systematically studied, within the Club of Rome, a global think tank founded in 1968, with the following basic objectives:

- A new approach – global – of the world's issues, which considers the more and more tighter interdependence between nations in a permanent global system;
- A global thinking – of ensemble, which shall note the connections between the political, economic, socio-cultural, psychological, technological and ecological issues of the world, of the contemporary society;

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<sup>15</sup>Mihaela Lutas, *Integrarea*, 39.

- A long-term perspective, orientating the options, policies and strategies which determine the faith of the future generations, giving the possibility for the governments to avoid the mistakes of the short-term management, which are favored.

The studies and analyses of the Club of Rome were confirmed by the future evolutions of the world.

Practically, the west-European states have considered that overcoming the postwar tough plight, could be achieved by a gradual economic integration through the political closeness. Concretely, the economic Europe precedes the political Europe.

The complexity of the phenomenon of integration resides from the fact that it assumes: economic, functional, institutional, social, cultural and political integration, the achievement of the latter one meaning the success of the integration phenomenon.

The economic integration proved to be a progressive elimination process of the economic barriers between independent states, which through cooperation start to function as an entity<sup>16</sup>. From a dynamic perspective, the economic integration refers to the creation of a certain structure of the international economy, which is characterized by the elimination of the barriers for commercial trades between interested states, harmonization of the customs fees or of different methods for stimulating the economy. Thereby, different types of discriminations between national economies disappear, getting to the point in which the national components of a bigger economy are not separated by economic borders, but they work together as an entity<sup>17</sup>.

The economic integration becomes possible only through the achievement of the *functional and institutional integration*<sup>18</sup>.

The *functional integration* requires the harmonization of the regulations in the economic and political areas, between the participant states, allowing the removal of the restrictions imposed for the free movement of goods, services, capital and persons.

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<sup>16</sup>Ioan Rotariu et al., *Sistemul*, p.128 quoting Willem Molle, *The Economics of European Integration: Theory, Practice, Policy* (Cambridge University Press, 3<sup>rd</sup> Ed.,1997), 8.

<sup>17</sup>Rotariu et al., *Sistemul*, 128.

<sup>18</sup>Rotariu et al., *Sistemul*, 128.

The *institutional integration* requires the creation of institutions regulating the intergovernmental international relations, institutions created to support and accelerate the process of integration through coordinated actions. The institutional integration assumes the transfer of competence from member states to the interstate organisms created to integrate the member nation not only economically, but also socially, culturally and politically.

*Social integration* aims the creation of a consolidated and stable situation regarding the labor, family and social relations of each individual. In EU's programs the notion of social integration is used to express the opposite of the notion of poverty and social exclusion. Social integration refers to the creation of a society in which all mechanisms of exclusion be annihilated, being possible through the following systems: democratic and legal; labor market; social protection; the community and family system<sup>19</sup>. European social integration represents a program for harmonization pointed towards the labor standards, the labor markets and the Europeanization of the collective and individual rights. An objective of the social policy regarding the correction of the market, the European social integration debuts during the 80s in two large directions: equality between women and men on the labor market and the second one, health and social security. Nowadays, the European social integration aims the professional mobility of the labor factor, technical aspects of social security and the issues of the social ethics<sup>20</sup>. In fact, the communitarian social integration went very slow, with numerous stagnations and syncope. Brought to debate for the first time with the occasion of adopting the Social Charter in December 1989, the idea of a common social policy has been accepted in 1997, being codified by the Treaty of Amsterdam<sup>21</sup>.

In a tight relation with the social integration is the European Social Area, geopolitical area with social connotation, established in the European continent, which aims the development of the social dimension of the European Union. It is considered a break or a facility in the process

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<sup>19</sup>*Dictionary of Economy* (Bucharest: Economic, 2<sup>nd</sup> ed., 2001), 236.

<sup>20</sup>*Dictionary of Economy*, 236.

<sup>21</sup>Rotariu et al., *Sistemul*, 128.

of the social integration. The European Social Area aims: a) the harmonization of the systems of welfare, which are different for each state; b) the achievement of the compatibility of social policies, of the system of social protection, in the area of work and health conditions, of the migration of labor force, of the duration of labor; c) the adoption of measures of approaching the social standards, especially for ex-socialist states; d) the complementarity of the socio-economic motivations in the ensemble of measures aiming the European “hot areas” (centers of political and military instability, areas with increased poverty, mass unemployment, deeply affected ecological areas etc.)<sup>22</sup>.

The *cultural integration*, seen as a sub-system of the European integration, in relation with all the other forms of integration and especially with the economic integration, refers to the elaboration and promotion of a common cultural policy, of certain institutions, as well as the communitarian coordination and financing of large scale programs<sup>23</sup>.

The *political integration* refers to the finality of the integration process, the perfection of integration, which can be reached after the fulfilment of all stages of the economic integration and after the achievement of the functional, institutional, social and cultural integration. We shall notice that, through their content, the functional, institutional and social integration are subsidiary to the economic integration, with which are interdependent. The political integration refers to a common policy of the Member States in the area of common security and defense policy, which means that the sovereign and independent state loses its traditional connotation, the autonomy of the states being placed between centralism and federalism<sup>24</sup>.

The history of Europe and of the European integration is presented as a history of interaction and, sometimes, of the competition between the economic and cultural policies, as basic elements of the contemporary project of European construction. The weakness of the pre-modern state

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<sup>22</sup>*Dictionary of Economy*, 415

<sup>23</sup>Rotariu et al., *Sistemul*, 128

<sup>24</sup>Anton-Florin Bota, *Integrarea economica si culturala – etape determinante in viitorul procesului de integrare europeana* (Pitești: International Conference “European Union’s History, Culture and Citizenship”, paper presented in the plenum, 2012).

system, as well as the powerful individuality and the selfishness of the new national states which formed the post-Westphalian system made impossible the promotion of a common political project regarding the European integration<sup>25</sup>. Only in the second half of the century, after the historical declaration of Robert Schuman of 9 May 1950, a core of European states – six at the beginning – Germany, France, Italy, Belgium, Holland and Luxembourg – shall initiate specific and efficient actions for the achievement of a European construction based on the idea of European solidarity. “Europe shall not be created at once or according to a single plan – said Robert Schuman – it shall be created through specific actions which, in a first instance, shall generate a de facto solidarity”<sup>26</sup>.

The economic-financial crisis rhythmically affecting the world economy, but also the European multiculturalism – the generator of the motto *united in diversity*, then the acceleration of the process of European construction, through successive waves of adhesion, and, more recently, the accelerated evolution of the emigrational phenomenon in towards Europe, are as many reasons for concern regarding the future of what the European Union represents.

## CONCLUSIONS

We conclude that the most important stages of the process of integration are the economic and cultural integrations. Under the recent geo-political and economic conditions, to the cultural integration should be given more attention, its role having new dimensions. The cultural integration may revive, by giving new life for the European unification process.

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<sup>25</sup>Hildegard Puvak, *Managementul extinderii Uniunii Europene – etape, obiective, strategii* (Bucharest: Expert, 2004), 10

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# LESION – VICE OF CONSENT

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**Abstract:**

*One of the conditions that consent must meet at the conclusion of a valid contract is that of being free, that is unaffected by any vice of consent. Vices of consent alter juridical will, which is not easy to identify as far as lesion is concerned, as this is characterized by an imbalance between the services of the parties, existing even at the time of conclusion of the contract, which is why it was also denied this legal nature in the regulation of the old Civil Code.*

*The new regulation is clearer in this respect, at least when talking about the lesion claimed by a person of age (over 18 years old), if one party to the contract takes advantage of the victim's state of need, lack of experience or lack of knowledge. Thus, the structure of lesion is composed of two elements: an objective element, which represents the disproportion between the victim's service and the counterperformance it obtained, and a subjective element, consisting of the unfair attitude of one of the parties to the contract, an attitude that represents the cause of lesion.*

*This study deals with the concept and regulation of lesion, the arguments leading to its classification as a vice of consent, the structure of lesion, the conditions that lesion must meet when claimed by a minor (person under age) and when claimed by an adult (person of age), the sanction applicable in case of lesion and the mechanism of contract adaptation, which has the effect of avoiding the application of the respective sanction.*

**Key-words:** *consent, juridical will, vices of consent, lesion, annullability.*

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## I. INTRODUCTION

One of the contract conditions is consent, which consists of the externalization of the decision to conclude a specific contract.

Together with the cause, consent is part of the juridical will. Part of the will in general, the juridical will forming the process is extremely complex and is governed by two principles: the principle of freedom of

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the civil juridical acts (also called the principle of will autonomy) and the principle of real will, called the principle of internal will.<sup>2</sup>

The principle of real will is to be of importance for our study. According to this principle, in the concluding of the civil act priority is given to the internal will of the parties and not to the will which was declared, externalized.

We note, however, that, in as far as the formation of the juridical will is concerned, there is a distinction between internal will, which is the result of a psychological, deliberative process, and externalized will, which is the public manifestation of the decision made after deliberation. Depending on the stage of will formation which is given primary legal relevance, there are two legal concepts: the objective conception and the subjective conception.

The objective conception starts from the reality that the other party to the contract, as well as third parties, will only know the declared will, and not the internal will. These people can learn only what the party managed to express, and not what it wanted to express. The consequence of this reasoning is that the law gives preference to the will declared in the detriment of internal will.

This conception, which dominates the German Civil Code of 1900 and the laws of the states that took it as a model, provides increased protection to the dynamic security of the civil circuit; thus, the rights purchasers' situation cannot be jeopardized by the fact that there might be discrepancies between the internal will and the declared will.

On the contrary, the subjective conception, which first found expression in the French Civil Code adopted in 1804, gives priority to internal will, therefore, if there are inconsistencies between internal will and the way in which it was externalized, the court will have to

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<sup>2</sup> For the formation of juridical will and its principles, please see: Tr. Ionașcu, *Tratat de drept civil (Civil Law Treaty)*, vol. I, The General Part, (Bucharest, 1967): 258 and foll.; I. Dogaru, *Valențele juridice ale voinței (Juridical Valences of Will)*, (Scientific and Encyclopedic, Bucharest, 1986): 33-78; G. Boroș, C.-A. Angheliescu, *Curs de drept civil. Partea generală (Course of Civil Law. The General Part)*, 2<sup>nd</sup> edition revised and enlarged, (Hamangiu: Bucharest, 2012): 133-138; O. Ungureanu, C. Munteanu, *Drept civil. Partea generală (Civil law. The general part)*, (Universul Juridic: Bucharest, 2013): 194-199.

determine the content of the internal will and to give priority to it in relation to how the party managed to express, to externalize this will. One must take into account the psychological nature of the internal will that makes it impossible to determine if not manifested by external works, so that it would prevail only to the extent that it can be proven.<sup>3</sup> Moreover, the principle of internal will is tempered by the fact that juridical effects are to be associated only with externalized consent.

The adoption of this conception results in the protection of the civil circuit static security, the person committed to estranging a good being safe from the risk of considering that (s)he willed more than (s)he wanted, only on the basis of what (s)he managed to declare, due to various circumstances, such as those which have altered his/her consent or even lack of culture.

The Romanian Civil Code adopted the subjective conception, which results from the rules that the regulation of vices of consent and simulation dedicated to the interpretation of the contract (according to Article 1266 paragraph 1, “*Contracts will be construed in accordance with the agreed will of the parties and not in the literal sense of the words.*”).<sup>4</sup>

Only the consent that meets the law requirements can lead to the valid conclusion of a contract. The condition that concerns us here is the freedom of consent and its expression in an informed manner, which involves its not being affected by any vice of consent.

However, the legislator uses the notion of consent with a double meaning: agreement of wills, which is the essence of the bilateral juridical act, a meaning suggested by the etymology of the term, which comes from the Latin *cum sentire*, but also manifestation of will by means of which one party gives its agreement to conclude the contract.

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<sup>3</sup> Please see P. Vasilescu, *Drept civil. Obligațiile (Civil law. Obligations)*, (Hamangiu: Bucharest), 64.

<sup>4</sup> In relation to simulation, Art. 1289 Civil Code stipulates: “*The secret contract between the Parties shall take effect only between the parties and if the nature of the contract or the stipulation of the parties does not indicate otherwise, between their universal successors or with universal title*”.

In this context claims were also made that consent is the will expressed in a juridical sense<sup>5</sup> and its outward form measures the distance between will as psychological manifestation and the juridically-expressed will<sup>6</sup>.

The conscious and free nature that characterizes a validly-expressed consent considers this second meaning of consent, something that must also be taken into account when discussing the vices of consent.

According to Article 1206, “*Consent is vitiated when given in error, surprised by fraud or torn by violence.*”

Vices of consent are circumstances which affect the free and conscious character of consent.<sup>7</sup> They interfere with the juridical will formation and result in expressing consent in circumstances other than those that have been considered by the victim or which is the result of violation of its will.

Therefore, the doctrine stipulates that, in terms of terminology, the phrase “vices of will” would be more accurate than that of “vices of consent.”<sup>8</sup>

## **II. LESION – JURIDICAL NOTION AND CHARACTER**

Under the old Civil Code, lesion was defined as: “*Lesion is the material damage suffered by one of the contracting parties because of the obvious disproportion in value (existing even at the time of contract conclusion) between the service for which it undertook an obligation and the service it would receive in return for the former*”.<sup>9</sup>

This definition emphasizes the content of lesion, without reference to its juridical nature. One possible explanation is that the authors,

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<sup>5</sup> P. Vasilescu in *Introducere în dreptul civil (Introduction to Civil Law)*, by I. Reghini, Ș. Diaconescu, P. Vasilescu, (Hamagiu: Bucharest, 2013): 479.

<sup>6</sup> M.A. Frison-Roche, “Remarques sur la distinction entre la volonté et le consentement en droit des contrats”, in *RTD civ.*: 3 (1995): 572.

<sup>7</sup> Boroi and Anghelescu, *Curs de drept civil. Partea generală*, 14.

<sup>8</sup> *Idem*: 141. The authors cited bring other arguments, relevant, to sustain their allegations.

<sup>9</sup> M. Costin, M. Mureșan and V. Ursa, *Dicționar de drept civil (Civil Law Dictionary)*, (Bucharest: Scientific and Encyclopedic, 1980): 313.

creating a dictionary definition, sought to avoid doctrinal controversy on the structure and the juridical nature of lesion, a controversy fuelled by the way it was regulated.

Two conceptions were opposed to each other: the objective conception and the subjective conception.

According to the objective conception, lesion has a single element - the obvious disproportion in value between the two services.

According to the subjective conception, the objective element is complemented by a subjective one that consists of vitiation of consent by the state of need of one of the parties, a state that the other party takes advantage of in order to get disproportionate benefits.<sup>10</sup>

Allowing the minors only to claim lesion, the old Civil Code adopted the objective conception. Thus, in Article 1157, it provided that the only element required to apprehend the existence of lesion consists of pecuniary lesion, equal to the disparity in value between the counter performances. As a result, it was sufficient to establish the existence of this disparity without having to prove that the opposing party would have taken advantage of the state of necessity of the lesion victim. Article 1165 of the old Civil Code expressly forbade persons of age to make action for rescission of the contract, which was the sanction specific to lesion.

Withholding this single element, which has an external existence and is not manifestly involved in the formation of consent, has also generated controversy in the legal literature on the juridical nature of lesion.

Thus, one opinion argued that lesion is not a vice of consent, but only a matter of capacity<sup>11</sup>.

The opponents of that view put forward the following arguments:<sup>12</sup> lesion is permitted as an exception in the case of the people of age (over

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<sup>10</sup> O. Ungureanu, *Drept civil. Introducere (Civil Law. Introduction)*, (C.H. Beck: Bucharest, 2007), 186; G. Boroï, *Drept civil. Partea generală. Persoanele (Civil Law. The General Part. The Persons)*, (All Beck: Bucharest, 2001), 171

<sup>11</sup> Please see D. Cosma, *Teoria generală a actului juridic civil (General Theory of the Civil Juridical Act)*, (Scientific: Bucharest, 1969), 153.

<sup>12</sup> Please see G. Boroï, *Drept civil. Partea generală. Persoanele*, 171.

18 years old) as well, as stipulated by the provisions of Article 694 sentence II of the old Civil Code<sup>13</sup>, the respective situation not being linked to the capacity of those who claim it; even in the case covered by Article 25 of Decree no. 32/1954, cancellation of the juridical act and refund intervene not so much for the status of minor as for the material damage suffered by the one who had limited legal capacity at its conclusion, i.e. for lesion – *minor restituitur non tanquam minor, sed tanquam laesus*.

A controversy on the same matter existed in French law as well, and the opinions expressed with this occasion are of interest to us since the French Civil Code was the model followed by the editors of the Romanian Civil Code of 1864 and one of the main sources of inspiration for the current Romanian Civil Code is still the French Civil Code, in its modernized version. In evaluating these opinions we must take into account the fact that French law also regulated time, in addition to the lesion applicable to contracts concluded by minors and the lesion for certain juridical acts signed by persons of age, respectively division (Article 891 of the French Civil Code) and sale of buildings (Article 1674 of the French Civil Code).<sup>14</sup> In both cases, the disproportion that must exist between services for the person of age to be able to claim lesion is quantified.

Under the first opinion, which develops the subjective conception about lesion, it is considered that this constitutes a presumption of vice of consent: if a person has made such a bad deal, it is because (s)he was wrong, deceived or coerced; if the will had been perfectly free and informed, (s)he would not have contracted.<sup>15</sup>

According to the objective conception, the fundament of sanctioning lesion does not lie in the analysis of consent and its vitiation,

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<sup>13</sup> According to the legal provision cited, the person of age cannot attack the act through which (s)he accepted a succession, on the grounds that this would have caused him/her an injury, “*unless when the succession is absorbed or reduced by more than half by the discovery of a will unknown at the time of acceptance.*”

<sup>14</sup> Subsequently, lesion was regulated in other contracts concluded by the person of age. Please see J. Flour, J.-L. Aubert and E. Savaux, *Droit civil. Les obligations. I. L'acte juridique*, 12<sup>th</sup> edition, (Dalloz: Paris, 2006), 195-196.

<sup>15</sup> *Idem*, 194.

which could be presumed, but in considerations of commutative justice, which, in an exceptional manner, have precedence over agreement of wills. In the cases provided by law, equality of services would be required as a higher principle of contractual freedom: what is just has precedence over what was willed - even if it was wished to be conscious and free.<sup>16</sup>

Even in our case, after the entry into force of the new Civil Code, it was claimed that despite its express qualification as a vice of consent, lesion cannot possess this juridical nature because through its mechanisms the free and conscious character of the juridical will cannot be defended. Lesion would be just a separate case of dissolving the contract, respectively a general cause of annullability<sup>17</sup>.

We believe that lesion, as it is regulated by the current Civil Code, is a vice of consent since the occurrence of an imbalance between the services, existing even at the time of conclusion of contract, is a consequence that was not foreseen by the victim when it agreed to the conclusion of the contract. For this reason, the victim's consent was not expressed knowingly. Although, in this respect, the situation described would approach error, it might not be so qualified for not falling into any of the assumptions referred to in Article 1207 paragraph 2 of the Civil Code, which regulate the essential error: error on the nature of the juridical act (*error in negotio*), error on the object of the juridical act; error on the identity of the performance object (*error in corpore*) or on its substantial qualities (*error in substance*) and error on the identity of the person or the quality of it (*error in personam*).

The fact that lesion is characterized by an imbalance between the performances of the parties to the contract takes this juridical institution closer to unpredictability, which, according to the doctrinal definition, is the imbalance that occurs between contractual performance due to considerable and unexpected price increases<sup>18</sup>.

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<sup>16</sup> *Ibidem*.

<sup>17</sup> P. Vasilescu, *Introducere în dreptul civil (Introduction to Civil Law)*, 520.

<sup>18</sup> B. Stark, *Droit civil. Les Obligations, Librairies techniques*, (Paris, 1972), 565. For details on the theoretical foundations of unpredictability and its incidence in the Romanian law, before and after the entry into force of the new Civil Code, please see

But the differences are essential!

First, there is the moment when the contractual imbalance occurs - in the case of lesion, ever since the conclusion of the contract, the value of one of the parties' service is disproportionately high in relation to the counter performance owed, while unpredictability is the result of an imbalance that occurs later, due to circumstances unforeseen by the parties.

Secondly, there are differences in the juridical nature of the two institutions - vice of consent, in the case of lesion, and exception from the principle of contractual binding force, in the case of unpredictability (unpredictability is therefore treated in the broader context of contractual effects, namely as a cause for judicial review of a legal agreement concluded).

Finally, the different juridical nature also causes means of remedying the contractual imbalances to be different: abolishing or adapting the contract, when lesion is concerned; cessation or judicial review of the contract, when unpredictability is concerned.

The juridical nature of the vice of consent is even more obvious in the regulation that the new Civil Code consecrates to lesion. Thus, not only does Article 1206 paragraph 2 expressly qualify lesion as a vice of consent, but this juridical nature emerges clearly from the provisions of Articles 1221-1224, at least when talking about the conditions that must be met by the lesion claimed by the persons of age. Thus, for persons of age to be able to claim lesion, it is not enough for the victim to prove the existence of disparity between the services, but also the fact that this result was reached because the other party to the juridical act took advantage of the former's state of need, lack of experience or lack of knowledge.

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E. Chelaru, *Teoria generală a dreptului civil (The General Theory of Civil Law)*, (C.H. Beck: Bucharest, 2014), 159-171.

The foundation of the new regulation on lesion is represented thus by both objective conception (when the victim is a minor) and subjective conception (when the victim is a person of age).<sup>19</sup>

Since the conditions in which minors and persons of age may claim lesion are partly different, we will examine them separately.

### **III. LESION CLAIMED BY PERSONS OF AGE**

The legal provision that allows persons of age to claim lesion is contained in Article 1221 paragraph 1 of the Civil Code, which stipulates that “Lesion occurs when one of the parties, taking advantage of the other party’s state of need, lack of experience or lack of knowledge, stipulates, at the conclusion of the agreement, on his benefit or in other party’s benefit, a service of a value significantly higher than its own service.”

The first conclusion that emerges from the interpretation of the legal provision cited is that, for a person of age to be able to claim lesion, two elements are necessary: an objective element and a subjective element. That fact is also the basis of the claim that the new regulation on lesion takes into account both the objective conception and the subjective conception.

The objective element is represented by the disparity in value between the victim’s service and the counter performance it obtained. Not every existing disproportion between the two services can be considered as injurious, but only that which is “significant”. Article 1222 paragraph 2 of the Civil Code quantifies this disparity, noting that it must exceed half the value the service promised or enforced by the injured party had at the time of conclusion. As we shall see, the size disparity envisaged by the legal text quoted constitutes only the threshold from which the party claiming lesion may request cancellation of the contract. To retain the existence of lesion, it is, however, enough to have a “significant disparity” between services, a matter of fact which is at the discretion of the court. In such cases, the provision contained in the same

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<sup>19</sup> Please see G. Boroï and C.A. Anghelescu, *Drept civil. Partea generală. Persoanele*, 160; O. Ungureanu and C. Munteanu, *Drept civil. Partea generală (Civil law. The general part)*, 237.

Article 1222 paragraph 2 of the Civil Code also reveals its usefulness, according to which the existence of lesion must be assessed depending on the nature and purpose of the contract as well.

Nevertheless, it is not enough for the disparity in value between services to exist when the juridical deed is concluded, but it is necessary for it to be kept by the time of the victim's filing an action for annulment.

If the value disparity of the services occurs because of circumstances that are subsequent to the conclusion of the juridical deed, this will no longer be qualified as lesion, but rather as unpredictability.

Random contracts, transactions and other agreements expressly provided by law (Article 1224 of the Civil Code) cannot be appealed for lesion. The element of risk is the essence of the random contract, which is why we cannot talk about an equivalence of services, while the transaction is a contract by which the parties may renounce, whole or in part, their rights to prevent or extinguish a dispute, and it requires mutual concessions.

It is to be deduced that only bilateral contracts of an onerous and commutative nature are susceptible of lesion.

The subjective element lies in the attitude of the other contracting party, which, knowingly, takes advantage of the victim's state of need, lack of experience or lack of knowledge. It is the aspect that illustrates most poignantly the juridical nature of lesion as a vice of consent.

#### **IV. LESION CLAIMED BY MINORS (UNDER-AGE PERSONS).**

In the case of minors, lesion has a simple structure, consisting only of the material element.

However, the material element has a different content than the one that has to exist in the case of persons of age. Thus, besides the situation in which there is a disparity in value between the service (s)he has assumed and the counter performance (s)he will receive, the minor may claim lesion when (s)he enters an obligation excessive in relation to his/her heritage state, even if there is no disproportion between contractual obligations.

It is what Article 1221 paragraph 3 of the Civil Code stipulates, which has the following wording: "Lesion may also exist where the

person under age enters an excessive obligation by reference to his/her heritage status, the benefits that (s)he gets from the contract or to the circumstances as a whole.”

On the other hand, when there is disparity between services to the detriment of the minor, this need not meet a certain proportion, as required by Article 1222 paragraph 2 sentence I of the Civil Code. This disproportion will have nonetheless to subsist until the moment the action for annulment will be lodged.

Only the bilateral juridical acts, onerous and commutative, may be challenged by the minor on grounds of lesion. Also, there must be an act of administration which the minor with limited legal capacity has concluded on his/her own, i.e. without the legal guardian’s consent.

## **V. SANCTIONING LESION**

The penalties that occur in the event of lesion are specified in Article 1222 paragraph 1 of the Civil Code. The victim of lesion may, at its discretion, request one of the two penalties:

- a) contract cancellation;
- b) reducing his/her own obligations to the amount of damages-interest he/she would be entitled to.

Article 1222 paragraph 2 of the Civil Code has that the action for annulment is admissible only if the lesion exceeds half the value that the service promised or enforced by the injured party had at the time of contract conclusion, and if the disparity between services continued until the date of application for annulment.

The minor may request cancellation of the contract on grounds of lesion even if the disparity between services is smaller than that prescribed by Article 1222 paragraph 2 of the Civil Code, cited above.

Reducing one’s own services may be obtained even if lesion does not exceed half the value that the service promised or enforced by the injured party had at the time of contract conclusion.<sup>20</sup> In this case, however, it is still necessary to have disparity between services, both at the time of conclusion of contract and at the time of lodging the legal

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<sup>20</sup> In the same sense, Boroi and Angheliescu, *Drept civil. Partea generală. Persoanele*, 161-162.

action calling for service reduction, even if value changes occurred meanwhile.

As with the vice of consent of error, the other party can paralyze the action for annulment or action for reducing the services brought by the victim of lesion, if it offers, in a fair manner, a reduction of their claims or, where appropriate, an increase of their obligations Article 1222 paragraphs 2-3 of the Civil Code). In these cases, the provisions of Article 1213 of the Civil Code governing adaptation of the contract shall be applicable.

As a result, the party alleging to have been the victim of lesion must notify the co-contractor, communicating to him/her the amount estimated to be a disproportion between the services. This communication shall be made before the annulment of the contract by notice or by communicating the notice of summons. Within 3 months from the date it was notified or from the date when the application for summons was communicated, the other party shall declare that it agrees with execution or execute the contract without delay, as the alleged victim of lesion claims to be necessary to balance the services. But adaptation of the contract can also be achieved while the trial for annulment by the victim of error is pending before the courts of law.

If the statement was made and communicated to the party in error within the period prescribed by law or if the contract was executed, the right to obtain annulment is extinguished and the notification by which the victim of error informed the other party about the way (s)he understood the contract is deemed void.

The deliverance of the contract can also be achieved by its confirmation by the victim or by the expiry of the limitation period, without the victim having filed a legal action. Confirmation conditions are provided for by Articles 1263-1264 of the Civil Code.

Both actions (actions for annulment and action for reducing the services) are prescriptible within 1 year from the date of contract conclusion.

By way of derogation from the rule of imprescriptibility of the relative nullity claim as a matter of exception, provided for by Article 1249 paragraph 2 sentence II of the Civil Code, Article 1223 paragraph 2

of the Civil Code states that annullability of the contract based on lesion cannot be opposed by way of exception when the right to remedy is prescribed.

## **CONCLUSION**

The way lesion was regulated in the new Civil Code is more realistic and complex than in the case of the old regulations.

Thus, if for the drafters of the Civil Code of 1864, only minors were in danger to enter obligations that were disproportionate to the counter performance they were entitled to, and the persons of age, having full legal capacity, were considered to be safe from such dangers, the current legislator, given the fundamentally-changed legal and economic reality, expanded the scope of the lesion to include the latter case as well.

Of course, because the persons of age have, however, full legal capacity, so they enjoy a presumption of discrimination, the conditions under which they can claim lesion are more restrictive. In establishing these conditions account was taken of the fact that the persons of age may find themselves in situations where the person with which they are contracting, without committing fraudulent manoeuvres (in order to retain the existence of undue influence), take advantage of their state of need, lack of experience or lack of knowledge. The reluctance which must be exercised in applying sanctions targeted to lesion is illustrated by two additional conditions imposed by law: the disparity between the parties' services must, on the one hand, achieve a certain proportion, which makes it be "significant", and, on the other hand, this disparity must be preserved until the time of the action for annulment by the victim.

As far as the lesion claimed by minors is concerned, we would like to recall two key differences compared to the old regulation: the minor may claim lesion only when the service it has assumed is disproportionate to what (s)he receives in return, as well as when (s)he enters an obligation that is excessive by reference to his/her heritage status, to the benefits that (s)he gets from the contract or to the circumstances as a whole; as with persons of age, the disparity between

services will have to subsist until the moment the action for annulment will be lodged.

At last, the law expressly qualified lesion as a vice of consent.

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# A COUPLE OF CONSIDERATIONS REGARDING THE CERTIFICATE OF INHERITANCE – A PIECE OF EVIDENCE FOR THE PROPERTY RIGHT

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## **Abstract:**

*In relation to the certificate of inheritance – which has undergone a significant change of its configuration together with the entry in force of the current Romanian Civil Code – a few reflections are necessary in our opinion. The present work shall attempt to discuss the following: the relation between the notion of acquiring a property right and the piece of evidence for proving this right and the property title, all of them in relation to the certificate of inheritance; the object representing the evidence of the certificate of inheritance; the relation between the national certificate of inheritance and the European Certificate of Succession; the need to know, for the time being, the proving evidence of the certificate of inheritance, as it was regulated prior to 1<sup>st</sup> October 2011.*

**Key-words:** *certificate of inheritance; European Certificate of Succession; piece of evidence; property title; way to acquire a property right.*

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## **INTRODUCTION**

The certificate of inheritance, reconfigured by the current Civil Code<sup>3</sup>, is an authentic notarial act, issued by the notary public where an inheritance is opened, within the non-administrative succession procedure; it proves the quality of heir, legal or testamentary, but also the property right of the heirs accepting the inheritance upon the assets within the hereditary patrimony, according to the share to which each of them is entitled. Moreover, the written document analysed here is also a

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<sup>3</sup> We are speaking of Law No. 287/2009, republished (Official Gazette No. 505 from 15<sup>th</sup> July 2011).

way to make sure that the heirs not benefitting from a rightful possession right enjoy it. The certificate mainly includes references to the hereditary patrimony, the number and quality of heirs and the shares to which they are entitled from the deceased's patrimony. It is released after the expiry of the term within which an inheritance can be accepted or rejected (a year or even before, if all the heirs are known). Each heir receives a copy of the certificate of inheritance, once the liquidation of hereditary liabilities ends. The persons having their rights damaged by the release of the certificate can demand to the competent court to acknowledge or to declare its nullity, according to the case, but also to establish their rights, according to the law<sup>4</sup>.

From all the aspects involved by the certificate of inheritance, the current work shall attempt to provide clear and fair answers to certain questions related to some of them, which are present in the specialized literature and practice. These are the following<sup>5</sup>:

- a) Is the certificate of inheritance a property title?
- b) Which is the object of the evidence provided by the certificate of inheritance?
- c) Are there raised previous issues also when it comes to the European Certificate of Succession?
- d) Which is the legal relation between the European Certificate of Succession and the national one?
- e) Does the former regulation of the certificate of inheritance still have any usefulness for the time being?

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<sup>4</sup> For more details, see for instance I. Genoiu, *Dreptul la moștenire în Codul civil*, 2<sup>nd</sup> edition (Bucharest: C.H. Beck, 2013), 338-346.

<sup>5</sup> To a certain extent, they have also been discussed by B. Pătrașcu, I. Genoiu, *Despre particularitățile unor instituții ale dreptului succesoral și despre dificultățile integrării lor în ansamblul materiei moșteniri*, in the Proceedings of the Annual session of scientific conferences "Intrarea în vigoare a noilor coduri. O primă evaluare", organized by the Legal Research Institute "Acad. Andrei Rădulescu" of the Romanian Academy, Bucharest, 15<sup>th</sup> April 2016 (Bucharest: Universul Juridic, 2016), 4-11.

## **IS THE CERTIFICATE OF INHERITANCE A PROPERTY TITLE?**

At a first sight, the answer to this question seems easy to find, by briefly reading the text of paragraph (1) of article 1133 of the Civil Code, according to which “*The certificate of inheritance proves the quality of heir, legal or testamentary, but also the property right of the heirs accepting the inheritance upon the assets belonging to the succession patrimony, according to the share to which everyone is entitled* (source: I.G; O.M.)”.

Therefore, the certificate of inheritance has the function of a piece of evidence for the property right enjoyed by the heirs accepting an inheritance upon the assets belonging to the succession patrimony, according to the share to which everyone is entitled, besides the functions of proving the quality of heir and to provide a rightful ownership upon assets to the legal heirs not enjoying it. It has to be reminded that, under the incidence of the civil regulation in force until 1<sup>st</sup> October 2011, the latter two functions were the only ones at which the role of certificate of inheritance was limited to.

Recent legal literature has stated that the certificate of inheritance constitutes a property title. As to us, we consider that some specifications should be made. This is because we believe that there are two conditions which should be met in order to speak of a property title:

- a written document should exist;
- the written document must have the capacity to prove the property title through itself.

Taking into account only the texts of paragraph (1) of article 1133 of the Civil Code, completely quoted above, we reach the conclusion that, when it comes to the certificate of inheritance, only the first requirement is met, namely that of a written document; without a doubt, this document is an authentic notarial act, as pointed before. But does this notarial act here discussed manage to prove the property title through itself? It seems that the answer to this question is no, since the legal text involved shows that the proof of the property right must be made only by the *accepting* heirs, under the conditions in which a certificate of inheritance makes reference to all the persons entitled to inherit, when

considering the incident provisions of Law No. 36/1995<sup>6</sup> (this is made on the basis of the statements of those persons, another important element for the present analysis). The persons in question are: those who accepted the inheritance and changed their statute from potential heirs to that of successor and heir; the persons who gave up on the inheritance, but also those who had nothing more to do with it, due to another reason than their renunciation, for instance as a result of succession unworthiness or their passivity and lack of reaction when it came to exerting their right to accept or refuse an inheritance within the one year legal term<sup>7</sup>. Therefore, in order for a certificate of inheritance to be released and prove the property right upon the shares within the succession patrimony, the acceptance act of the person entitled to inherit is previously needed. In the absence of this, namely the acceptance of the inheritance, be it clearly expressed or tacit, the release of the certificate of inheritance would not be possible. Then, the acceptance of the inheritance must also be preceded by the proof of the death of the person leaving the inheritance involved (as only opened inheritances can be obtained), but also of the proper vocation of the person entitled to inherit. The following documents are therefore needed when it comes to both types of inheritance: a death certificate (proving the death of the person leaving the inheritance; the type of death has no relevance here), civil state documents (proving the kinship with the deceased person or the quality of spouse when it comes to legal inheritances), but also a will, when it comes to testamentary inheritances.

It therefore clearly results the fact that the certificate of inheritance only contributes and helps proving the property title, but does not stand as an independent proof, like a genuine title.

In our opinion, this quality of property title characterizes contracts transferring property, since the convention is listed by article 557 of the

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<sup>6</sup> The Law of notaries public and notarial activity, republished in the Official Gazette No. 444 from 18<sup>th</sup> June 2014).

<sup>7</sup> For more details regarding the right to accept or reject an inheritance, see B. Pătrașcu, I. Genoiu, *Aspectele esențiale ale opțiunii succesoriale potrivit noului Cod civil*, in M. Uliescu (coordinator), “Noul Cod civil. Studii și comentarii”, volume II (Bucharest: Universul Juridic, 2013), 910-941.

Civil Code among the ways to acquire a property right, together with: legal or testamentary inheritance, accession, usucapio, good faith possession for movables assets and fruits, occupation, tradition and legal decision transferring property through itself.

Going through the succession of ideas here presented, specialized literature<sup>8</sup>, has stated that the certificate of inheritance is only a piece of evidence for the property right, while the title is represented by the inheritance – legal, testamentary and conventional. Besides the fact that we are not convinced about the existence of the third form of the aforementioned inheritance – the conventional one – the main argument being that at article 333 of its Book II the Civil Code strictly regulates the preciput clause, a legal concept quite difficult to qualify, we consider that an inheritance cannot have either the value of a property title *stricto sensu*, precisely because among its official acknowledgments there is none of a written document. It is true that, when it comes to the testamentary inheritance, the written document can be encountered, but this one produces legal effects only if it is drafted by complying with the legal conditions. The mere existence of a legacy within a last will act shall not have the meaning of a property title. The meanings which the inheritance has been acquiring for more than a hundred years are the following three: the transmission of the patrimony of one natural person who died, towards one or several persons who are still alive; succession patrimony; institution of the civil law.

It is true that French people say “un fait de meuble possession vaut titre” (when it comes to movable property, possession means ownership), hence providing a value of property title to the good faith possession of the movable assets. Yet, this can only be considered a large definition of the property title concept, in which could also be included the heir certificate and the inheritance.

In conclusion, in our opinion the certificate of inheritance is, *stricto sensu*, a means of evidence for the property right. It can also be considered a property title, but we are taking into account the broad definition provided to this concept. We could not deny the value of

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<sup>8</sup> D. Chirică, *Tratat de drept civil. Succesiunile și liberalitățile* (Bucharest: C.H. Beck, 2014), 547.

property title of the certificate of inheritance, as long as this represents a ground for registering real estate rights in the real estate register, this even if the proof which the notarial document in discussion generates is only relative, and not absolute<sup>9</sup>. We are saying this because the certificate of inheritance contains, just like any other document within its category, two kind of mentions: those representing personal observations of the notary public and constituting the absolute evidence, until being declared false, and those recorded and inserted by the notary public as a result of the parties statements and which have an evidence force typical to written documents under private signature, therefore until the contrary evidence.

### **WHICH IS THE OBJECT OF THE EVIDENCE PROVIDED BY THE CERTIFICATE OF INHERITANCE?**

In this case too, an answer seems to be provided also by paragraph (1) of article 1133 of the Civil Code, according to which the certificate of inheritance “(...) *proves the property right (...) upon the assets belonging to the succession patrimony, according to the share to which each heir is entitled*”. It would emerge from above that the proof insured by the certificate in discussion regards both the inheritance on the whole (we are also considering here the notion of inheritance as patrimony transmitted) and its component elements. We could draw this conclusion just by taking into account the legal text above, drafted with flaws in fact.

In fact, after an inheritance has been accepted, the severalty state emerges, ending only by partition. But the severalty state is a form of the property right, similar to the common ownership based on shares, when the owners know only the share to which they are entitled, and not also the assets taken individually, and is at the same different from the same precisely from the perspective of the object which it involves. Co-ownership regards single assets, while the object of the severalty is represented by legal universality, hence by an inheritance. At least for the reason above, we consider that the evidence provided by the certificate of inheritance regards the shares from the inheritance to which the accepting heirs are entitled, and not individual assets. The place of the shares shall

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<sup>9</sup> See also: D. Chirică, *Tratat de drept civil...*, 548; Fr. Deak, R. Popescu, *Tratat de drept succesoral*, volume III, III edition (Bucharest: Universul Juridic, 2014), 150-151.

be taken by assets and amounts of money precisely as an effect of the succession partition, irrespective of the form which this takes. It is true that, when it comes to the partition between ascendants made by will, the severalty state no longer emerges, by being avoided precisely by the testator leaving the provisions.

By keeping the same order of ideas, we are wondering whether the evidence which the certificate of inheritance would provide in terms of singular assets from the inheritance is fragile, as long as in most of the cases it contains mentions regarding the main assets of the deceased, the immovable and movable assets which are the most important in terms of value, while the other assets within the succession patrimony are reflected by the notarial act involved through expressions like “and others”/”and so on”. Since they are not named by the certificate of inheritance, does it mean that the other assets do not exist within the succession patrimony and that they shall not be subject to the division? Or their lack of nomination in the certificate of inheritance would be synonymous to the impossibility of the owner to prove the property right upon them by any other legal means of evidence? We believe that the answer to the question above is negative, since the way to acquire a property is inheritance, while the certificate of inheritance only makes the proof of the shares from the inheritance. Individual assets, which shall compose these fractions, will be determined only as an effect of partition. At any rate, law offers remedies for this kind of situation, by allowing either for an additional certificate of inheritance to be released or for the annulment of the one initially released and the release of another one, to include all the assets belonging to the inheritance.

We would also like to mention that the legal text only refers to the heirs with a universal vocation and with a universal title, and not also to those with particular title, as it speaks of the inheritance assets “according to the share to which every heir is entitled”. In the case of the legatee by particular title we cannot speak of a share. We can at most understand that the legal text wanted to consider also the situation in which the heirs divided their assets by agreement within the same framework of the non-administrative and elegant debate related to inheritance.

To conclude this aspect, we tend to believe that the evidence provided by the certificate of inheritance regards shares from the inheritance and not single singular assets.

## **DO THE ISSUES PREVIOUSLY DEBATED APPLY ALSO TO THE EUROPEAN HEIR CERTIFICATE?**

We believe that the two questions which we have attempted to answer before could also be asked in regard to the European Certificate of Succession, regulated by the EU Regulation No. 650/2012 of the European Parliament and Council on the competence, enforceable law, recognition and enforcement of legal decisions, as well as the acceptance and enforcement of the authentic acts in the field of successions, and the creation of a European Certificate of Succession<sup>10</sup>. This is justified by the fact that article 63 paragraph (2) of the EU Regulation contains the following provision: “a certificate can be used precisely for proving one or more of the following: a) the statute and/or the rights enjoyed by each heir or, according to the case, by any legatee mentioned in the certificate and the shares from the succession patrimony; b) the assignment of a certain asset or of the assets belonging to the succession patrimony to one heir/several heirs or to the legatee/legatees mentioned in the certificate, according to the case; c) the attributes of the person mentioned in the certificate as a testamentary executor or as an administrator of the succession patrimony”.

It appears in fact that the European Certificate of Succession represents, just like the national one, a piece of evidence for the quality of heir and for the property right enjoyed by universal heirs and by universal title upon the share to which each of them is entitled, but also by the legatee by particular title upon individual assets.

Taking into account this type of certificate, we believe that it is not wrong to state that it represents only a property title *lato sensu* and not necessarily a piece of evidence for the property of certain shares from the

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<sup>10</sup> Available at the link <http://eur-lex.europa.eu>. The greatest part of the provisions of this Regulation has become enforceable starting with 17<sup>th</sup> August 2015. Articles 79, 80, 81, as well as articles 77 and 78 of this normative act have entered in force starting with 5<sup>th</sup> July 2012 and 16<sup>th</sup> November 2014.

inheritance, when it comes to universal heirs and heirs by universal title, and the property of some individual assets, when it comes to legatees by particular title.

## **WHICH IS THE LEGAL RELATION BETWEEN THE EUROPEAN CERTIFICATE OF SUCCESSION AND THE ROMANIAN ONE?**

In our opinion, it is useful to establish the relation between the European Certificate of Succession<sup>11</sup> and the Romanian one.

Since it is optional, the European Certificate of Succession does not replace the national one, for which it is not a substitute [article 62 paragraph (2) of the Regulation]. Nonetheless, it is not clearly established the relation between the national certificate of succession and the European one, as the Regulation does not mention which one of the two would have priority in case of a conflict or which would be the solution if the authorities from different states would be requested at the same time to release it.

According to CNUE (The Council of the Notariats of the European Union)<sup>12</sup>, the European Certificate of Succession would represent a piece of evidence reserved only to successions involving at least a foreign character (from the perspective in which we are interested, here are some examples: a Romanian citizen has his regular residence abroad, in an EU member state or a third country; the citizen of an EU member state has his regular residence in Romania). As a consequence, only in this case a European Certificate of Succession would be released, and not also for the case in which the inheritance has no foreign character, case in which a national certificate of inheritance shall be released.

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<sup>11</sup> For more details, see also I. Genoiu, *Petiția de ereditate și certificatul de moștenitor*, in S. Neculaescu et al „Instituții de drept civil. Curs selectiv pentru licență”, 3<sup>rd</sup> edition (Bucharest: Universul Juridic, 2016).

<sup>12</sup> CNUE is the official authority which represents the 40.000 notaries of Latin law within the EU institutions. Starting with 1<sup>st</sup> January 2007, CNUE includes 21 notarial organisations from the European Union. European notariats are represented within CNUE by the presidents of the national notariats. CNUE functions under the authority of a president, who represents it during his 1 year mandate.

The European Certificate of Succession can be issued by the competent court according to the Regulation conditions or by another authority which, on the basis of the internal legislation, has attributes in the succession field. Therefore, this kind of certificate could come either from the courts or the notaries public, with the observance of the territorial competence rules (the deceased – foreign citizen – had his regular residence in Romania upon his death)<sup>13</sup>.

The European Certificate of Succession shall be issued upon an application (it can be used the specific file contained by the Regulation in its Appendix), only if the competent court shall consider that the deeds presented by the applicant as a ground for his application were proven.

### **DOES THE FORMER REGULATION OF THE CERTIFICATE OF INHERITANCE STILL HAVE ANY USEFULNESS AT THE MOMENT?**

Before the entry in force of the current Civil Code, the certificate of inheritance had two functions, as pointed before: 1. a piece of evidence for the quality of heir and for the share or assets to which each heir was entitled 2. a way to make sure that legal heirs got rightful ownership on the inheritance when they did not enjoyed this right (partially others than those representing this legal character by *lege lata*<sup>14</sup>). Therefore, the new thing brought by the current legal regulations in the succession field is, as pointed before, the function of the certificate of inheritance to prove the property right of the heirs accepting an inheritance upon the shares from

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<sup>13</sup> D.A. Popescu, *Ghid de drept internațional privat în materia succesiunilor* (Onesti: Magic Print, 2014), 102.

<sup>14</sup> According to the 1864 Civil Code, the category of rightful heirs included the relatives of the deceased on a straight line, irrespective of their degree and class, that is descendants, privileged ascendants and ordinary ascendants. See for example D. Văduva, *Succesiuni. Devoluțiunea succesorală* (Bucharest: Universul Juridic, 2011), 38, 43, 44. The specialized literature of that time considered that the choice of the Civil Code in terms of the heirs considered as rightful it was “too restrictive”. See for this purpose Fr. Deak, *Tratat de drept succesoral* (Bucharest: Actami, 1999), 524. By *lege lata*, are considered to have a rightful character the succession rights of the surviving spouse, descendants and privileged ascendants of the deceased, hence those of the persons considered as enjoying forced heirship.

it to which they are entitled, but also upon individual assets, when it comes to legacies by particular title.

As a consequence, if during a litigation judged by a court is invoked a certificate of inheritance issued according to the law, before 1<sup>st</sup> October 2011<sup>15</sup>, this certificate will only prove the quality of heir and his share from the inheritance. The property right upon a share acquired by inheritance shall become active under the conditions of common law, which was regulated at that moment, as there must be applied the principles governing the enforcement of civil law in time (of non-retroactivity and the immediate enforcement of the new civil law), with the exceptions which they involve: the retroactivity of the new civil law and the ultra-activity of the former civil law<sup>16</sup>. Since *tempus regit actum*, the certificate of inheritance issued before the date mentioned above shall forever generate the same legal effects and shall therefore prove only the quality of heir and the share from the inheritance to which he is entitled, but also the shares attributed by a legacy by particular title.

## CONCLUSIONS

The discussion of any aspect regarding the certificate of inheritance has, without any doubt, both a theoretical and practical usefulness. In our opinion, it is even more important to insist on the new function which the current Civil Code provides to the authentic written document, which has been herein discussed, namely that of piece of evidence for the property right enjoyed by the heirs accepting an inheritance upon the shares from that inheritance. By containing such provisions, the current civil regulations ease considerably, from a practical perspective, the proof of the property right enjoyed by the heirs from the succession patrimony, while the heir certificate constitutes a ground for registering the real estate rights in the real estate register (although in our opinion it is not an actual property right, nor it provides an absolute piece of evidence).

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<sup>15</sup> Regarding the multiple aspects which the certificate involved, see for instance: Fr. Deak, *Tratat de drept succesoral...*, 537-541.

<sup>16</sup> For more details related to the action of the civil law in time, see also: E. Chelaru, *Teoria generală a dreptului civil* (Bucharest: C.H. Beck, 2014), 22-34; I. Genoiu, *Drept civil. Partea generală. Persoanele*, 2<sup>nd</sup> edition (Bucharest: C.H. Beck, 2016), 22-25.

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# THE PRINCIPLE OF LEGALITY MEANS OF APPEAL

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## Abstract

*The legislature intended to provide a useful procedural tool to avoid losing the appeal, within the meaning of its unsettlement respecting the principle of legality of appeals.*

*The article 457 from the New Code of Civil Procedure allow retraining the right of appeal exercised in considering of the mention inaccurate judgment on appeal open against it or dismiss it as inadmissible, but thereafter the possibility of exercising the appeal provided by law in order to avoid harming the party as following the exercise of the appeal as erroneous claims from the judgment that it had been communicated.*

**Key-words:** *Appeal, the principle of legality means of appeal, inadmissibility, requalification*

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## PRESENTATION OF PRINCIPLE

The New Code of Civil Procedure stipulates expressly the principle of legality right of appeal, doctrinarian<sup>3</sup> and jurisprudential<sup>4</sup> recognized also under the previous code, according to its judgment being subject only to the right of actions allowed by law, regardless of the particulars given on the disposition judgment.

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<sup>3</sup> V.M.Ciobanu, *Tratat teoretic și practic de procedură civilă, vol. II* (Bucharest: Național, 1997), 321; I. Leș, *Tratat de drept procesual civil*. (Bucharest : C.H. Beck, 5th edition with references to the Project of the Code of Civil Procedure, 2010), 686-687; I.Deleanu, *Tratat de procedură civilă vol. II* (Bucharest: C.H. Beck, 2007), 124-125; M. Tăbârcă, *Drept procesual civil, vol. II, ed. a II-a* (Bucharest: Universul Juridic, 2008), 8.

<sup>4</sup> High Court of Cassation and Justice, Section of civil and intellectual property, Decision no. 532 of 27 January 2005, the Cassation Bulletin no.4/2005, 2; High Court of Cassation and Justice, Section I Civil, Decision no.8039 of 11 November 2011.

In the context of the lack of an express provision in the Civil Procedure Code from 1865, the jurisprudence has considered either be dismissed as inadmissible the right of action, not provided by law, either it is possible the qualification of it and disposal of the right of appeal provided by law, many situations being possible: in the judgment under appeal correctly was indicated the appeal right provided by law but the part exercise another right of action; the judgment was mentioning a wrong appeal right and the part declare the right of action provided by the law; in the judgment under appeal was mentioned a right of action not provided by law and the part was following the instructions of the court.

The lack of qualification and dismiss the appeal right as inadmissible determine the consequence loss of the part possibility to aim the correct right of action, but also the requalification could have serious consequences for the part, because an appeal "became" recourse was subject to procedural rules specific to its, regarding motivation, term etc.

Therefore, the legislature intended to make available a useful procedural instrument to avoid losing the right of appeal in the sense of not solving it respecting the principle of legality appeals<sup>5</sup>.

Thereby, firstly NCPC shows that inaccurate indication from the content of judgment regarding the overt appeal against it has no effect on the right to exercise the appeal provided by law (art.457 par. 2 NCPC), so if declare the correct appeal will be resolved that.

In applying of the same text, whether the judgment indicates that it is definitive, but the part lodged an appeal or recourse provided by law, the competent court for judicial review will sustain the right of action.

Similarly, although NCPC expressly provided this case in art. 457 par. 3, where is mentioned that the judgment is subject to appeal or recourse, while the law provides that judgment is indefeasible, and the part exercises the right of action recommendable by the court whose

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<sup>5</sup> V.M.Ciobanu, et al., *Noul Cod de Procedură Civilă, commented and annotated, vol.I art. 1-526* (Bucharest: Universul Juridic, 2013), 1036-1037; I. Deleanu, *Tratat de procedură civilă, vol. II, Revised Edition, completed, updated, Noul Cod de Procedură Civilă* (Bucharest: Universul Juridic, 2013); I.Les, *Noul Cod de Procedură Civilă, comment on articles, Articles 1-1133* (Bucharest: C.H. Beck), 612.

judgment is appealed, the court of judicial review will dismiss the right of appeal exercised as inadmissible, under the principle of legality appeal.

In these hypotheses the part does not suffer any lesion, because either the right of appeal is resolved being that it was exercised according to the law, or this is dismissed as inadmissible because, according to the law, the part could not hold out any hope of an right of action "conferred" by the judge.

Secondly, it's interesting to know the answer to the question whether the application of art. 457 par. 2 and 3 NCPC refers only to the assumption that the mention of the judgment concerns the right of appeal title (appeal, recourse) or at this and other matters, for instance the term for exercise or if the indication may only target other aspects, indicating the correct right of appeal provided by law, but showing wrong other term or time pass thereof or other element?

Expression of legislator is considering the right of appeal, without referring specifically to the legal regime, respectively to parties, object, term, the court to be filed, motivation etc., seeming so that only the nature right of the appeal produce the legal consequences analyzed and not just certain elements of legal regime. However, to the purpose pursued by the legislature, ascertaining that a wrong mention regarding an element of right of action (for example the term, the court where is submitted) can cause prejudicing of the part, which sees its dismissed or canceled the request, it follows that the wrong mention meant the title of right of appeal, as well as any element, some or all related to right of appeal provided by law.

According to the code, if the court "mislead" the part and mentions another right of appeal than that provided by law, or other juridical regime of its, indicating a different term or a different passing moment period of exercising, the part declared right of appeals after disposal of court, it risk losing the legal term or to determine the consequence of nullity right of appeal, for non-compliance of requirements formal of its.

In such a situation, article 457 par. 3 NCPC provides two hypotheses and the solution required by law if the court rejects as inadmissible the right of appeal unforeseen by law, exercised by the part

concerned in the light of the judgment inaccurate indication regarding the right of appeal.

Thus, the text using the word "if" does not require the rejection as inadmissible of such right of appeal in all cases, leaving the possibility of its correct qualification, with the consequence settlement “in substance” of the right of action provided by law.

But if the court dismiss as inadmissible the right of appeal, the judgment of the judicial review court communicate ex officio to all parties who took part in the process in which was pronounced the judgment under appeal, and from the communication term begins to run, if need be, deadline for exercising the right of appeal provided by law.

The last sentence of the text include also the situation where, as noted above, the court whose decision is appealed, mention that its subject to appeal or recourse, although the law provides that it is final, and the part exercise the right of appeal shown by the court whose judgment is appealed, in which case the court for judicial review has no other possibility than to dismiss the right of appeal, as inadmissible, that from the communication decision to run a time, since the law does not provide any right of appeal of reforming against judgment under appeal.

It also raises the question whether the court for judicial review, enforcement to art. 457 par. 3 NCPC, will dismiss in all cases the right of appeal as inadmissible or, on the contrary, will operate a qualification thereof and to what cases?

We consider that the wording of the purport leaves no other interpretation than the one mentioned in a significant part of the doctrine, that retains the possibility of court for judicial review requalifying of appeal right<sup>6</sup>, referred to the opening of the appeal provided for by law dependent on part prejudice because of the wrong mention in the judgment under appeal<sup>7</sup>.

### **SPECIFIC CASES OF APPLICATION OF ART. 457 NCPC**

In matters of the Law no.85/2006, presently repealed by Law no. 85/2014, but which will continue to produce effects for pending

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<sup>6</sup> Ciobanu, *Noul cod*, 1037.

<sup>7</sup> Leș, *Noul Cod de procedură civilă*, 612.

procedures to the entry into force of the new law<sup>8</sup>, the application of art.457 par. 3 NCPC has determined in the recent judicial practice non-unified solutions.

Both Law no. 85/2006<sup>9</sup> and Law no. 85/2014<sup>10</sup> foresee that their provisions its complies, to the extent compatibility or as far as do not contravene, to those of the Civil Procedure Code and Civil Code, so that, whenever the special procedure does not provide, it will apply the rules of NCPC .

It is the case of eligibility appeals exercised against decisions of the bankruptcy judge towards the rules of Law no. 76/2012<sup>11</sup> implementing Law no. 134/2010 regarding the Code of Civil Procedure.

The entry into force of this normative act Law no.85 / 2006, in force at the time, suffered some changes in procedural perspective, interests of which the right of appeal, the recourse provided for by the form of art. 8, prior to 15.02.2013, becoming appeal.<sup>12</sup>

Appeal is also the right of action established by Law no. 85/2014, so, although the new law should apply only to proceedings commenced after its entry into force, we do not exclude the possibility that the problem arisen to be reflected also into the realm of the new normative act.

Two situations are possible: the court mentions as right of appeal the appeal, within 30 days of communication, although the process was triggered under the previous code and the form of art. 8 at Law no.85/2006 prior to 15.02.2013, the right of appeal provided for by law being the recourse, respective the court indicates the recourse, but the

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<sup>8</sup> Art. 343 from the Law no.85/2014 – „Processes started before the entry into force of this law remain subject to applicable law prior to this date.”

<sup>9</sup> Art. 149.

<sup>10</sup> Art. 342.

<sup>11</sup> By amending art. 8 and art. 12 of Law no.85/2006 has been omitted mention regarding the length of the appeal term, so that after the coming into force of NCPC and on insolvency matter became applicable common law term of 30 days, according to art. 468 para 1.

<sup>12</sup> Art. 8 Law no. 85/2006 - Court of Appeal shall be the appellate court for judgments delivered by the syndic judge pursuant to art. 11. The Court of Appeal's decisions are final.

right of appeal is the appeal, because the procedure was initiated after 15.02.2013.

In the first hypothesis, is not incident the art. 457 NCPC because the process is subject to the Code of Civil Procedure prior, provided that the practice was not uniform within the meaning of requalification, although it seems to be the majority view<sup>13</sup>. The court requalify the appeal as recourse, solving it by the rules with possible harmful consequences for its part, determined by noncompliance of formal requirements of recourse, though, also in this case, a part of the practice recognized the implement of Art. 6 of the European Convention on Human Rights and solved the cases "in substance", beyond the aspects of term precisely because the part complied the provisions of the court whose decision was appealed.

In the second case, if the court indicate in the judgment the right of action as recourse, but the right of action is the appeal according to the law, the court in all cases can retrain and disposal an appeal although it was stated recourse by part, depriving the possibility of harming it failure to comply with procedural forms<sup>14</sup>.

A solution of dismissing the recourse as inadmissible<sup>15</sup> with the consequent of commencement right of action provided by law from the communication date of the recourse decision would only prolong the final case disposition, with negative consequences for part and for the court whose role is being charged thereby artificial.

Doubtless the situations can be found also in other subjects or procedures, such as the presidential ordinance or administrative disputes,

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<sup>13</sup> Dec. no. 1981/17.04.2014, Curtea de apel Pitești, Second Civil Section, administrativ and fiscal, dec.no.3124/26.06.2014, Curtea de apel Pitești, Second Civil Section, administrativ and fiscal, dec.no.2648/29.05.2014, Curtea de apel Pitești, Second Civil Section, administrativ and fiscal.

<sup>14</sup> The Judgment from 26.06.2014 and the Decision no. 226 / 06.26.2014, Court of Appeal Pitesti, Section II of civil, administrative and fiscal dec.nr. 197 / 06.12.2014 Pitesti Court of Appeal, Section II of civil, administrative and fiscal, The Decision no.198 / 12.06.2014 Pitesti Court of Appeal, Section II of civil, administrative and fiscal.

<sup>15</sup> Decision no. 1914/16.04.2014, Pitesti Court of Appeal, Section II of civil, administrative and fiscal.

to the particularity of each situation the court making the application of art. 457 par. 3 NCPC so the wrong mention of the judgment concerning the right of action, followed by lodging a right of action indicated by the court, but not provided by law, will not draw in any case dismiss right of action as inadmissible exercised.

Where the requalification right of action the part would be prejudiced through the dismiss of it by the lack of forms they ignored, taking into account precisely the wrong mention judgment, the dismissal of the right of action as inadmissible is the only which avoid prejudicing part.

But if such prejudice cannot produce, requalification is the solution to follow, to avoid wearing a new litigation on right of action reviewed by the law. Judicial court, to decide whether makes the application of art. 152 NCPC, requalifying the right of action, will check procedural consequences of retraining so that if it finds that it would close to the part the possibility of settling the right of action "in substance", will dismiss the right of appeal as inadmissible.

There were different solutions precisely in consideration of the item prejudicial to part: in front of a stated recourse according to the mention of the disposition sentence, the judicial court qualified the right of action as appeal dispose it as such<sup>16</sup>, because the appeal was exercised in compliance with formal requirements (interlocutory decision, appeal in 5 days of communication) respectively dismissed the recourse as inadmissible<sup>17</sup>, giving the party concerned the possibility of exercising the appeal after the decision of recourse (interlocutory decision, appeal over 5 days from communication, taking into account mention wrong from disposition regarding the recourse within 15 days of the communication).

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<sup>16</sup> Decision no. 80/3.04.2014 Pitesti Court of Appeal, Section II civil, administrativ and fiscal.

<sup>17</sup> Decision no. 816/19.02.2014, Pitesti Court of Appeal, Section II civil, administrativ and fiscal. Decision no. 2305/14.05.2014, Pitesti Court of Appeal, Section II civil administrativ and fiscal.

## CONCLUSIONS

Noting the tendency of eroding the rule *nemo censetur ignorare legem*, shows that the application of art. 457 NCPC will be done on appreciating each situation arising in practice, in order to avoid harming the part as a result of exercise right of action according to the wrong mention of the judgment which has been communicated.

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- **Decision no. 816/19.02.2014, Pitesti Court of Appeal**, Section II civil, administrativ and fiscal.
- **Decision no. 2305/14.05.2014, Pitesti Court of Appeal**, Section II civil administrativ and fiscal

# CONSIDERATIONS ON THE CONTENT OF THE WRIT OF SUMMONS IN THE REGULATION OF THE NEW CIVIL PROCEDURE CODE

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## **Abstract**

*The new Civil Procedure Code has brought innovations in terms of civil proceedings, sometimes fundamentally changing notions, institutions, procedural instruments, means etc.*

*However, the writ of summons, as a form of civil action, has remained the same as in the previous regulation, which is a benchmark for the most common way to refer to court.*

*Nevertheless, the new regulation has brought some changes that were intended to provide a formal and safe framework for persons subject to trial to pursue their legitimate rights and interests.*

**Key-words:** *civil proceedings, writ of summons, court of law*

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## **I. INTRODUCTORY CONSIDERATIONS**

The New Civil Procedure Code, Law no. 134/2010, has substantially changed the Romanian civil procedure field, bringing substantial transformations in terms of civil disputes.

The important procedural acts in the civil procedure field include the writ of summons, as the form of civil action by which a court of law is vested with the settlement of a dispute between two or more parties.

On the other hand, the effects of the writ of summons are not restricted only to vesting the court with authority to judge, but there are also the acknowledged effects of determination of the procedural framework where the trial will be judged by the plaintiff, establishing the territorial jurisdiction if there is an alternative territorial jurisdiction, arising of the possibility to resort to the assignment of litigation rights, it may determine a formal notice of default to the debtor of the obligation

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that is unperformed, performed improperly or late, the effect of discontinued limitation<sup>2</sup>.

Returning to the effect of vesting the court with authority to judge, the writ of summons takes on a previously established formalism necessary to confer a status of seriousness and determination to the legal action. The need to meet certain conditions and the requirement that a writ of summons must have a certain content are intended to bring about the conviction that the plaintiff did not file the writ of summons simply to tease his opponent, the procedure for regulating the writ of summons being regulated precisely for this purpose.

This procedure, regulated by art. 200 and the following of the Civil Procedure Code, is intended to ensure the completeness and formal nature of the writ of summons, which will be communicated to the other party only after meeting the conditions provided by art. 194 of the Civil Procedure Code.

## **II. ABOUT THE CONTENT OF THE WRIT OF SUMMONS**

The content of the writ of summons is provided by art. 194 of the Civil Procedure Code, by which the litigant refers to the court through an application that must take on a solemn form, with a content that is predetermined by the lawmaker.

First of all, the writ of summons must include the identification data of the parties, plaintiffs and defendants, such as name and first name, domicile or residence or the name and registered office of legal persons.

The text of art. 194 para. (1) letter a) of the Civil Procedure Code mentions only the name and first name of natural persons, yet nothing prevents the mentioning in the writ of summons, in addition to and not

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<sup>2</sup> For details, see Mihaela Tăbărcă, *Civil Procedural Law*, vol. II (Bucharest: Universul Juridic, 2013), 75-76; Gabriel Boroï and Mirela Stanca, *Civil Procedural Law* (Bucharest: Hamangiu, 2015), 348-350; Viorel M. Ciobanu, Traian C. Briciu and Claudiu C. Dinu, *Civil Procedural Law. Civil enforcement law. Arbitration. Notary law* (Bucharest: Național, 2013), 254-255.

instead the name and first name<sup>3</sup>, of other identification elements of the person, such as the pseudonym or nickname<sup>4</sup>.

Although the mentioned text refers exclusively to the domicile or residence, the interpretation of these notions should be extensive, in the sense that it will indicate the place, the address where the person concerned actually resides, because subsequently the court will proceed with summoning the person in question and the purpose of the summoning procedure is to actually notify the party of the existence of the dispute and/or other procedural events whose communication is necessary.

The conclusion that can be drawn from the wording of the analysed text, thesis I, is that the elements of the writ of summons regarding the identification data of the parties, plaintiffs and defendants, such as name and first name, domicile or residence or the name and registered office of legal persons are mandatory elements, which cannot be absent.

Another necessary mention is that the place where the parties actually reside (domicile, residence or another location) must be included in the writ of summons in all situations and the mentioning of the domicile/registered office for service under art. 158 of the Civil Procedure Code may not be accepted. Therefore, choosing an address for service under art. 158 of the Civil Procedure Code does not exempt the parties from indicating the address where they reside, as the person responsible for receiving the mail in case of choosing an address for service may refuse the receipt, may be absent or may be in impossibility to receive mail, in which case the court must be aware of the address of the party in order to perform the communication, alternatively, directly to the party<sup>5</sup>.

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<sup>3</sup> Tăbârcă, *Civil Procedural Law*, 30.

<sup>4</sup> For details, see Carmen T. Ungureanu, *Civil Law. General Part. Persons*, 2nd issue, (Bucharest: Hamangiu, 2013), 309-310; Ovidiu Ungureanu and Călina Jugastru, *Civil Law. Persons*, 2nd issue, (Bucharest: Hamangiu, 2007), 177-179; Ion Dogaru and Sevastian Cercel, *Civil Law. Persons*, (Bucharest: C.H. Beck, 2007), 153-155; Ovidiu Ungureanu and Cornelia Munteanu, *Civil Law. Persons*, 3rd issue, (Bucharest: Hamangiu, 2015), 271-273.

<sup>5</sup> For an opinion to the contrary, see Tăbârcă, *Civil Procedural Law*, 31.

The judicial practice had another opinion<sup>6</sup> and appreciated that the simple fact of mentioning the professional address of the conventional representative is equivalent to choosing an address for service although the party did not expressly show the intention of choosing the address for service at the representative's office but, according to the legal requirements, only mentioned the identification data of the representative as well.

On the one hand, the court assessed that, in the first instance, the appellant established his address for service at the headquarters of the conventional representative although the requirements for choosing the address for service were not met, as we have shown, in particular since there was no indication of the person responsible for receiving the mail.

Thus, in order to establish the address for service, the party must indicate, expressly and not tacitly, the location where it wants to receive the procedural documents but, as a cumulative requirement, the party must also indicate the person responsible for receiving the procedural documents, matters that are not found in any procedural document.

In fact, the text of art. 93 of the Civil Procedure Code 1865, and art. 158 of the Civil Procedure Code is very clear, establishing that, in the absence of such indications, communications shall be sent to the domicile of the party.

We cannot understand what part of the Procedure Code texts was unclear for the court of appeal, which caused such a material error, since even the case law of the High Court of Cassation and Justice clearly establishes the applicability of such provisions<sup>7</sup>.

Ignoring such provisions of the applicable regulation, art. 93 of the Civil Procedure Code 1865 and art. 158 of the Civil Procedure Code, is obviously a regrettable material error of the court, which could have been

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<sup>6</sup> C.A. Galați, decision no. 654/16.10.2013, not published.

<sup>7</sup> The High Court of Cassation and Justice, Civil and Intellectual Property Dispute Division, decision no. 5613 of 14 October 2004: "The summoning and service of process shall be communicated to the address for service chosen by the party only if, according to art. 93 of the Civil Procedure Code, the person responsible for receiving the documents was also indicated. In the absence of such indication, the decision of the first instance court shall be communicated to the domicile of the party and the period for filing appeal shall be calculated as of the date of such communication".

corrected by an extraordinary appeal for withdrawal – appeal for annulment.

The court was also wrong when adding to the act of procedure performed by the appellant (to the statement of defence filed on the merits of the case) when it determined that the appellant established his address for service at the headquarters of the conventional representative although there is no reference to this matter throughout the statement of defence.

The court makes a regrettable confusion between the identification data of the party [which must be mentioned in the statement of defence according to art. 115 para. (1) pt. 1 of the Civil Procedure Code 1865 and art. 205 para. (2) letter a) of the Civil Procedure Code<sup>8</sup>] and the identification data of the representatives of the parties [art. 82 para. (1) thesis I final part, Civil Procedure Code 1865 and art. 148 para. (1) Civil Procedure Code<sup>9</sup>] both being required to be recorded in the statement of defence, but separately and distinctly, as identity.

Therefore, the fact that the appellant indicated the identification data of the conventional representative (legal obligation) but omitted to indicate his own identification data (legal obligation) may not be interpreted in the sense that he established his address for service at the headquarters of the conventional representative but it could possibly be considered a confirmation of the fact that his identification data indicated by the other party are correct.

In fact, he was required to also mention the identification data of the conventional representative, as provided by art. 82 para. (1) thesis I final part of the Civil Procedure Code 1865 and art. 148 para. (1) of the Civil Procedure Code, since there is no interpretation in law to overturn the meaning of these provisions.

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<sup>8</sup> Art. 115 para. (1) pt. 1 of the Civil Procedure Code 1865, and art. 205 para. (2) letter a) of the Civil Procedure Code: “The statement of defense shall include: the name and first name, the domicile or residence of the defendant”.

<sup>9</sup> Art. 82 para. (1) thesis I of the Civil Procedure Code 1865, and art. 148 para. (1) of the Civil Procedure Code: “Any application referred to the courts must be in writing and include (...) name and first name, domicile or residence of their representatives, if applicable (...)”.

By this decision, the court managed to innovate the provisions applicable to the address for service, as well as the procedural provisions referring to the principle of availability and regulation of the insolvency proceedings. In fact, the court established orders supported by provisions that are more *de lege ferenda* than *de lege lata*, ignoring the fact that the judgement is delivered in the name of law and not in the name of equity or other regulations.

The second thesis of art. 194 para. (1) letter a) of the Civil Procedure Code sets the inclusion in the writ of summons of other identification elements of the parties as well, such as the personal identification code, the unique registration code, the fiscal registration code, the registration number with the Trade Register for legal persons or professionals, the registration number in the register of legal persons and the bank account of the plaintiff and of the defendant, if the parties have such identification elements and to the extent that they are known by the plaintiff. The phrase at the end of the second thesis of art. 194 para. (1) letter a) of the Civil Procedure Code – “if known by the plaintiff” – shows their optional nature, which means that, even to the extent that they were known by the plaintiff, it could not be appreciated that they are mandatory and, therefore, the annulment of the writ of summons in case of failure to indicate them would not be required.

In all these matters, the provisions of art. 148 para. (1) thesis II of the Civil Procedure Code apply accordingly, provisions that refer to the inclusion in the writ of summons of the mentions regarding the electronic address, phone number, fax numbers or the like. These mentions are also optional and not essential to the writ of summons and, in their absence, the writ of summons may not be annulled either by the regularization procedure or, if a hearing was set, during the trial.

Further, the writ of summons must include the plaintiff’s address for service in Romanian, where the procedural documents will be sent to him if he lives abroad. According to an opinion<sup>10</sup>, if the plaintiff who lives abroad omits to mention in the writ of summons the address for service in Romania, where he is to receive the procedural documents, the application shall be annulled in regularization procedure or, if the first

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<sup>10</sup> Tăbârcă, *Civil Procedural Law*, 32.

hearing was set, it shall be suspended under art. 242 para. (1) of the Civil Procedure Code.

I consider the solution is wrong because, according to the provisions of art. 156 of the Civil Procedure Code, in case the persons who live abroad fail to comply with the obligation to choose an address in Romania for service of the procedural documents, the sanction is that communications will be made by registered letter, the delivery receipt of the letter at the Romanian Post, which shall mention the documents to be dispatched, shall take the place of proof of compliance with the procedure. Therefore, the indicated text does not mention the sanction of annulment of the application or suspension of the action, but states that the actual fulfilment of the procedure of service of process (as it happens under common law) shall not be considered, but the mere delivery of the registered letter (proved with postal receipt) shall take the place of fulfilment of the procedure of service of process.

A mention that can be made in this situation is that the lawmaker strangely restricts the possibility to use the services of a courier, in the broad sense [as it happens in other situations – art. 154 para. (5), art. 165 para. (1) pt. 2 or art. 183 of the Civil Procedure Code] forcing the court to use exclusively the services of the Romanian Post. I consider that, *de lege ferenda*, an amendment should be brought to this text to be in consistency with the provisions of other texts of the Code, where the participants are free to use any express courier, specialised delivery service or the Romanian Post. In fact, taking into account that the lawmaker does not identify the Romanian Post as being the company identified by certain elements, we can use an interpretation reasoning to reach the same conclusion as the previously mentioned.

The writ of summons must also include, according to the provisions of art. 194 para. (1) letter b) of the Civil Procedure Code, the name, first name and capacity of the person representing the party in the trial and, in case of representation by lawyer, the latter's name, first name and professional office. Therefore, the identification elements of the legal or conventional representative or the agent do not replace the identification of the party, but supplement them, being mandatory to mention them in the writ of summons.

Also, the second thesis of art. 194 para. (1) letter b) of the Civil Procedure Code states that the provisions of art. 148 para. (1) thesis II shall apply accordingly, in the sense that the writ of summons shall also include, as the case may be, the electronic address or coordinates, such as the phone number, the fax number or the like of the legal or conventional representative or the agent.

As regards the proof of the capacity as representative, it shall be attached to the writ of summons.

It should be emphasized that the plaintiff is not required to indicate the data of the defendant's representative, since the obligation is mainly to indicate the data of his own representative. To the extent that the plaintiff knows that the party has a legal representative, then he should mention the latter's data, according to the mentioned provisions. As regards conventional representation, I consider there can be no such representation before vesting the court with the authority to judge by the writ of summons, given that a special power of attorney is necessary for the party to be represented in the trial, a power of attorney that may not be granted prior to registration of the case as pending with the court, since the unique file number is missing.

Also, the mentioning of the representative capacity is an important element in terms of the procedural framework since, in its absence, it may be considered that the representative acts in its own name and not *in nomine alieno*<sup>11</sup>.

The central part of the writ of summons is the mention regarding the plaintiff's claim, which will determine the procedural framework (with the appropriate consequences) but will also delimit the cause and object of the claim. Thus, in the writ of summons, the plaintiff must specify the object of the claim and its value, according to his appreciation, when assessable in money, as well as the method of calculation for determining such value, by indicating the appropriate documents.

It can be seen that the lawmaker let the plaintiff determine the value of the object of the application (to determine the stamp duty or jurisdiction) but, in order to prevent any attempts to elude the provisions

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<sup>11</sup> Tăbârcă, *Civil Procedural Law*, 34.

on stamp duty and/or jurisdiction, the plaintiff must also describe how he reached the value shown.

If the object of the writ of summons is a real estate, its value shall be determined according to the taxable value established under the tax law, according to art. 104 of the Civil Procedure Code.

If the other party considers that the value assessed by the plaintiff is too small or does not reflect reality, it may challenge the way of establishing the value of the object of application, in which case the provisions of art. 98 para. (3) of the Civil Code shall apply and the value shall be established according to the submitted documents Procedure and statements of the parties.

To explain and detail the requirement in art. 194 para. (1) letter c) of the Civil Procedure Code regarding the object of the writ of summons, letter d) of the same article requires the plaintiff to also include in the application to the court the reasons in fact and in law for his claims.

According to the principle *actor incumbit probatio*, the plaintiff must prove his claims so that art. 194 para. (1) letter e) of the Civil Procedure Code requires him to show evidence supporting each claim.

By evidence, the lawmaker refers to the means of evidence regulated in the section reserved to evidence in the civil trial, and the allegations of the parties cannot be exclusively received as sufficient for admission or dismissal of the action in any case<sup>12</sup>.

The last requirement of the code regarding the writ of summons refers to the signature that must belong to the plaintiff or the representative, to the extent that the latter has a mandate. Signing the application means confirmation of the legal action and undertaking the procedural consequences that may be caused by vesting the court with authority to judge.

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<sup>12</sup> As we have shown, in certain situations, the courts get over these matters and consider the statements of one of the parties sufficient to substantiate their decision - Court of Appeal Galați, decision no. 654/16.10.2013, not published. These appreciations of the court are perhaps "*de lege ferenda*" proposals more than resolution of the dispute *de lege lata*.

## CONCLUSIONS

The new regulation takes over mentions from the Civil Procedure Code 1865 but also includes new elements, likely to improve legislation and create an effective and clear framework on resolving conflicts of private nature.

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# THE LEGAL ACTION IN THE LIGHT OF THE NEW CODE OF CIVIL PROCEDURE

Dumitru VĂDUVA<sup>1</sup>

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**Abstract:**

*The Romanian doctrine is divided regarding the nature of the civil legal action. Mainly, for the doctrine of the civil law it is a prerogative of the subjective law, and for the one of the civil procedural law, is, on the contrary, an autonomous subjective law, an instrument designed to allow the legal subjects to valorize their rights in justice. The New Civil Procedural Code does not clarify the legal nature of the right to action, leaving room for the perpetuation of the dispute between the civil doctrine and the procedural one, or even between the authors of each of the two doctrines. In the absence of an express rule regarding the legal nature above-mentioned, it must be deduced from the rules of the legal regime of the action in justice organized by the New Civil Procedure Code and, for certain aspects, from the rules of a new Civil Code which refer to the civil action. In the Romanian doctrine, starting with 1956, the two theories were conciliated through the dualist theory of the right to action, this one having a double meaning: the subjective right of the person to address the judge for the achievement of constraint, if necessary, a prerogative of the civil subjective law (the right to action in a material meaning) and the second, the prerogative of the subject to use the action, an ensemble of technical means organized by the rule of the civil procedural law is considered to be an independent subjective right, named the procedural right to action or the right to action in a procedural meaning.*

**Key-words:** *civil action, the legal nature of the civil action; constitutive element of the civil subjective law; material right to action.*

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## INTRODUCTION. THE NOTIONS OF THE LEGAL ACTION AND THE RIGHT TO ACTION

Legal nature. The right to action is the very subjective right representing the object of legal protection or is an autonomous right? Theories regarding the action and the right to action.

The *Roman law* did not recognize the notion of subjective right, but only the one of action. The person pretending something would address

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the praetor to receive a legal action. By offering the action, his right to address to address the judge, and thus the right to terminate the litigation regarding his power of that of another person object or person – the debtor, was recognized.

In the *Medieval law*, and especially in the canonic law, when the notion of subjective law emerged, the roles were inversed. The person owing a subjective right has the right to action.

In this correlation, subjective law – action, the latter one is the power recognized to the owners of the subjective right to address the justice in order to see their rights and legitimate interests being complied with.

In the *modern law*, the action is just the material right to action. It is the dynamic mode of existence of the subjective right, by the exercise of the prerogative of constraint specific to it. The action is the application of the sanction from the subjective law, by exercising the prerogative of constraint.

*Starting with the 20<sup>th</sup> century*, the doctrine of the civil procedural law, as well as a part of the public law authors, has contested the above mentioned theory, claiming that the action and the right to action are autonomous notions with a procedural nature, namely of public law.

In our doctrine, the connection between the material law and the right to action is controversial<sup>2</sup>. Classically<sup>3</sup>, especially according to civil law authors, the right to action is nothing more than the material right to action, because there is no right without action and its reverse, there is no action without a material right<sup>4</sup>. In this meaning, the legal practice rejects a claim which does not refer to a right, by considering it without interest, namely that it does not tend to the protection of a right or even of an interest.

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<sup>2</sup> Marian Nicolae, *Prescripția extinctivă* (Bucharest: Rosetti, 2004) 85-117.

<sup>3</sup> Nicolae, *Prescripția extinctivă*, 88-91.

<sup>4</sup> Viorel- Mihai Ciobanu and Marian Nicolae, *Noul Cod de procedură civilă comentat și adnotat*, 1<sup>st</sup> Volume (Bucharest: Universul Juridic, 2013), 29; Marian Tăbârcă, *Drept procesual civil, Teoria generală*, 1<sup>st</sup> Volume (Bucharest: Universul Juridic), 156-157; Andreea Tabacu, *Drept procesual civil*, 2<sup>nd</sup> Edition revised and amended (Bucharest: Universul Juridic, 2014), 118-119.

An important part of the procedural law authors consider the right to action to be autonomous<sup>5</sup>. The authors deny the classical thesis showing that there is action without a subjective right and vice versa, such as the action submitted by the Public Ministry. Likewise is the fact that some actions have as object the application of a sanction, such as the actions for unfair competition<sup>6</sup>.

In the doctrine of the civil procedural law, the action is the expression of the person's subjective right to address the judge. It is a notion specific to the civil procedural law which consists in the prerogative of the person to use the technic means offered by the rules of this law: sue petition, counterstatement, application for joinder as a party with a personal interest, counterclaim, application for evidence approval, appeals etc.

The right to action in this conception is autonomous, having a procedural nature, different than the material subjective right.

Starting with 1956, an author stated the theory of the material right to action and the procedural right to action, which is placed at the border of the two concepts, including them<sup>7</sup>.

The public law's authors state that the right to action is a public right<sup>8</sup>.

## **RELEVANT PROVISIONS**

Following the example of other European legislations, the new Civil Procedure Code brings, for the first time in our objective law, a legal definition for the action. According to Art 29, "the civil action represents the ensemble of the procedural means stated by the law for the

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<sup>5</sup> Ioan Leș, *Noul Cod de procedură civilă* (Bucharest: C.H Beck, 2013), 45; Nicolae, *Prescripția extinctivă*, 113-114; Gabriel Boroî and Mirela Stancu, *Drept procesual civil* (Bucharest: Hamangiu, 2015), 33.

<sup>6</sup> Paul Roubier, *Droits subjectifs et situations juridiques* (Paris: Dalloz, 1963), 54-60 apud. Nicolae, *Prescripția extinctivă*, 91; Viorel Mihai Ciobanu, "Considerații privind acțiunea civilă și dreptul la acțiune", *Romanian Magazine of Private Law* 3 (2010): 11-19.

<sup>7</sup> Mihail Eliescu, "Unele probleme privitoare la prescripția extinctivă în cadrul unei viitoare reglementări legale", *Juridical Studies and Researches* 1 (1956): 229.

<sup>8</sup> Ion Deleanu, *Drepturile subiective si abuzul de drept* (Bucharest: Dacia, 1973).

protection of the subjective right claimed by one of the parties, or of another legal situation, as well as for the insurance of the parties' defense during the trial". Therefore, it organizes and details the elements of the main means of the action, as well as the conditions for its admissibility: Art 30 – sue petitions; Art 31 – defenses; Art 32-39 – the conditions of the civil action; Art 143 – the form of the petitions; Art 194 – the content of the sue petitions, of counterstatements (Art 205), of the counterclaim (Art 209), of the accessory claims (Art 60-78) etc.

Also, Book 6 regarding the statute of limitation, Art 2500 of the new Civil Code, using the marginal title "Object of the statute of limitation" defines the right to action (the material right to action) as being the right to coerce a person with the aid of the public force to provide a certain service, to comply with a certain legal situation or to bear any civil sanction, where appropriate (Art 2500 Para 2 of the New Civil Code).

Therewith, according to Art 21 Para 1 of the Constitution, "Every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests".

Finally, Art 6 Para 1 of the European Convention on Human Rights states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide upon the violation of his rights and civil obligations (...)".

## **THE ACTION AND THE RIGHT TO ACTION IN THE POSITIVE LAW**

**1. The notion of action** – as above mentioned, the former Civil Procedure Code defines the action, not the right to action (a), while the new Civil Procedure Code defines the right to action (b).

a. Unlike the Civil Procedure Code of 1865, the new Code of Civil Procedure has defined the civil action. According to Art 29 of the latest code, *the civil action is the ensemble of the procedural means stated by the law for the protection of the subjective right claimed by one of the parties or of another legal situation, as well as for the insurance of the defense during the trial.*

From this definition it results that the action must not be seen only from the perspective of the plaintiff, but also from that of the defendant. This is why, Art 30 and 31 of the new Civil Procedure Code defines the claims in justice, namely the defenses.

From the rules above mentioned it results that the action is the framework notion which includes the different technical means specific to the civil procedure which can be used by a party according to its litigious situation.

b. In the objective law, the subjective rights are prerogatives of the owner of the right over his area of power, over goods and persons who are connected to him by a debt, as well as the right to constrain the one violating his area of exclusivity. The exertion of the coercion is performed by the legal action, namely a request of the litigant, the state authority, judge, for the protection of the violated subjective right.

In this reason, the exertion of the action is recognized as being the application of a subjective right, namely the material right to action. In the doctrine of the civil law the application of the prerogative of constraint, element of the subjective right, is achieved by action. Thus, this is a notion from the civil law, being an instrument which connects it with the civil procedural law.

In the current civil law, the right to action is mentioned as being a prerogative of the civil subjective right. Art 2500 of the new Civil Procedural Law states the theory of the double nature of the right to action. By the express regulation of the material right to action, legally defined by the above mentioned article, it is implicitly recognized the procedural right to action. From the definition of a material right it is inferred that there is a corollary, a procedural right to action. This double nature of the right to action also results from the context in which the two codes were drafted, one of the members of the drafting commission being recognized as the supporter of the theory of the double nature of the right to action<sup>9</sup>.

In our opinion, the legal nature of the action, notion of the civil law, results also from the organization of the conditions of the civil action, from which it results that, in order to have an action, i.e. for the

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<sup>9</sup> Nicolae, *Prescriptia*, 112-114.

admissibility of the action, condition for justification of an interest, namely for the protection of a subjective right, is essential. In this regard, Art 32 of the new Civil Procedural Code “*any request may be submitted if its author (...); d) justifies an interest*”. On the other hand, the actions are classified by the new Civil Procedure Code based on the nature of the material subjective right: real (Art 102, Art 114), personal (Art 99-100), claims regarding successional rights (Art 103, Art 115) etc.

## **2. The right to action in justice – a fundamental right**

### ***2.1. The right to action stated by the Constitution as a fundamental right.***

All theories regarding the action and the right to action accept the principle according to which every person has the right to address to a judge. Currently, it is stated by the Constitution as a *fundamental right* (Art 21). This right is correspondent to a correlative obligation for the state, a normal correlation in every democratic state. In its absence every person would be entitled to apply his own justice. In this logic, according to the new Code of Civil Procedure “the judges have the obligation to receive and solve any request which is in the competence of the courts, according to the law” (Art 5). The right to legal action is translated by the right to a judge. From a procedural perspective, the right to action is a faculty, because the owner has the prerogative to address to a judge or to waive his right of addressing a judge or dropping the action already initiated (Art 9)<sup>10</sup>.

### ***2.2. The right to legal action in the legislation of human rights.***

Apart from Art 6 Para 1 of the European Convention on Human Rights, above mentioned, it is also recognized as fundamental by Art 13. In this regard, the European Court of Human Rights has recognized this right as being “a right to access the justice”<sup>11</sup>. In doctrine, “the right to an effective appeal”, stated by the above mentioned article, is considered to have less the nature of a personal subjective right, and more to be a

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<sup>10</sup> Ciobanu and Nicolae, *Noul Cod*, 29.

<sup>11</sup> Radu Chiriță, *Convenția europeană a drepturilor omului, comentarii și explicații – Case Airey* (Bucharest: C.H Beck, 2008), 254.

safeguard mean for the rights stated by the Convention<sup>12</sup>. It is also recognized, in the same time, that the above mentioned right has a hybrid nature, mostly being a mean attached to the mechanisms of valorizing the rights and freedoms stated by the Convention, but also having the nature of a subjective right with a particular feature<sup>13</sup>. Nevertheless, the doctrine states that according to the Strasbourg Court's practice, initially the right to action stated by Art 13 of the Convention was considered to be a subjective right without an autonomous, independent existence, being conditioned by the violation of the rights stated by the Convention, for later to be given the nature of the procedural right, guaranteeing a "right to access" in front of the national judge<sup>14</sup>.

### **2.3. The effectiveness of the right to action established by the Strasbourg Court**

The Court has decided that for the effectiveness of the right to action, the legal action must lead to a real and sufficient control of the claim<sup>15</sup> and that it is not effective if the state does not create a system of legal support for those in lack of financial resources who could not hire an attorney or lost a litigation for this reason, even if they were entitled to win it<sup>16</sup>.

### **3. Restrictions of the right to action in the procedural plan according to the new Code of Civil Procedure**

In the procedural plan, the right to action, even if is considered a fundamental right, it is not absolute. It is subjected to certain limitations: the fulfilment of the procedural acts in the conditions, order and terms established by the law or by the judge; to prove his claims and defenses, to contribute to the performance without delay of the trial (Art 10 Para 1 of the Code of Civil Procedure). Moreover, the right to action must be

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<sup>12</sup> Corneliu Bârsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, 2<sup>nd</sup> Edition (Bucharest: C.H Beck, 2010), 926.

<sup>13</sup> Bârsan, *Convenția*, 926.

<sup>14</sup> Bârsan, *Convenția*, 929; see also the practice and doctrine quoted by the author.

<sup>15</sup> Jean Francois Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 267.

<sup>16</sup> *Weissman v Romania*, Casefile No 63945/00 of 23 October 2006, published in Recueil 2006 –VII; the judiciary practice of the Strasbourg Court, unpublished, quoted in Bârsan, *Convenția*, 439; *Iorga v Romania*; *Ilie v Romania*.

exerted with good faith, namely according to the purpose which has been recognized by the law and without violating the procedural right of other parties, the sanction for the violation of these obligations being the engagement of the tort liability for material and moral prejudices, as well as the risk of fine (Art 12).

## **THE CONDITIONS FOR THE LEGAL ACTION**

### **1. Enumeration**

According to Art 32 Para 1-2 of the new Civil Procedure Code, any claim (of the plaintiff, namely of the defendant or of third parties included in the litigation) may be submitted and supported only if its author: has the capacity to stand in trial, has legal capacity, submits a claim, justifies an interest.

**2. The capacity to stand in trial** – is the ability given by the law to a person in order to stand in trial. This ability is established by the norms regarding the civil capacity. The rules of the material law, regarding the capacity of use and of exercise of the right organizes the limits of the procedural capacity, reason for which Art 55-56 of the new Civil Procedure Code, with certain mentions regarding the entities which can stand in trial without having legal capacity, make reference to these rules.

**2.1. The sanction.** The absence of the procedural capacity may at any time be invoked, the sanction being the absolute nullity for the absence of the procedural capacity of use (Art 55 Para 3 of the new C.C.P), namely the partial invalidity (Art 56 Para 4 of the new C.C.P). The absence of the capacity of exercise may be covered by the confirmation of the acts from the representative of the incapable (Art 56 Para 5 of the new C.C.P) the same regime being used for the acts concluded by the person with limited capacity of exercise (Art 56 final paragraph).

**2.2. The special curator** – in case of emergency, or in the case of conflicts of interest, the court shall appoint a special curator (Art 57 Para 1 of the new C.C.P) among the lawyers enlisted in the bar in this meaning, establishing their provisory remuneration as means of payment, with the possibility of increasing it, if necessary (Art 57 Para 3-4 of the new C.C.P).

### 3. The interest

The need of the interest is of a patrimonial or extra-patrimonial order and must fulfil certain requirements: to be legitimate, born and actual, personal and direct (Art 33 of the new C.C.P).

**3.1. *The legitimate interest*** – namely it must be based on a right. This is why the jurisprudence often underlines that the request in justice must originate from the one whose interest is legally protected. This condition risks to generate confusions because by verifying the legitimacy of the interest to submit the action, sanctioned by the rejection of the request for the lack of interest, the judge is actually performing verifications on the ground of the material law.

**3.2. *The interest born and actual.*** The right to action must have as object an interest born and actual. It assumes that the interest must be real in the moment of the submission of the action. Future or possible interest is not enough, entailing the inadmissibility.

Basically, preventive actions are inadmissible. For instance, the person who has the right to option within a term could not be sue petitioned to mention what he shall do when the term expires. Thus, it is inadmissible the declaratory judgment by which a person states that it entitled to certain rights and sue petitions another person to coerce him to prove the reality of his rights.

The new Code of Civil Procedure attenuates the inadmissibility of the preventive actions, stating that “*if the interest is not born and actual it may be submitted a request with the purpose of preventing the violation of a threatened subjective right or for the prevention of an imminent damage which could not be repaired*” (Art 33 of the new C.C.P). Exceptionally, are admitted the claims which tend to the insurance of evidences, when there are legitimate reasons to preserve certain evidences; or the declarative actions, i.e. the claims by which a person requests the mentioning of his current legal situation regarding certain laws, for instance he requires the declaration of the quality as inheritor to use the laws for the restitution of properties.

A second attenuation from the inadmissibility of the preventive actions is that of certain actions for the achievement of the rights affected by a term. According to Art 34 of the new C.C.P, the claim for the

handing over a good at the fulfillment of the contractual deadline may be submitted even before the fulfillment of this term (Para 1) or for the performance of the maintenance obligations or for another periodical benefit (Para 2) or for those preventing an important damage if the plaintiff would wait for the fulfillment of the term (Para 3).

**3.3. *The interest must be personal and direct.*** The right to action belongs to the one who has a personal and direct interest to act. It cannot be received the action of a person protecting the interests of another person, without including here the hypothesis of the representation, because in this case the exercise is performed in the interest of another person, but in the virtue of the legal or conventional obligation.

The inadmissibility of the action for the protection of another person is mitigated (Art 36 of the new C.C.P). This rule is very general. No person shall be able to ground his action in the name of another person on this text due to its generality, reason for which he shall refer to the material law. In fact, our substantial law recognizes three cases in which a legal action for the protection of another person's right shall be submitted: is the case of the trade union actions, the actions of the governmental agencies for the protection of consumers and those of the house tenants '& flat owners' associations.

Regarding the trade union associations, the law of the trade union recognizes its right to act for the protection of the collective rights of the union's members or even for the protection of their individual rights, generated by the labor relation.

The same right is also held by the National Authority for Consumer Protection, acting as a syndicate of consumers. Same case for the actions submitted by the flat owner's associations regarding the rights resulted from the joint possession.

Finally, beside the associations stated by the law, in practice numerous associations or foundations submit the action for the protection of collective rights, such as the: National Association of War Veterans, flat tenant's association etc. Besides the lobbying made by them for a favorable regulation of their interests, their dissatisfaction is translated also by the legal actions submitted especially in relation to the central public administration.

#### **4. The procedural quality**

**4.1. *Notion*** – the new C.C.P does not define the procedural quality, but makes certain applications for this condition in Art 37 and 38. Noticing these rules, we see that a person has a procedural quality if he has a legal title allowing him to invoke in justice the right representing the object of his claim. This is why the procedural quality is passed with the legal or conventional alienation of the rights or legal situations representing the object of the claim (Art 37), such as the inheritance or by onerous judicial acts (Art 38).

From the definition, we note that the notion of procedural quality is difficult to be determined than the one of interest. For this reason, if the plaintiff is able to justify an interest, according to the conditions above mentioned, he must also be recognized the procedural quality. Precisely, the procedural quality stands close to the confusion with the direct and personal interest. We distinguish it from him when the law limits the quality of a person. Thus, for instance, the divorce action submitted by another person shall be rejected for the lack of procedural quality, even if the person who submitted the action might justify an interest, because the law itself states that such action is personal. The same situation is also valid for the actions for the partial invalidity. Even if many persons could justify an interest for the annulment of the act affected by this nullity, the request shall be rejected for the lack of the procedural quality because the law expressly states the persons who may submit such request.

The procedural quality must be distinguished from the condition that an action be submitted by the owner of the right. The action for the ascertainment of the unenforceability of an act concluded by a third party person towards the act, the unsecured creditor, shall not be rejected for lack of interest because the law recognizes for the latter one the procedural quality in an oblique action.

**4.2. *The sanction.*** According to Art 39 Para 1 of the new C.C.P “the requests or defenses submitted by persons without procedural quality or without an interest shall be rejected as being made by a person or against a person without quality or free of interest”.

#### **5. The application of the right to action**

The exercise of the right to action is translated by claims and defenses.

#### **6. Sue petitions. Classification.**

According to Art 30 of the new C.C.P “*every person who has a claim against another person or aims the solution in justice of a legal situation has the right to submit a request in front of the competent court*” (Para 1).

*The requests shall be: main, accessory, additional or incidental*” (Para 2). The following paragraphs (Para 3-6) define each of these types of requests.

a. The *main requests* are those introductive of court and may comprise both main and accessory heads of claim (Para 3).

b. *Accessory requests* are those of whose solution depends on the solution given to a main head of claim.

c. *Incidental requests* are those drafted during a pending trial (Para 6): the counterclaim, the additional claim and the intervention application.

d. The *additional claim* is the claim by which a party modifies his previous claims (Art 5).

The new C.C.P establishes the legal regime of these types of claims. Thus, under the aspect of the competence of solving the accessory, additional and incidental requests, these shall be trialed by the court competent to trial the main request, even if they would fall under the material or territorial competence of another court, except the requests regarding the insolvency and concordat (Art 119).

e. The *counterclaim* – if the defendant has, regarding the plaintiff’s request claims resulting from the same legal relation or in a tight relation to them, he shall submit a counterclaim (Art 204 Para 1 of the new C.C.P). It must fulfil the same conditions as the sue petition and must be filed with the counterstatement, under the penalty of preclusion.

**7. Defenses** – are of two types: on the main issue of the matter on trial or procedural (Art 31 of the new C.C.P). The procedural way of submitting the defense is the counterstatement. The absence of the counterstatement lead to the termination of the defendant’s right to

propose evidences and to invoke exceptions, besides the ones of public order (Art 203 of the new C.C.P).

## CONCLUSIONS

As a conclusion, the new Code of Civil Procedure defines the action and details its conditions and types without stating its legal nature, thus leaving room for the division of the civil doctrine and of the civil procedure regarding this nature. From the corroboration of Art 29 of the new C.C.P with Art 2500 of the new Civil Code, may be interpreted that there are arguments to support the fact that in the civil procedural law it is imposed the conception of the duality of the action (material right and procedural right to action) and the theory of the autonomy of the right to action. According to us, the logic of the concept of subjective right which includes the prerogative of the right to action is present also in the positive law.

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# EU REGULATIONS ON UNFAIR CONTRACT TERMS

Sorina ȘERBAN-BARBU<sup>1</sup>

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**Abstract:**

*The paper analyzes the EU regulations regarding the unfair contract terms. The Directive on unfair terms in consumer contracts introduces a notion of "good faith" in order to prevent significant imbalances in the rights and obligations of consumers. In this context, EU countries must provide effective means to enforce these rights. Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts lay down a number of contractual rights for consumers. Those Directives have been reviewed in order to simplify and update the applicable rules.*

**Key-words:** *European Union, regulations, contract, unfair, consumer contracts.*

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## INTRODUCTION

Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through the measures adopted pursuant to Article 114.

Thus, the internal market represents an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. In this context, the harmonisation of certain aspects of consumer contracts is necessary for the promotion of a real consumer internal market establishing the right balance between consumer protection and the competitiveness of enterprises.

The purpose of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

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Directive 2005/29/EC on Unfair Commercial Practices was adopted on 11 May 2005. Its purpose is to help consumers benefit from the Internal Market by removing regulatory barriers, deriving from divergent national rules. All Member States have implemented its rules in their national legislation.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council establishes rules on information to be provided for distance contracts, off-premises contracts and contracts other than distance and off-premises contracts and also regulates the right of withdrawal for distance and off-premises contracts and harmonises certain provisions dealing with the performance and some other aspects of business-to-consumer contracts.

## **EU REGULATIONS ON UNFAIR CONTRACT TERMS**

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts represents an important regulation in the field of unfair contract terms that was recently modified by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

By article 3 is defined the term unfair and it is considered that 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. Also, a term shall always be regarded as not individually negotiated where it 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.

According to Article 5 of the Directive 2005/29/EC on Unfair Commercial Practices a commercial practice shall be unfair if:

- (a) it is contrary to the requirements of professional diligence, and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

In this context, we believe that full harmonisation of the regulations regarding this area should considerably increase legal certainty for both consumers and traders. The effect of this harmonisation should be to eliminate the barriers resulting from the fragmentation of the rules and to complete the internal market in this area and these barriers can only be eliminated by establishing uniform rules at Union level.

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts lay down a number of contractual rights for consumers. These 2 Directives were reviewed in order to simplify and update the applicable rules by removing inconsistencies and closing unwanted gaps in the rules<sup>2</sup>.

By Article 3 is established the scope of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights – to apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

Also, by Article 32<sup>3</sup> it is made an amendment to Directive 93/13/EEC, modifying article 8a of this Directive. In this regard, where a

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<sup>2</sup> That regulation simplification was made by replacing those two Directives by a single Directive - Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>3</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions: extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or contain lists of contractual terms which shall be considered as unfair.

## **EUROPEAN COMMISSION'S FITNESS CHECK REGARDING THE CONSUMER LAW REGULATIONS**

The European Commission's promise for a better regulation<sup>4</sup> from 5.19.2015 by which to achieve better results will apply to all legislative construction taking into account the progress already made by the program launched in 2013<sup>5</sup>.

There were identified areas where some initiatives envisaged will not be continued, a number of proposals were withdrawn that have blocked the adoption process and several laws were repealed. In total, there were identified more than 100 actions, half of which are new proposals to simplify and reduce the regulatory burden. The remaining actions are evaluations and fitness checks designed to examine the efficiency and effectiveness of EU regulations and to prepare future burden reduction initiatives<sup>6</sup>.

On 27 October 2015 the European Commission adopted its work program for 2016<sup>7</sup>.

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<sup>4</sup> Christensen Tom, Laegreid Per, Wise Lois R., *Transforming Administrative Policy*, (Public Administration, 2011), 159.

<sup>5</sup>The Regulatory Fitness and Performance programme (REFIT) that identifies opportunities to reduce regulatory burdens and simplify existing laws in order to ensure that the objectives of the legislation or policy can be reached in a more effective and efficient way.

<sup>6</sup> See also Șerban-Barbu, Sorina, *Public administration regulations codification in the European Union*, Comparative Law Review, Torun, Poland, 17(2014): 81-95.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2016 No time for business as usual, 27.10.2015 COM(2015) 610 final.

Thus, the Commission's commitment to better regulation prioritizes studying the available evidence and ensuring that, when it intervenes, the European Union will proceed in a way that actually brings a positive change on the ground<sup>8</sup>.

Regarding the general EU consumer law the Fitness Check will cover the following directives:

- The Unfair Contract Terms Directive that protects consumers against the use by traders of standard (not individually negotiated) contract terms;

- The Price Indication Directive regarding the indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices;

- The Sales and Guarantees Directive lays down the rules on the conformity with the contract (commonly referred to as "the legal guarantee") and the respective remedies, and deals with commercial guarantees;

- The Unfair Commercial Practices Directive protects consumers against practices by businesses which are contrary to requirements of professional diligence and which affect consumer behaviour, such as misleading and aggressive commercial practices;

- The Consumer Rights Directive which will be subject to a separate report by the Commission but its results will be in the conclusions of the Fitness Check.

## **CONCLUSION**

Within the Member States, national authorities can provide specific regulations on consumer law, but we can observe that the European Commission ensures better harmonization of consumer laws at EU level by introducing important legislative initiatives.

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<sup>8</sup> Each year, the Commission adopts a work program setting out the list of actions that will be undertaken in the next twelve months. The work program informs the co-legislators on the political commitments of the Commission and presents new initiative to withdraw pending proposals and to review existing EU legislation.

Also, we can observe the value and performance the legislation brings to the system and we recognize the European Union and the European Commission's ambition<sup>9</sup> for further improvement of this system and the desire to provide concrete and sustainable benefits for citizens, businesses and society.

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# COMPARATIVE LAW STUDY ON THE AGE LIMITS IN DIFFERENT STATES MEMBERS OF THE EUROPEAN UNION

Al- Temimi FISAL <sup>1</sup>

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**Abstract:**

*This article analyzes the main regulations on civil capacity of natural person in different European countries: France, Italy, Austria, Germany, Estonia, Bulgaria, Czech Republic, Denmark, Greece, and Romania. The author has sought mainly to highlight the similarities and differences that exist in national laws both in terms of the age of majority, as in terms of age limits between which restricting legal capacity of natural persons is operating. Equally, even if belonging to different systems of law - Germanic, Roman, Scandinavian - there are many similarities between the analyzed civil legislations concerning the legal age for marriage or for employment.*

**Key-words:** *legal capacity, age of majority, minor, contract, natural person*

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## INTRODUCTORY CONSIDERATIONS

Starting with the main regulations from different states, on addressing the capacity of the physical person, it can be noticed that there are differences, both as regarding the coming of age threshold and the limitation of a person's legal capacity. Furthermore, between the different systems of law – German, Romania, Scandinavian, English – there are numerous similitudes. Even the approaches regarding the doctrine that, at the first sight, seem very different, are, at a closer look, much more similar than they appear.

In all the analysed systems of law, the minors and the adults with permanent mental disorders, cannot enjoy full capacity, but the age by which the minors lack the capacity, or have a restricted legal capacity, differs. Moreover, in most of the countries, the minors can get married, can become employed, until they have come at full age.

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## FRANCE

According to art. 388 from the Civil Code, the minors are people who have not attained the age of eighteen. The young people, according to different regulations on the age, discernment or responsibility of the physical persons, are either under 21, or 25 years old.

The French Civil Code regulates two situations for gaining the anticipated capacity, such is to become a major through emancipation. According to art. 476 from the Civil Code, the emancipation of the minor through marriage occurs rightfully. It is a tacit emancipation, resulting from the act of marriage, of the minor girl, aged between 15 and 18.

The second situation is that of the expressly requested emancipation of the minor who have not yet reached the age of 16, or is under that age. If the minor's parents are alive, the emancipation of the minor will take place on their request, for thoroughly justified reasons, through the decision of the guardianship court. If the both parents do not agree on the necessity of emancipation, one of them can request the court to pronounce the emancipation of the minor, for grounded reasons. For this purpose, before sentencing, the guardianship court shall listen the other parent of the minor, except for the situations when he/she is not able to express their will. The request on the emancipation cannot be made but for grounded reasons that, due to the fact that they are not stipulated by the law, are entrusted to be decided upon, to the guardianship court. If the parents of the minor died, the request of emancipation can be made after the minor reached the age of 16, the initiative coming either from the tutor, or the family council, or a member of the family council. The guardianship court is the only one to decide, according to the existence of discernment, on the maturity and the possibility of the minor to know their own interests, as regarding the acceptance or the rejection of the request<sup>2</sup>.

The effects of emancipation, expressed or tacit, consist from the fact that the minor is considered major as regarding the civil legal

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<sup>2</sup> Michel de Juglart, Alain Piedelièvre, Stéphane Piedelièvre, *Cours de droit civil avec travaux dirigés*, tome I – *Introduction. Personnes. Famille*, édition refondue (Paris: Montchrestien, 2001), 293.

documents, according to art. 1305 from the Civil Code. The minor stops to be under the tutorship or the parent or tutor, who is no longer held responsible for the damages caused by the minor to another person (art. 482 from the Civil Code). The effects of emancipation are nevertheless partial, because the emancipated minor cannot marry and cannot carry out commercial activities if the agreement of the legal representatives misses, and the adoption is possible, under the same circumstances, similar to the situation when the emancipation would have not occurred<sup>3</sup>.

The minor can get married starting with the age of 18 (boys) and 15 (girls); before they have reached the age of 15, the marriage of a girl is possible provided that the general prosecutor of the Republic sentences the issuing of a certificate of exemption, for grounded reasons (for example, if the minor girl is pregnant)<sup>4</sup> and only with the agreement of the legal representatives. The married minor girl obtains the full capacity (through emancipation), a capacity that they do not lose after the breaking, the annulment of the marriage, or the death of the husband, before reaching 18 years old.

The concluding of a labour contract with a minor is possible from the age of 16, even 15 for temporary jobs, during the school holidays, or in the cultural or sports field. In the both cases, it is necessary the authorisation of the parents, but after reaching the age of 16, the agreement of the parents can also be made tacitly (the lack of opposition of the legal representatives being equal with the tacit acceptance)<sup>5</sup>. Yet, there is an exception, in case of apprenticeship, when the agreement of the legal representatives must be made expressively<sup>6</sup>.

## ITALY

In Italy, there are no specific definitions, nor legal limitations for the notions of “child”, “teenager”, “young”. In general, these age limitations are associated with different stages of the period when

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<sup>3</sup> Juglart *et al.*, *Cours de droit civil*, 293-294.

<sup>4</sup> Juglart *et al.*, *Cours de droit civil*, 339, 342-343.

<sup>5</sup> Jean Mouly, *Droit du travail*, 4<sup>e</sup> édition actualisée (Bréal, 2008), 46.

<sup>6</sup> Veronique Roy, *Droit du travail 2009 en 22 fiches*, 13<sup>e</sup> édition (Paris: Dunod, 2009), 17.

attending school, and the process of growing-up. This is considered ended when they come at age, which, by law, is specified for the age of 18.

According to the stages of the period when attending school, there were identified the next periods: childhood (“bambini”/ “bambine”), which usually takes from birth to the age of 10 (the early childhood, or the “first” childhood, from 0 to 6 years old; “the second” childhood, from 6 to 10 years old), pre-teenage (“ragazzi”/ “ragazze”), which is between 11 and 13 years old, and the teenage (in Italian, there are used the same terms “ragazzi”/ “ragazze”), which starts from the age of 14 and ends at the age of 17. Nonetheless, this pattern is only partially according to the definition of the general physical development.

The Italian Civil Code does not contain a definition for the notion of “minor”, confining to defining the terms of “juridical capacity” and “the capacity to act”. Thus, according to section 1 from the Civil Code, the juridical capacity starts from the moment of birth, whereas the capacity to act is gained when reaching the major age (18 years old), together with the possibility to carry out all the activities for which no age limitation is established.

Although there is not an express legal definition of the minors, through the ratification of the United Nations Convention on the rights of the child, since 1986<sup>7</sup>, Italy has accepted automatically the definition of the child (“fanciullo”), which is contained by art. 1 of this convention, as a synonym for the notion of minor.

Yet, art. 1 from Law no. 977/1967 – “The professional security of children and teenagers”<sup>8</sup> makes a distinction between the term of “child” (“bambino”), and that of “teenager” (“adolescente”), mentioning that, under the provision of law, through the term “child”, it is understood the minor who is less than 15 years old and who is still subjected to the mandatory education, while through “teenager”, it is understood the minor between 15 and 18 years old, who is no longer subjected to mandatory education<sup>9</sup>.

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<sup>7</sup> By law no. 176/1999.

<sup>8</sup> Modified by Ordinance no. 345/1999.

<sup>9</sup> Edoardo Ghera, *Diritto del Lavoro. Il rapporto di lavoro* (Bari: Cacucci, 2006), 163.

As regarding the capacity, the Italian law draws a distinction between the legal capacity (“capacità giuridica”), the capacity to act (“capacità di agire”) and the natural capacity (“*capacità naturale*”).

In the Italian law, through legal capacity it is understood the ability of an individual to enjoy their own rights and obligations, a concept which, having political and legal significance, being also protected by the Constitution, which stipulates that no human being can be deprived from their general legal capacity<sup>10</sup>. In certain cases, specifically provisioned in the laws, there are admitted limitations of the legal capacity. For example, the minors do not have the legal capacity to contract a marriage, and the bankrupt does not have the capacity to tutorship<sup>11</sup>.

The capacity to act represents the attitude of the subject to conclude their own documents and legal operations for their own legal field (“*propria sfera giuridica*”). According to art. 2 from the Civil Code, the capacity to act is usually gained after the age of eighteen, except for the cases stipulated by special laws, which establish a lower age, for example, as regarding the capacity to do a certain job, case in which the minor can exercise the rights and carry out the duties established in the labour contract. Art. 2 makes the distinction between the capacity to be a party of a labour contract, for which the age condition must be observed (the labour contract cannot be concluded just by a minor, it has to be signed by the legal representative of the child) and to the capacity to carry out the job, acknowledged to the minor. It has to be mentioned that the capacity to work is governed by special laws<sup>12</sup>, and once with the entering in force of the Law no. 296/2006, the age was established for sixteen years old, considering the mandatory ten-year education period.

The natural capacity represents the ability to have discernment, and the lack of this capacity leads to the annulment of the juridical acts concluded by the physical person.

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<sup>10</sup> Art. 22 from the Constitution.

<sup>11</sup> It is the case of bankrupt who was not deleted from the register of bankrupts, according to art. 350, n. from the Civil Code.

<sup>12</sup> Cristina D’Agostino (ed.), *Compendio di Diritto del Lavoro e della Previdenza Sociale*, II Edizione (Napoli: Gruppo Editoriale Esselibri – Simone, 2009), 101-103.

Before coming of age, it can be obtained a condition of semi-capacity (“semicapacità”), once with the emancipation, through marriage, which is allowed starting with the age of 16, with the authorisation of the court for minors, in case there are “serious reasons” and it is noticed “the psycho-physical maturity” of the minor child<sup>13</sup>. The emancipated minor is in the same legal condition as the incapacitated major, with the possibility to obtain almost entire capacities for acting (limited and circumstantial), through the authorisation to exercise a commercial activity<sup>14</sup>.

## ROMANIA

Age of majority under the Romanian law is 18; full legal capacity is acquired at this age, unless, for good reasons, the Court of guardianship recognizes full legal capacity to the minor who has reached the age of 16 (advance capacity is governed by Article 40 NCC) and where the child acquires by marriage full legal capacity (Article 272 NCC). Romanian legislator considered that, since minor aged between 14 and 18 have developing discernment, must recognize its limited legal capacity<sup>15</sup>.

According to Article 272 NCC, marriage may be concluded if the spouses have reached the age of 18. For good reasons, a minor under the age of 16 can marry under medical opinion, with the consent of his parents or, where applicable, of his guardian and the permission of the Court of guardianship in whose district the child resides. If a parent refuses to give his permission to child’s marriage, the court of guardianship decides on this divergence in the best interests of the child.

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<sup>13</sup> Franco Della Casa et al, *Famiglia e Servizi. Il minore, la famiglia e le dinamiche giudiziarie*, seconda edizione, (Giuffrè, 2008), 100, Accessed January 10, 2016, [https://books.google.ro/books?id=MccOtlMPD8C&pg=PA90&lpg=PA90&dq=minore+e+famiglia&source=bl&ots=Y0OUOmyLlp&sig=GY4IpVA7\\_NAdd-Pct6dvN3V\\_k4w&hl=ro&sa=X&ved=0ahUKEwj-rfin6tbJAhXFVhQKHcbsDXkQ6AEIZzAM#v=onepage&q=minore%20e%20famiglia&f=false](https://books.google.ro/books?id=MccOtlMPD8C&pg=PA90&lpg=PA90&dq=minore+e+famiglia&source=bl&ots=Y0OUOmyLlp&sig=GY4IpVA7_NAdd-Pct6dvN3V_k4w&hl=ro&sa=X&ved=0ahUKEwj-rfin6tbJAhXFVhQKHcbsDXkQ6AEIZzAM#v=onepage&q=minore%20e%20famiglia&f=false).

<sup>14</sup> Art. 390-397 from the Civil Code. Also see art. 774.

<sup>15</sup> Flavius-A. Baias et al, *Noul Cod Civil. Comentariu pe articole art. 1-2.664* (București: C.H. Beck, 2012), 246.

If one parent is deceased or is unable to manifest the will, consent of the other parent is sufficient. If there is no parent or guardian who can approve marriage, it is required the consent of the person or authority entitled to exercise parental rights.

Until the age of 15 years old children can not be employed. Article 13 para. 2 of the Labor Code recognizes that minors who are aged between 15 and 16 years have a limited capacity to engage in work, that their employment is possible only with the consent of both parents or of their legal representatives and only if “their health, development and vocational training are not jeopardized”<sup>16</sup>. Parental consent must be prior or simultaneous with the conclusion of the employment contract; special (must refer to the contract of employment); clearly expressed<sup>17</sup>. At the conclusion of the contract will be mentioned the existence of the consent and those who gave it (parents or guardians) will sign the contract together with the minor. A natural person acquires full capacity to conclude an employment contract at the age of 16 years because it is presumed that at this age has physical and mental maturity necessary to enter into an employment relationship. For reasons of health protection young employees under the age of 18 can not be assigned to jobs with harmful, heavy or dangerous conditions and may not be used to work at night.

## AUSTRIA

In Austria, where the influence of the French Civil Code of Napoleon was insignificant, there can be met few essential differences, as confronted to other European states, whose civil legislation took a lot of the dispositions stipulated in the Napoleonic Code and the French legislation.

According to § 21 section 2 from the Austrian Civil Code<sup>18</sup>, the minor is the person who has not yet reached 19 years old, this representing one few of the cases in which the coming of age is not at 18

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<sup>16</sup> Traian Ștefănescu, “Necesitatea modificării Constituției României cu privire la vârsta minimă de încadrare în muncă”, *Dreptul* 4 (2001): 59-63.

<sup>17</sup> Roxana-Cristina Radu, *Dreptul muncii* (București: C.H. Beck, 2008), 119.

<sup>18</sup> For the German version, see [http://www.internet4jurists.at/gesetze/bg\\_abgb01.htm](http://www.internet4jurists.at/gesetze/bg_abgb01.htm).

years old. In the Austrian cantons, there is a great diversity of regulations as regarding the civil capacity of the physical persons. For example, according to the law for the protection of young people, from the cantons of Steiermark, Kärnten, Tirol and Vorarlberg, the minors are the children until the age of 14, those between 14 and 18 years old are considered young people. The law for the protection of young people from the canton of Oberösterreich encompasses all the physical persons until 18 years old into the category of young people. In the cantons of Wien, Niederösterreich and Burgenland, the law uses the expression “young person” (instead of “child” or “minor”) to designate all the physical persons who reached 18 years old. As regarding the age of majority, this is reached at 18 years old.

Nevertheless, the legal age for marriage is 18, according to § 1 section 2 from the Marriage Act, the court being able to declare a person capable for marriage from the age of 16, on the condition that the other spouse to be major, and the minor to be mature enough for marrying. This implies the fact that, in case of divorce, the legal age is 18, and as an exception, 16 years old<sup>19</sup>.

## GERMANY

Children are physical persons under 14 years old, while the teenagers are persons between 14 and 18 years old.

Personality begins at birth, and coming of age is at 18 years old<sup>20</sup>. The term “personality” is used because that of “capacity” has other meanings. In the German doctrine and legislation, we meet three distinct notions: “legal capacity” (“Rechtsfähigkeit”), which is the general capacity to enjoy the rights and assume obligations, which belongs to any physical person, from birth to death, “the capacity to conclude legal

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<sup>19</sup> H. W. Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2<sup>nd</sup> Edition, Wien, Manz, 1990, marg. No. 348, 2329, quoted after Marianne Roth, *Grounds for divorce and maintenance between former spouses*, (Salzburg: Institut für Zivilverfahrensrecht, 2002), Accessed January 15, 2016, <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> .

<sup>20</sup> See section 1 and 2 from the German Civil Code, promulgated on the 2<sup>nd</sup> of January 2002, in Federal Law Gazette [*Bundesgesetzblatt*], I, 42; Accessed December 12, 2015, [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) .

documents/to contract” (“Geschäftsfähigkeit”), which is the ability to be part of such documents, concluded directly and personally, and “the capacity to be liable for damages” (“Zurechnungsfähigkeit”), which represents the capacity of the persons to be held responsible for tort liability, done by fault<sup>21</sup>. The capacity to contract is the equivalent full capacity to exercise, from the Romanian right. Moreover, there are certain preliminary requests, necessary to be fulfilled for concluding certain legal documents or being liable, in case contracts are breached.

According to § 104 from the General Civil Code, the persons incapacitated to conclude a contract are:

a) people who have not been 7 years old yet;

b) the person who suffers from pathological mental disorder, which is an impediment of exercising the free will, except the case in which the condition is only temporary.

Until the end of 1974, a physical person obtained full legal capacity at the age of 21. The motivation of such a juridical solution was owed to the fact that the limit of 18 years old was considered to be too low for certain transactions, such is the buying of expensive consumables, or to guarantee for a large amount of money<sup>22</sup>, and the difference between the level of development of those of 18 years old, and those above this age limit, is a rather high one. Based on a trend from most of the European states (the establishing of the coming of age at 18 years old) and on the possibility to ensure other forms of protection, through the annulment of important legal documents, Germany also joined the ranks, in 1970s, of this trend. Yet, unlike most of the European states in which the minor is considered to have restricted legal capacity until maturity, in Germany (along with other states of the German family – for example Austria), the minor lacks the capacity to exercise, until 7 years old. A minor who has not yet been 7 years old, does not have the right to conclude legal

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<sup>21</sup> Ernest Joseph Schuster, *The Principles of German Civil Law*, (London: Oxford, 1997), 335, Accessed January 10, 2016, [http://dlib-pr.mpiet.mpg.de/m/kleioc/0010/exec/bigpage/%2244930\\_00000381.gif%22](http://dlib-pr.mpiet.mpg.de/m/kleioc/0010/exec/bigpage/%2244930_00000381.gif%22) .

<sup>22</sup> D. Medicus, *Allgemeiner Teil des BGB : ein Lehrbuch*. 6 Aufl, (Heidelberg: Müller Verlag, 1994), § 38, sec. 538, quoted from Paul Varul, Anu Avi, Triin Kivisild, “Restrictions on Active Legal Capacity”, *Juridica International* IX (2004), 100, Accessed January 17, 2016, [http://www.juridicainternational.eu/public/pdf/ji\\_2004\\_1\\_99.pdf](http://www.juridicainternational.eu/public/pdf/ji_2004_1_99.pdf) .

documents, not even with the agreement of the legal representative, and can take part in transactions only through such a representative or a third party, with the consent of the legal representative, under the provisions of § 110, from the General Civil Code.

The legal age for marriage is 18 years old, but the family court can sentence the issuing of an exemption for the minor who reached 16 years old, if the other spouse is major<sup>23</sup>. The minor needs the agreement of the legal representative, and if they refuse it, on unjustified reasons, the family court can approve the marriage<sup>24</sup>.

In the German law, unlike the Romanian law, the minor does not obtain the full legal capacity through marriage, being considered that such an event does not determine a sudden (rapid) necessity to become psychically mature, of the minor. Therefore, there are situations when a minor gives birth to a child, or have in their custody a minor who also has restricted legal capacity. Thus, the statement for parental taking into custody, which has to be written before the birth of the child, according to the provisions of § 1626 b section 2 from the Civil Code<sup>25</sup>, in case of the parent with restricted capacity, is subjected to the approval of the legal representative of the minor parent. The agreement of the family court can, nonetheless, substitute this consent, on the request of the limited legal capacity parent, on the condition that the statement for taking into parental custody to not affect the wellbeing of the parent in case.

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<sup>23</sup> § 1303 section 2 from the Civil Code.

<sup>24</sup> Mathias Reimann, Joachim Zekoll (ed.), *Introduction to German Law*, (Kluwer Law International, 2005), 254, Accessed December 19, 2015, [https://books.google.ro/books?id=6eBz6cnDe7gC&pg=PA297&lpg=PA297&dq=Mathias+Reimann,+Joachim+Zekoll+%28ed.%29,+Introduction+to+German+Law&source=bl&ots=RIzo1RIIZH&sig=xiDU4lCa0ivHXoBs\\_1uNkSFv5o0&hl=ro&sa=X&ved=0ahUKewjMuKvHnNfJAhUGzxQKHVnBBRMQ6AEIHZA#v=onepage&q=Mathias%20Reimann%2C%20Joachim%20Zekoll%20%28ed.%29%2C%20Introduction%20to%20German%20Law&f=false](https://books.google.ro/books?id=6eBz6cnDe7gC&pg=PA297&lpg=PA297&dq=Mathias+Reimann,+Joachim+Zekoll+%28ed.%29,+Introduction+to+German+Law&source=bl&ots=RIzo1RIIZH&sig=xiDU4lCa0ivHXoBs_1uNkSFv5o0&hl=ro&sa=X&ved=0ahUKewjMuKvHnNfJAhUGzxQKHVnBBRMQ6AEIHZA#v=onepage&q=Mathias%20Reimann%2C%20Joachim%20Zekoll%20%28ed.%29%2C%20Introduction%20to%20German%20Law&f=false).

<sup>25</sup> Introduced through the law from the 2<sup>nd</sup> of January 2002, published in Federal Law Gazette [*Bundesgesetzblatt*], I, p. 42, 2909.

## ESTONIA

In the Estonian legislation, we can meet two definitions, one referring to the notion of “child”, another to that of “young person”. Thus, the Law on the Protection of the Child<sup>26</sup> stipulates in §2. *The age of the child*: “Under the provisions of the present law, a child is a human being under 18 years old”. The Youth Act<sup>27</sup> stipulates that the young person is a physical person with the age between 7 and 26 years old (§ 2 section 1).

The Civil Code<sup>28</sup> from Estonia declares “the active legal capacity”, defined as “the capacity to independently take part in valid transactions”<sup>29</sup>. Children and persons with permanent mental disorders lack the full active legal capacity. The full active legal capacity is obtained after the age of 18.

## DENMARK

In the Danish law there is not an official definition of the minors. Thus, the people under 18 year sold are considered minor or young. The young people are physical persons between 14 and 18 years old.

In Denmark, as also in other northern countries, the transactions concluded with minors are valid if they have the common agreement, they are ordinary and have a decreased value. Moreover, a person who reached 15 years old can enjoy the money gained from the work they perform<sup>30</sup>.

In Denmark, there is valid the rule according to which a court can limit the legal capacity of a person, on the request on another interested

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<sup>26</sup> For the English version, see <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/531102014002/consolide>.

<sup>27</sup> For the English version, see <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520122013004/consolide>.

<sup>28</sup> For the English version, see <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528032014002/consolide>.

<sup>29</sup> §8 section 1 from the General Provisions of the Civil Code.

<sup>30</sup> R. Nielsen, *Contract Law in Denmark*, The Hague, 1997), note 6, sec. 345, quoted after Paul Varul, Anu Avi and Triin Kivisild, “Restrictions on Active Legal Capacity”, *Juridica International IX* (2004), 100.

person, if the first one endangered their family economically, due to drugs or alcohol consumption.

Furthermore, the court can declare the lack a person from their legal capacity, provided that they are incapable to manage their business directly, due to a disability or mental disorder, if they scatter the family wealth, menacing their wellbeing, or if they cannot manage their businesses due to alcohol consumption, or other similar bad habits<sup>31</sup>.

The statement of a person, referring to their lack of legal capacity, is also accepted before the court<sup>32</sup>.

## CZECH REPUBLIC

According to the Civil Code, an individual enjoys legal capacity from birth until death.<sup>33</sup>

In the Czechian law, which belongs to the German law family, it is mentioned “the juridical/legal capacity”, a term that designates both the notion of general capacity to have rights and also obligations, and that to gain rights and assume obligations<sup>34</sup>.

In Czech Republic, a person is minor until they reach the age of 18. The physical person is considered “young” until they are 26. According to the dispositions of the Civil Code, minors are persons who have not yet reached the age of 18. Minors are capable to conclude only the legal documents that are accordingly to their maturity and will.

Starting with the age of 18, a physical person becomes capable to contract (through exception, the legal capacity depends on the health

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<sup>31</sup> R. Nielsen, *Contract Law in Denmark*, nota 6, sec. 343, quoted after Varul, Avi, Kivisild, “Restrictions on Active Legal Capacity”, 102.

<sup>32</sup> L. Gustafsson, *Business Law in the Nordic Countries, Legal and Tax Aspects*, (Stockholm, 1998), 389, quoted after Paul Varul, Anu Avi, Triin Kivisild, “Restrictions on Active Legal Capacity”, 103.

<sup>33</sup> § 23 from the Civil Code of the Czech Republic. Accessed February 8, 2016, <http://www.czechlegislation.com/en/89-2012-sb>.

<sup>34</sup> Markéta Selucká et al, *Introduction to the Czech Civil Law, I. Parties, Ownership, Sale, Lease, Liability for Damages*, (Masarykova Univerzita, 2009), 16, Accessed February 6, 2016, <https://is.muni.cz/el/1422/jaro2013/SOC038/um/IntroductionBook.kor.02.pdf>.

condition, existing situations in which an 18-year-old person lacks the capacity).

As in the Romanian law system, and other law systems too, the minor who gets married (starting with the age of 16 years old) gains, through marriage, full legal capacity that he cannot lose after the breaking or the annulment of the marriage (according to § 23 from the Civil Code).

## **BULGARIA**

Starting with the age of 18, the physical person comes of age and they are completely capable to gain rights and assume obligations.

The people who have not reached the age of 14, are considered minors. The legal representatives – parents or tutors – conclude legal documents on behalf of them or in their place.

Those between 14 and 18 years old are considered “young”. They can conclude legal documents, with the agreement of the parents or tutors, but they can also make small transactions on their own, for their current necessities, and can dispose of their income, obtained for a job done by them.

All who reached the age of 16 are assumed to have full capacity of employment<sup>35</sup>. As an exception, a physical person can also become employed between 15 and 16 years old, but only for jobs that are easy, not dangerous and not harmful for their health and physical, intellectual and moral development<sup>36</sup>, but only with the consent of the Territorial Labour Inspectorate. In this case, the capacity of employment emerges as a consequence of the agreement given by the Territorial Labour Inspectorate<sup>37</sup>.

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<sup>35</sup> Art. 301 section 1 from the Labour Code. For the English version, see [http://www.mpsv.cz/files/clanky/3221/Labour\\_Code\\_2012.pdf](http://www.mpsv.cz/files/clanky/3221/Labour_Code_2012.pdf).

<sup>36</sup> The list with the jobs dangerous and harmful for the health and physical, intellectual and moral development of the minors, is an annex at Ordinance no. 6/2006 on the works forbidden to people between 15 and 18 years old, published in The Official Journal no. 64/2006.

<sup>37</sup> Vassil Mrachkov, *Labour Law in Bulgaria* (Wolters Kluwer International, 2011), 71, Accessed February 8, 2016, <https://books.google.ro/books?id=1NBrFtjv0nwC&pg=PA74&lpg=PA74&dq=bulgaria>

## GREECE

In Greece, the physical person is the child until 12 years old, and a young person until 18 years old. The minor is considered the persons of 8 to 18 years old, an age when it is obtained the full legal capacity (as it is regarded in the Romanian law).

In the Greek law, as in the German one too, there is made a distinction between “the legal capacity” that represents the capacity to have both rights and obligations, which is characteristic for any physical person from birth to death, “the capacity to conclude legal documents” that belongs to all the major and healthy people, and “the capacity to be liable for damages”, which represents the capacity of a person to understand the signification of their deeds, to make the distinction between good and bad<sup>38</sup>. It seems that this is the reason for which it is preferred the use of the term “personality”, instead of “capacity”.

The legal age for marriage is 18 years old. By exception, the minors under 18 years old can get married if they get an exemption (permission) from a court. This permission is given if there is a grounded reason that justifies the marriage of the minor<sup>39</sup>. Those under legal assistance can get married only with the agreement of the judicial (legal) assistant.

The people with full capacity to contract are those who reached the age of 18 years old, who can conclude any legal document.

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[n+civil+capacity&source=bl&ots=1humjjCA20&sig=vYrVdJmm2NeMrWy0dWERLNFi2Qo&hl=ro&sa=X&ved=0ahUKEwi0mcT2nNnJAhXFkQ8KHTe7AEgQ6AEILTAC#v=onepage&q=bulgarian%20civil%20capacity&f=false](http://www.academia.edu/6852425/BASIC_CONCEPTS_OF_GREEK_CIVIL_LAW) .

<sup>38</sup> Penelope Agalopolou, *Basic Concepts of Greek Civil Law*, (Athens: Ant. N. Sakkoulas, 2005), 109-110, Accesed February 3, 2016, [http://www.academia.edu/6852425/BASIC\\_CONCEPTS\\_OF\\_GREEK\\_CIVIL\\_LAW](http://www.academia.edu/6852425/BASIC_CONCEPTS_OF_GREEK_CIVIL_LAW) . P. Agalopoulou %CE%92%CE%91%CE%A3%CE%99%CE%9A%CE%95%CE%A3%CE%91%CE%A1%CE%A7%CE%95%CE%A3%CE%91%CE%A3%CE%A4%CE%99%CE%9A%CE%9F%CE%A5%CE%94%CE%99%CE%9A%CE%91%CE%99%CE%9F%CE%A5 manual of Greek Civil Law trnsl. from Greek into English . Konstantinos D. Kerameus, Phaedon J. Kozyris (ed.), *Introduction to Greek Law*, second revised edition, (Deventer-Boston: Kluwer Law and Taxation Publishers, 1993), 54.

<sup>39</sup> Art. 1350 section 2 (2) from the Civil Code.

The people with a limited capacity to contract are the minors between 10 and 18 years old, those under partial privative legal assistance and those under concurrent legal assistance, along with those under privative legal assistance, combined with the concurrent one<sup>40</sup>.

The minor who reached the age of 14 years old can have at their free disposal the income obtained after doing a job, the sums and the goods that they were given, in order to use them freely (art. 135), as alimonies, clothes, toys etc.

The minor who has reached the age of 15 years old can conclude a labour contract as employee, if the people entrusted with their bringing up and care (usually the parents) agree on their employment (art. 136, section 1, from the Civil Code). Unlike the Romania law<sup>41</sup>, the consent of the parents is general, not being necessary their agreement for each labour contract that the minor would conclude. If the people entrusted with the bringing up and the care of the minor refuse to give their agreement for the employment, the minor can address to the court that, after hearing the arguments, decides according to the interests of the minor (art. 136, section 2).

Taking into account that the minor can become employed without restraints only after 15 years old, it results that the minor who reached the age of 14 years old can make free use of their income, obtained for doing an occasional job or after a contract concluded in their behalf by the legal representatives (the parents or the tutor), as regarding the types of works allowed for the under 15 years old minors.

Exceptionally, the married minor (who gains full legal capacity, as in the Romanian law) can conclude by themselves certain legal documents, expressly specified by the laws (art. 137 from the Civil Code). Such documents can be represented by the transactions necessary for the maintaining or the increasing of patrimony, the necessary documents for the certain needs related to supporting and education, or the current needs of their families.

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<sup>40</sup> Penelope Agalopolou, *Basic Concepts of Greek Civil Law*, 118.

<sup>41</sup> Roxana Cristina Radu, *Dreptul muncii*, (București: C.H. Beck, 2008), 119.

## CONCLUSION

By comparing the main regulations from the different states on addressing the capacity of the physical person, it can be noticed that there are both differences and similarities on the moment when coming of age, and the limitations of the legal capacity. The first similarity is that in all the analysed law systems, the minors and the adults with permanently mental disorders cannot enjoy full capacity. There are countries where the minors lack the capacity until the age of 7 (Germany, Austria), or until the age of 10 (Greece). In other states, the minors have restricted legal capacity until the age of 18 (Estonia). Another resemblance is that, in most of the countries, the coming of age takes place at 18 years old (except for Austria, where the minor becomes a major person when reaching 19 years old, while in England and Germany, it was passed from the limit of 21 to that of 18 years old, in the 1970s).

In all the analysed law systems, the minor can conclude certain legal documents of a special importance, such is marriage or a labour contract, before reaching the age that the law stipulates for becoming a major. There are countries in which the minor obtains the full capacity after the marriage (generally those belonging to the Roman system), and others in which the minor does not become a major after the marriage, considering that such an event does not necessarily determine a sudden (rapid) psychical maturity of the minor (Germany, Estonia, Czech Republic).

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# IMPLICATIONS REGARDING THE SUBSIDIARITY CONTROL MECHANISM IN THE EUROPEAN UNION

Mihaela- Adina APOSTOLACHE<sup>1</sup>

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## **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.*

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## **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 down the legislative function of the Commission<sup>2</sup>; The Commission

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<sup>2</sup> 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

revised its legislative proposals and withdrew those which violated the subsidiarity principle<sup>3</sup>.

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?*”.

## **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 which mention that the respective proposals violate the subsidiarity

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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

<sup>3</sup> 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.

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<sup>4</sup>.

The doctrine<sup>5</sup> has found an asymmetry existing between national legislatures and executives in terms of access to the information

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<sup>4</sup> Anamaria Groza, “Parlamentele nationale si procesul decizional european: o acomodare dificila?”, *Revista Romana de Drept European*, 5(2010): 85.

<sup>5</sup> Groza, “Parlamentele nationale si procesul decizional european: o acomodare dificila?”, 86.

conveyed by European governments and institutions to parliaments concerning the European draft laws and the afferent documentations. 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, articles 1-8. 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”<sup>6</sup>. 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 application 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

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<sup>6</sup> Article 1 of Protocole no.1 on the role of national parliaments in the European Union.

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 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)*<sup>7</sup>, 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<sup>8</sup> 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.

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<sup>7</sup> 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, 3).

<sup>8</sup> See also Mihaela Adina Apostolache, *Rolul parlamentelor nationale in elaborarea si aplicarea dreptului european*, (Bucharest: Universul Juridic, 2013), 147.

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 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<sup>9</sup>.

**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<sup>10</sup>.

Based on Protocol No. 2, each national parliament has two votes, which are distributed according to the national parliamentary system. If it

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<sup>9</sup> 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.

<sup>10</sup> 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.

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 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<sup>11</sup> 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<sup>12</sup>.

CJEU confirmed for the first time the possibility of monitoring the subsidiarity principle in the Case UK/Council<sup>13</sup>, 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

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<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

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”<sup>14</sup>, which is also supported by the jurisprudence of the CJEU, where the subsidiarity had only a “low value as a control standard”<sup>15</sup>.

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.

## CONCLUSIONS

Regarding the control procedures to respect the principle of subsidiarity by European draft laws, in the doctrine<sup>16</sup> 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

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<sup>14</sup> Constantin, “Reconsiderarea subsidiaritatii”, 144.

<sup>15</sup> 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.

<sup>16</sup> 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.

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”<sup>17</sup>.

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 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<sup>18</sup>, 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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<sup>17</sup> Tapio Raunio, “National Parliaments and European Integration, What we know and what we should know”, *Arena Working Paper*, 2 (2009): 12.

<sup>18</sup> Philipp Kiiiver, “The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity”, *Maastricht Journal of European and Comparative Law*, 15 (2008): 79.

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# INTERNATIONAL AGREEMENTS – CATEGORY OF DISTINCT SOURCE OF THE UNIONAL LAW SYSTEM

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Alina-Gabriela MARINESCU<sup>2</sup>

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## **Abstract:**

*The European Union has acquired legal personality with the entry into force of the Lisbon Treaty also known as the Reform Treaty. Its legal personality is reflected by the fact that the European Union is able to negotiate and conclude international agreements in their own name. These agreements establish both rights and obligations for both the European institutions and Members. From a legal point of view international agreements belong to the secondary legislation, so they must comply with the founding treaties of the European Union. It is worth mentioning that the international agreements have a higher legal value in relation to the other acts of secondary legislation, also called unilateral. These acts are unilaterally adopted by the EU institutions. They are the following: regulations, directives and decisions. The founding treaties of the European Union define the procedures by which the EU can conclude international agreements. Another important aspect addressed in this paper is the procedure for adoption of international agreements stated by the Lisbon Treaty.*

**Key-words:** *international agreements, procedures, procedure for adoption, Reform Treaty*

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## CONSIDERATIONS REGARDING THE CATEGORIES OF SOURCES SPECIFIC TO THE EUROPEAN UNION'S LEGISLATION

The Union's legal order has been defined by the doctrine as being on the one hand, an ensemble of rules and norms stated by the constitutive or subsequent treaties, and on the other hand, the communitarian acts adopted by the European Union's institutions<sup>3</sup>.

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<sup>3</sup> Elise-Nicoleta Valcu, *Drept comunitar instituțional*, 3<sup>rd</sup> Edition revised and amended (Craiova: Sitech, 2012), 14.

An important feature of the communitarian law system is the immediate applicability in the internal law of the Member States. This theory aims the relation between the communitarian law and the internal law of the Member States. This theory aims the relation between the communitarian law and the internal law of the Member States, in the meaning that, the law of the European Union has supremacy in relation with the national system, its sources being included in the legal order of each state, either by direct takeover of the communitarian norm, or by its transposition.

The main source of the European Union law is represented by the *treaty*, which does not come from a legislative power, but it is the result of the agreement of will of the Member States using the ratification procedure. Thus, we note as immediate consequence of the supremacy of the enforceability of the communitarian law, which cannot vary from a state to another in favor of the future internal legislations<sup>4</sup>. Moreover, by signing the constitutive treaties, all Member States have recognized the legitimacy of the European institutions.

The law of the European Union, as above mentioned stated, has as main source the treaty. This, in its turn, is classified in: the constitutive treaty, the subsequent treaty, treaties for the adhesion to the European Union, budgetary treaties.

Also, the communitarian law has secondary sources classified into two main categories, namely: a) communitarian acts with binding legal force, namely regulations, directives, decisions; b) communitarian acts without binding force: opinions and recommendations.

Certain doctrinaires have added to these two categories of sources other categories, namely: i) complementary sources: *sui generis* acts, declarations of the Member States' governments, acts issued within the European institutions etc.; ii) general principles of law; iii) jurisprudence of the communitarian institutional courts; iv) international agreements to which the European Union is part.

*What are the international agreements and where do we place them in the category of communitarian sources of law?* We consider that, legally, the international agreements are sources belonging to the

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<sup>4</sup> Cornelia Lefter, *Drept comunitar instituțional* (Bucharest: Economica, 2001), 63.

communitarian legislation having a superior legal force in relation with the acts of the secondary communitarian legislation called “unilateral”, because are adopted with unanimity by the European institutions (regulations, directives and decisions)<sup>5</sup>.

The international agreements represent the result of an agreement of will between the European Union on the one hand, and a state or a third-party organization, on the other hand. These agreements generate rights and obligations for the European institutions and the Member States. The agreements are integrated in the European legal order at the date of their entrance into force or at the date stated in their content<sup>6</sup>.

## **CATEGORIES OF INTERNATIONAL AGREEMENTS CONCLUDED BY THE EUROPEAN UNION**

With the entrance into force of the Lisbon Treaty, the European Union has received legal personality. Thus, it is a subject of international law, capable to negotiate and conclude international agreements in its own name. These international agreements have legal effects in the internal law of the European Union and the Member States. Also, the founding treaties of the European Union define the procedures by which the European Union may conclude international agreements<sup>7</sup>. In the relations between the European Union and third countries or international organizations shall be applicable the international public law<sup>8</sup>.

After the EU received legal personality, it also received external competences, defined by Art 216 of the Treaty on the functioning of the European Union. Thus, the EU may conclude international agreements in the following cases:

- Where the founding Treaties so provide;
- Where a binding legal act of the Unions states so;

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<sup>5</sup> [www.europa.eu](http://www.europa.eu)

<sup>6</sup> [www.europa.eu](http://www.europa.eu)

<sup>7</sup> [www.europa.eu](http://www.europa.eu)

<sup>8</sup> Fabian Gyula, *Drept Instituțional Comunitar*, 3<sup>rd</sup> Ed. with modifications referring to the Lisbon Treaty (Bucharest: Hamangiu, 2010), 144.

- Where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties, even in the absence of an internal legislation.

- Where the conclusion of an agreement is susceptible to influence the common norms of internal law adopted by the Union. Thus, if the European Union adopts common norms for the application of a policy, the Member States no longer have the right to assume contractual obligations with third countries, which could affect these norms<sup>9</sup>.

Specifically, the European Union shall establish any form of useful cooperation with the United Nations and its specialized institutions, with the Council of Europe, with the Organization for Security and Cooperation in Europe and with the Organization for Economic Cooperation and Development. These missions are carried out by the High Representative of the Union for Foreign Affairs and Security Policy, namely the European Commission. The Union is represented in its relations with the international organizations by the Union's Delegations. These Delegations are under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. The Delegations shall act in tight cooperation with the diplomatic missions and consulates of the Member States.

***i) Agreements concluded between the European Union as party with third countries or international organizations***

The Court of Justice of the European Union has created the principle of the “implied power” (implied powers doctrine), stating that the European Union beneficate, in the virtue of the competences reserved in its relations with the Member States, from external competences resulted from these relations. Therefore, it has been extended the capacity to conclude international treaties for the European Union over the entire internal communitarian activity. The same CJEU has limited the external competences of the Union, emphasizing that it does not have the capacity to conclude treaties in the areas in which, until the conclusion of the treaty, has not used the appropriate internal competences, establishing that, according to the principle of the “implied powers”, based on the performance of the implicit external competence it

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<sup>9</sup> [www.europa.eu](http://www.europa.eu)

should be placed the preliminary performance of the internal competences<sup>10</sup>.

Moreover, the conventions concluded by the European Union become part of the communitarian law without being necessary the adoption of some transposition or takeover acts. In the case in which an international treaty raises issues falling both in the competence of the Union, as well as in the competence of the Member States, it shall be signed both by the European Union and the Member States<sup>11</sup>.

Regarding the agreements concluded between the Member States and third countries previous to the creation of the Communities or to the adhesion of it to it, Art 234 of the Treaty on the European Economic Community stated that: “The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty”. Thus, in literature it is concluded that to the extent to which these conventions are not compatible with the present Treaty, the state or Member States shall take all the appropriate measures to eliminate the incompatibilities ascertained. In this purpose and if it is necessary, the Member States shall mutually grant the necessary and adopted assistance, and shall adopt a common attitude<sup>12</sup>.

#### **ii) Joint agreements**

Joint agreements are those agreements, to which both the European Union and the Member States are contractual parties, for the reason that their joint participation is necessary, because not all areas aimed by the agreement are under the exclusive competence of the Union or exclusively under the one of the Member States. It is thus made the distinction between the parallel competence and the shared competences. The parallel competence represents the fact that the participation of the Union to an agreement is identical to that of any of the contractual parties and does not directly affect the rights and obligations of the Member

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<sup>10</sup> Fabian Gyula, *Drept instituțional al Uniunii Europene* (Bucharest: Hamangiu, 2012), 137-138.

<sup>11</sup> Gyula, *Drept Instituțional Comunitar*, 144-145.

<sup>12</sup> Gyula, *Drept instituțional comunitar*, 147.

States. Regarding the shared competence, it involves a distribution of the rights and obligations stated by the agreement.

Withal, the shared competence is classified in two categories:

- The *coexistent competence*, when the agreement states both provisions which fall under the exclusive competence of the Union, as well as provisions related to the exclusive competence of the Member States, thus the agreement may be separated into different parts;

- The *concurrent competence*, when the agreement represents a whole and cannot be separated into parts.

Regarding the negotiation, the distribution of competences within a joint agreement, generally do not influence the participation in negotiations. While the practice is established for each case, it is accepted the fact that the Commission may act as single negotiator for the entire agreement, in accordance with the mandate entrusted by the Council of the European Union<sup>13</sup>.

### **iii) *Economic and Trade Cooperation Agreements***

The European Union, for the achievement of the objectives stated by the constitutive treaties, has concluded numerous economic and trade agreements, stating important agreements in those areas, which offers them the quality as sources of communitarian law<sup>14</sup>.

The specificity of the agreements within this category consists in the fact that they do not state only commercial clauses, such as the granting of certain advantages for exports, but also assistance and cooperation in economics, industry, services, technological research and development areas, granting the advantages being coordinated by the compliance with the democratic principles, such as the compliance with the human rights<sup>15</sup>.

#### **1. *Trade Agreements***

The legal base for trade agreements is represented by the regulations of the constitutive treaties, which state the framework for the

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<sup>13</sup> Paul Craig and Grainne de Burca, *Dreptul Uniunii Europene – Comentarii, Jurisprudență și doctrină*, 4<sup>th</sup> Ed. (Bucharest: Hamangiu, 2009), 247-248.

<sup>14</sup> Dumitru Mazilu, *Integrarea Europeană – Drept Comunitar și Instituții Europene*, 5<sup>th</sup> Ed. (Bucharest: Lumina Lex, 2007), 82.

<sup>15</sup> Felician Cotea, *Drept Comunitar European* (Bucharest: Wolters Kluwer, 2009), 228.

promotion of the common trade policy. We note that the *trade agreements* concluded by the European Union are sources of the communitarian law to the extent to which they contain trade provisions applicable within the communitarian relations, as well as in the relations between the Union and its Member States<sup>16</sup>. In order to ease the access to market, the Communities have decided, in 1989, to offer special treatment for the products imported from Poland and Hungary and to eliminate or suspend the quantitative restrictions starting with 1<sup>st</sup> January 1990. Subsequently, these measures were applied to imports from Czechoslovakia, Bulgaria and Romania. Albania and the Balkan states started to benefit from this program in 1992<sup>17</sup>.

## 2. *Economic cooperation agreements*

The European Union has concluded agreements for economic cooperation which stated clauses regarding the conclusion of long time contracts, to the joint construction of certain industrial objectives, to the grant of preferential licenses, as well as to the exchange of licenses.

Agreements of this type, besides specific trade provisions, state concords regarding the consultation and cooperation in the economic sector, which underlines their complex feature.

Considering the complexity of these agreements, which surpass the area of usual trade relations, it has given the right for the competent European institutions to negotiate and to accept clauses, which are in accordance with the general interests of the European Union<sup>18</sup>.

Agreements of this type have been concluded with the Islamic Republic of Pakistan (2004), the Framework Agreement for Trade and Cooperation with Korea (2005), the Cooperation Agreement concluded between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela, of the other part (1984)<sup>19</sup>.

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<sup>16</sup> Mazilu, *Integrarea Europeană*, 82.

<sup>17</sup> Augustin Fuerea, *Manualul Uniunii Europene*, 5<sup>th</sup> Ed. with modifications referring to the Lisbon Treaty (Bucharest: Universul Juridic, 2011), 228.

<sup>18</sup> Mazilu, *Integrarea Europeană*, 83-84.

<sup>19</sup> Cotea, *Drept Comunitar European*, 452.

## **INTERNATIONAL AGREEMENTS IN THE LIGHT OF THE LISBON TREATY**

According to the Lisbon Treaty, the European Union may conclude agreements with one or more third countries or international organizations, if so provided by the treaties, or if the conclusion of an agreement is necessary for the achievement, within the EU's policies, of one of the objectives established by the treaties, either stated in a binding legal act of the Union, or it may influence the common norms or it can alter their area of application<sup>20</sup>. Also, the agreements concluded by the European Union are binding both for the EU's institutions, as well as for its Member States.

The agreements between the European Union and third countries or international organizations are negotiated and concluded according to the following procedure: the Council of the European Union shall authorize the initiation of the negotiations, after which it shall adopt the directives and authorize the signing and conclusion of the agreements.

The European Commission or the High Representative of the Union for Foreign Affairs and Security Policy and may appoint a special committee, the negotiations remaining to be managed in consultation with this committee.

At the proposal of the negotiator, the Council of the European Union shall adopt a decision by which it authorizes the signing of the agreement and, if necessary, for its provisory application before its entrance into force. Also at the proposal of the negotiator, the Council shall adopt a decision regarding the conclusion of that agreement.

If the agreement exclusively refers to the foreign affairs and security policy, the Council of the European Union shall adopt the decision regarding its conclusion, after receiving the approval of the European Parliament, in the following cases:

- association agreements;
- agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

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<sup>20</sup> Art. 188 L of the Lisbon Treaty.

- agreements establishing a specific institutional framework by organizing cooperation procedures;
- agreements with important budgetary implications for the Union;
- agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required;
- agreements for the accession of a Member State to the European Union<sup>21</sup>.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent<sup>22</sup>.

After consulting the European Parliament, it shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

Also, when concluding an agreement, the Council may authorize the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorization. The Council shall act by a qualified majority throughout the procedure.

However, the Council it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and

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<sup>21</sup> The Lisbon Treaty, 98-100.

<sup>22</sup> [www.europa.eu](http://www.europa.eu)

establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement. The European Parliament shall be immediately and fully informed at all stages of the procedure<sup>23</sup>.

The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties<sup>24</sup>. The control aims the substantive (compliance with the procedure for adoption) and formal (the agreement must comply with the European primary law) validity<sup>25</sup>. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

The Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavor to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament<sup>26</sup>.

## CONCLUSIONS

Regarding the relation *international law – communitarian law*, from the traditional perspective of the international public law we may state that both the communitarian primary law, as well as the secondary one belong to the public order of international law. There are also opinions considering that not only the *communitarian primary law* would have a double legal nature, opinion based on the idea that in the same time it is formed by the totality of the communitarian treaties either constitutive or subsequent, but always recognizing their international

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<sup>23</sup> Art 188N of the Lisbon Treaty.

<sup>24</sup> The Lisbon Treaty, 100.

<sup>25</sup> [www.europa.eu](http://www.europa.eu)

<sup>26</sup> The Lisbon Treaty, 101.

nature, on the other hand, the same primary law representing “a true constitution” for a supranational communitarian legal order.

Being the supporters of the second thesis, we agree with the opinion expressed by the literature according to which, in case of collision, the communitarian primary law as special regulation is imposed in front of the general international public law, to the extent to which we are not talking about international public law norms such as “*jus cogens*”, which cannot be violated by contractual provisions<sup>27</sup>.

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<sup>27</sup> Gyula, *Drept Instituțional Comunitar*, 144.

# GENERAL ASPECTS REGARDING THE NATIONAL REGIME OF THE PROTECTED NATURAL AREAS

Georgeta-Bianca SPÎRCHEZ<sup>1</sup>

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## **Abstract:**

*Considering that the protection of the environment is an objective of public interest, the following paper focuses on the maintenance of the natural habitats and species, namely on the legal regime of the natural protected areas. Such a study involves the examination of the main aspects, as follow: the procedure and formalities applied in order to establish the legally protected natural areas and also the management of the national network of protected areas. The research methodology is based on consulting the Romanian legislation in this area and the relevant case-law.*

**Key-words:** *protected natural areas, natural habitats, environment, ecological network, custodian*

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## **INTRODUCTION**

Within the legal framework of nature protection, special attention is paid to the protected natural areas. Thus, at the European level, the reference document is the Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora<sup>2</sup>, and into national, Romanian law there was enacted the Government Emergency Ordinance (hereinafter G.E.O.) no. 57/2007 relating to the protected natural areas, conservation of natural habitats, wild flora and fauna<sup>3</sup>, for harmonization with the European legal order.

In art. 4, section 18 of the G.E.O. no.57/ 2007 there was established the following legal definition of the protected natural areas: "land and/or sea area hosting species of wild plants and animals, elements and biogeographical formations, landscape, geological, paleontological, caving or other elements, with ecological, scientific or particular cultural

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<sup>2</sup> JO L 206, 22.7.1992

<sup>3</sup> Published in the Official Gazette of Romania, Part I, no.442 / 29.06.2007, as amended and supplemented

value, which has a special protection and conservation regime, established under the law."

In the doctrine<sup>4</sup>, the concept of protected area was explained as follows: "It represents the geographically defined area with natural rare elements or in high percentage, designated or regulated and managed so as to achieve some specific conservation goals, it comprises national parks, natural and biosphere reserves, natural monuments and others."

The law maker<sup>5</sup> provided the following categories of protected areas:

- of national interest: scientific reserves, national parks, natural monuments, natural reserves, natural parks;

- of international interest: natural sites of the universal natural heritage, geological parks, international importance wetlands, biosphere reserves;

- of Community interest or "Natura 2000" sites<sup>6</sup>: community interest sites, Special Areas of Conservation, Special Protection Areas of Birds;

- of county or local protected areas: set only on the public/private of administrative-territorial units, where applicable.

We refer, in what follows, by reference to the provisions of G.E.O. no.57/2007, to the establishment, organization and development of the national network of protected areas, and to the management regime of protected natural areas management.

## **ESTABLISHING THE NATIONAL NETWORK OF PROTECTED AREAS**

In accordance with article 8 of the Government Emergency Ordinance no.57/2007, the natural protected area regime is done by issuing the following laws:

- law for natural sites of universal natural heritage;

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<sup>4</sup> Valentin-Stelian Bădescu, *Dreptul mediului. Sisteme de management de mediu*, (Bucharest: C.H. Beck, 2011), 265

<sup>5</sup> In Article 5 of the GEO no. 57/ 2007.

<sup>6</sup> The European ecological network.

- Government decision for scientific reserves, national parks, natural monuments, natural reserves, parks, wetlands of international importance, biosphere reserves, geoparks, Special Areas of Conservation, Special Protection Areas of Birds;

- order of the head of the central public authority for environmental protection and climate change, for Community importance sites, with the Romanian Academy approval;

- county or local councils resolutions, for natural protected areas, of county or local interest.

The documentation submitted in this respect, differs based on the category of protected area<sup>7</sup>.

Thus, for the creation of the national interest protected area, the documentation must contain:

- the scientific study;

- the cartographic documentation with the limits of the protected area, identifying the land use categories;

- the area and the legal status of the land, specifying the form of property and owners upon establishment of the area;

- the resolutions of the municipal, town, city or county council, as appropriate, approval of the administrative area will come to form part of the protected area;

- the Romanian Academy's approval.

In setting up the natural protected areas of community interest will be submitted:

- Natura 2000 Standard Form, compiled by the European Commission by Decision 97/266/EC and approved by the Ministry of Environment and Water no. 207/2006 approving the content Natura 2000 Standard Form and content of the manual completion thereof;

- the Romanian Academy's approval.

The dossier for creating the status of the protected natural areas of international interest, shall include:

- scientific substantiation of the universal natural heritage site, the wetland of international importance, the geopark or biosphere reservation, as applicable;

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<sup>7</sup> It is provided by article 11 of the G.E.O. no.57/ 2007..

- the document attesting recognition of the area as a protected area of international interest by the authorized international bodies;
- the Romanian Academy's approval.

## **COMPLIANCE WITH THE STATUS OF PROTECTED NATURAL AREA**

In accordance with article 7 of the G.E.O. no. 57/2007 'the protection status is established regardless of the intended use of the land and the holder, and its observance is mandatory in accordance with the provisions of this Emergency Ordinance, and with other statutory provisions in this matter".

Among the obligations of the natural and legal persons related to the observance of the legal regime of protected natural areas, the legal doctrine<sup>8</sup> has made the following inventory:

- strict observance of the status of areas adjacent to the protected areas, nature monuments, on which there were identified items that need to be protected;
- ecological and sustainable management of the areas held by them in their capacity as owners and which are declared protected areas;
- the prohibition to collect and to market plants declared natural monuments;
- the prohibition to catch, hold or sell species of animals declared natural monuments.

In terms of ownership of lands in the protected natural areas, we note that "it is encumbered by the owner's obligation to keep their intended use, to ensure their management through authorized forestry structures and to allow the necessary intervention works"<sup>9</sup>. Moreover, the legislation concerning reconstitution of ownership offers the possibility of the former owners to opt for assigning an equivalent area, if the liens affecting the land are deemed too burdensome as provided by the law.

In carrying out the obligations incumbent upon the EU Member States related to natural areas, those adopted by the Court of Justice of

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<sup>8</sup> Bădescu, *Dreptul mediului*, 266.

<sup>9</sup> The Romanian Constitutional Court decision no. 652/28.04.2009 published in the Official Gazette of Romania, part I, no. 415/17.06.2009.

the European Union are relevant<sup>10</sup>: protection of natural areas must not be limited to actions designed to avoid external claims and disturbances caused by humans, but, according to the current situation, must comprise positive measures aimed at the preservation and enhancement of the site condition. In terms of positive obligations, it was established<sup>11</sup> that adopting positive measures aimed at the preservation and improvement of the condition of a site does not have a systematic character, but depends on the actual situation of the relevant natural area.

Also, the Court of Luxembourg<sup>12</sup> decided that since a site appears on the list of Community interest established by the Commission, execution of any work is subjected to a general obligation involving avoidance of deterioration of natural and species habitats, and perturbation of species for which the protected areas have been designated. The Court also stated<sup>13</sup> that, since a site appears on the national list transmitted to the Commission for inclusion on the list of Community importance sites, such a site should not be subject to interventions that might seriously jeopardize its ecological attributes. Any plan or project likely to have a significant impact on a protected area must be subjected nationally to an assessment regarding its effects on the site concerned, taking account of its conservation objectives. National authorities may only approve plans or projects which do not affect the integrity of such site.

## **MANAGEMENT OF THE NATIONAL NETWORK OF PROTECTED AREAS**

Art. 15 of G.E.O. No. 57/2007 provides that protected natural areas will be highlighted in the national, zoning and local landscaping and urbanism plans, cadastral plans and land books. Additionally, in accordance with article 12 of the Ordinance, at the time of receipt of the

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<sup>10</sup> The European Court of Justice decision dated 14.10.2010 in the case C-535/07, the European Commission against the Republic of Austria, UE:2010:602.

<sup>11</sup> *Idem*.

<sup>12</sup> The European Court of Justice decision dated 14.01.2010 in the case C-226/08 Stadt Papenburg/Bundesrepublik Deutschland, UE:C: 2010:10.

<sup>13</sup> The European Court of Justice decision dated 14.01.2010 in the case C-226/08.

documentation necessary for the establishment of the status of protected natural area, the environmental competent authorities must notify the holders of land and initiate consultations with all stakeholders.

The provisions of article 16(2) G.E.O. no. 57/2007 indicate that "the management of biosphere reserves, national parks, natural parks, and, where appropriate, geoparks, natural universal heritage sites, wetlands of international importance, Community importance sites, special areas of conservation and special protection areas, is carried out by the specially designated structures" , and in relation to para. 3 of art. 16 of the Ordinance, "scientific reservations, natural reservations, nature monuments and, where appropriate, geoparks, universal natural heritage sites, wetlands of international importance, sites of Community importance, special areas of conservation and birds special protection areas, not requiring special management structures are managed under custody agreements".

Natural or legal entities, who have the qualification, the training and the means to establish and enforce measures for the protection and preservation of the assets entrusted to them can be custodians. The capacity of custodian is determined following the conclusion of a Custody agreement.

## CONCLUSION

At the Romanian national level, the enactment of the G.E.O. no. 57/2007 meant that regulatory framework that responds to the European requirements imposed in order to secure the biodiversity and to guarantee the sustainable development of the natural heritage.

The rules of the G.E.O. no. 57/2007, to which we referred through this study, are likely to contribute to the conservation of the natural habitats.

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# THE TREATY OF LISBON AND THE NEW DIMENSIONS OF EU INSTITUTIONAL REFORM

Suhail- Abbas- Chachan ALJABRI <sup>1</sup>

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## **Abstract:**

*Once the number of EU Members increased from 15 to 25 and then to 27, the Community institutions, procedures and mechanisms, conceived for a certain European configuration, proved to be too „narrow”, rigid and constraining for the new profile of the European construction. The Lisbon Treaty (2009), apart from its „labyrinthine” nature, represents a reference moment in simplifying and reorganizing the institutional architecture of the European Union. However, the delimitation and definition of the competences at the level of the new „rectangle” institutional structure appears to be still not enough clarified<sup>2</sup>. From the perspective of the Romanian translation, the Lisbon Treaty can be, a modifying/amending treaty (in French) or an reformatory treaty (in English). Although, in reality, the two terms can be considered synonyms, in substance, the Lisbon Treaty combines them both: it modifies EU treaties and also reforms the institutions within<sup>3</sup>.*

*In the following we will try to demonstrate , among other things , that pure theoretical finding , but with coverage within the Treaty of Lisbon.*

**Key-words:** *the treaty of Lisbon, institutional reforms, European Commission, European Council, rotating presidency*

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## **INTRODUCTION**

The Lisbon Treaty addresses the need to reform the structure and functioning of the European Union. Successive EU enlargements have brought the number of EU countries to 28. Therefore it was necessary to adapt the functioning of the institutions and ways of decision-making at European level. In addition , the Lisbon Treaty reforming enabled several

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<sup>2</sup> Gabriela Drăgan, „The Lisbon Treaty – a new step in creating a United Europe?”, *Political Sphere* vol. XVIII, 5 (2010): 10, accessed on 13<sup>th</sup> of march 2016, [http://www.sferapoliticii.ro/sfera/pdf/Sfera\\_147.pdf](http://www.sferapoliticii.ro/sfera/pdf/Sfera_147.pdf).

<sup>3</sup> Andrei Popescu, „The Lisbon Treaty – a modifying and reformatory treaty of EU”, *Legislative Newsletter* 1 (2008): 3, accessed on 13<sup>th</sup> of march 2016, [http://www.clr.ro/eBuletin/1\\_2008/Buletin\\_1\\_2008.pdf](http://www.clr.ro/eBuletin/1_2008/Buletin_1_2008.pdf).

EU policies. It has redefined and strengthened actions taken at European level.

A first attempt at reform took place with the elaboration of the training Treaty of a **Constitution for Europe**. The objective was to replace the founding treaties of the European Union with a European Constitution. The Constitution was signed in Rome on 29<sup>th</sup> of October 2004. However, before being valid, it had to be ratified by all EU member states. The ratification process was unsuccessful in several of them.

On 23 July 2007 a new intergovernmental conference was convened in Lisbon to find an alternative to the Constitutional Treaty and to continue reforms. The idea of a European Constitution was therefore abandoned and further negotiations took place to develop an amending treaty. On 13 December 2007, the 27 Heads of State or Government of the EU signed the new amending treaty in Lisbon . The Lisbon Treaty became valid on the 1<sup>st</sup> of December 2009, after being ratified by all EU countries in accordance with their respective constitutional requirements. This treaty is largely inspired by the Constitutional Treaty. Most institutional and policy reforms envisaged in the Constitution are set out in the Treaty of Lisbon, but presented in a different form.

The Reform of EU institutions was necessary due to the increasing number of EU countries. The Lisbon Treaty amended the rules on the composition of the Commission, the European Parliament, the Committee of the Regions and the European Economic and Social Committee. Plus, it also reforms the process of decision-making within the Council of Europe. This effectively eliminates the old system of weighted voting and introduces a new definition of qualified majority voting decisions. The Treaty also creates two new features in the institutional architecture of the European Union: European Council President and the High Representative for Foreign Affairs and Security Politics<sup>4</sup>.

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<sup>4</sup> „The Lisbon Treaty”, accessed on 13<sup>th</sup> of march 2016, last modified septembrie 22<sup>nd</sup> 2015, <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=URISERV%3Aai0033>.

## **THE LISBON TREATY – FROM THE „TRIANGLE” TO THE INSTITUTIONAL „RECTANGLE”**

The new Treaty of Lisbon, also known as the "Reform Treaty" provides only an amendment of the Treaties considered to be fundamental (Treaty on European Union and the Treaty on the Functioning of the EU), as they did in their time the Amsterdam and Nice Treaties. Furthermore, mainly to answer the objections coming from the members of the EU whom were worried about the federal advance of the Union, from the new Treaty were suppressed all the clues that could lead to the idea that the EU might turn into such a State (disappeared, for example, the term "constitution" and the already established section on EU symbols). However, the new Treaty has taken over most of the innovations contained in the Constitutional Treaty, the modifications brought upon the institutions will have a profound effect on their functioning. Being a treaty amending the previous ones, the new Treaty gets hard to be deciphered. Comparative reading between the new revised text and old fixed texts, turns into a laborious activity, the text itself is accompanied by a significant number of additional protocols and declarations that make it quite difficult to browse.

But passing over its "labyrinthine" nature, the content itself provides a different picture, which marks the existence of substantial progress in simplifying and reorganizing the institutional architecture of the EU. In the institutional field, the Treaty of Lisbon comes with important content changes for each institution placed in the tops of the so-called "institutional triangle": the Council, the European Commission and the European Parliament, marking also the shift from the classic institutional triangle to an "quadrilateral" and from the well-known "trio" to an "quartet" or a "quintet"<sup>5</sup>. In such a formula, the answer to the famous question asked by H. Kissinger in connection with the telephone number at which Europe could respond, is, despite appearances, is even more difficult to offer. At the other end, from the 1<sup>st</sup> of December 2009, together with the Commission's President and the European Parliament

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<sup>5</sup> Gian-Luigi Tosato, „The Shape of Post-Lisbon Europe”, Stefano Micossi, Gian Luigi Tosato (editors), *The European Union in the 21st Century. Perspective from the Lisbon Treaty*, (Brussels, Center for European Policy Studies, 2009), 276.

are the new Permanent President of the European Council and High Representative for Foreign Affairs and Security Policy. The fifth "soloist", the Council of Ministers, has its place alongside the other partners, despite the fact that after Lisbon, its score is not as clearly drawn. Replacing the rotating presidency of the European Council with a permanent chairmanship (Article 15 TEU) for two and half years, with the possibility may of being extended once, it was one of the major institutional innovations introduced by the new Treaty.

The new president, Herman Van Rompuy, designated as such by the leaders of the 27 EU Members on the 19<sup>th</sup> of November began his mandate on the 1<sup>st</sup> of December 2009. Clues about how the permanent President intends to play its role were offered by the way the works were carried by the first European Council, meeting attended by all the actors mentioned above<sup>6</sup>. As already noted in a recent EPIN<sup>7</sup> comment, Van Rompuy seems to play a facilitator rather than a leader, ability that is not of a less importance but which may prove very useful in the extremely tense current climate. In addition, the close relationship between the European Council President and President of the Commission (weekly meetings) can be regarded also as a positive development, the strengthen cooperation between the two institutions can support the process of European integration.

Another novelty brought by the Lisbon Treaty, the position of High Representative for Foreign and Security Policy (High Representative of the Union for Foreign Affairs and Security Policy). Unlike Van Rompuy, Catherine Ashton has played a much more complicated role, many questions still persisting about the "job". The new position attributed to Mrs. Ashton<sup>8</sup> brings together two old positions, that of Javier Solana, former High Representative for Common Foreign and Security Policy (1999 to 2009) and that of Benita Ferrero-Waldner, Commissioner for

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<sup>6</sup> Gabriela Drăgan, „The Lisbon Treaty – a new step in creating a United Europe?“, *Political Sphere* vol. XVIII, 5 (2010):13, accessed on 13<sup>th</sup> of march 2016, [http://www.sferapoliticii.ro/sfera/pdf/Sfera\\_147.pdf](http://www.sferapoliticii.ro/sfera/pdf/Sfera_147.pdf).

<sup>7</sup> P.M. Kaczynski et al. „Lisbon five month on: Surveying the new EU political scene“, *EPIN Commentary*, 5 (29<sup>th</sup> of April 2010): 1.

<sup>8</sup> Catherine Ashton functioned as an European Commissioner for Trading between October 2008 and November 2009.

External Relations and neighborhood Policy, in the first Barroso Commission. In addition, Mrs. Ashton, who is also vice president of the European Commission, chairs the Foreign Affairs Council and also the new EU diplomatic service, the European External Action Service (EEAS). Since, in fact, within the EU, operated until now a sort of external services sui generis, on the one hand, within the European Commission, led by Benita Ferrero-Waldner, Commissioner for External Relations and the European neighborhood policy, and on the other hand, within the EU Council, under the leadership of Javier Solana, Secretary-General and High Representative for the Common Foreign and Security Policy<sup>9</sup>, rightly raises the question what will be the newly created structure of the EEAS. Charles Grant, of the Centre for European Reform, brought out the attention since 2007 that the new position of High Representative, equivalent to a minister of foreign affairs, cannot function effectively without having the back of an appropriate technical support because otherwise "it would be like having an orchestra without a conductor - or rather, a conductor who tries to manage two separate orchestras at the same time."<sup>10</sup> A report drafted by the European deputy Elmar Brok (Chairman of Foreign Affairs Committee of the European Parliament) and adopted by the European Parliament at the end of October 2009, show that the EEAS should be "a sui generis service from an organizational and budgetary point of view", which should be incorporated into the Commission's administrative structure. Also, to avoid creating a huge new bureaucracy, the over 120 delegations of the European Commission in third party countries, the liaison offices of the Council and the offices of the EU's Special Representative should be merged to create true "Union embassies", headed the External Action Service personnel who will respond to the High Representative. The

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<sup>9</sup> Gabriela Drăgan, „The Lisbon Treaty – a new step in creating a United Europe?“, *Political Sphere* vol. XVIII, 5 (2010):13, accessed on 13<sup>th</sup> of march 2016, [http://www.sferapoliticii.ro/sfera/pdf/Sfera\\_147.pdf](http://www.sferapoliticii.ro/sfera/pdf/Sfera_147.pdf).

<sup>10</sup> „It would be like having a conductor without an orchestra - or rather, a conductor trying to conduct two separate orchestras at the same time“, Charles Grant, „Constitutional fudge. The EU's foreign policy arrangements are dysfunctional, so why is Britain trying to block plans to make them more effective?“, *Guardian blog*, 19<sup>th</sup> of June 2007.

concern of most Member States, however, is that the new EEAS could replace bilateral diplomacy and would further transform EU into a super-state, reducing the power of the Member States in this area. On the case of the Council of Ministers, the Lisbon Treaty maintains the rotating presidency of councils (each Member State continuing to chair the Council for a period of 6 months), but make changes in their structure.

Thus, if in accordance with previous rules, the national representatives met in nine separate formations, depending on the topic of public policy discussion (environment ministers within the Council of Environment, Ministers of Agriculture within the Council for Agriculture and Fishing, Ministers of Finance within the Council for Economic and Financial Affairs (ECOFIN) etcetera), according to the Reform Treaty, General Affairs and External Relations Council splits into two components: the General Affairs Council (GAC) and the Foreign Affairs Council (FAC), the number of councils rising at 10. Furthermore, FAC will be chaired by the High Representative and the rotating presidency, and CAG by the Council's rotating presidency. In these circumstances, the MO of the rotating presidency of the council, with the newly introduced permanent presidency of the European Council already raises questions. While the new President and the High Representative (HR) (job equivalent to that of a foreign minister) will preside over meetings of heads of state and government and of the foreign ministers, the country holding the rotating presidency will continue to chair meetings of all other ministers. For example, with the chairmanship rotating (1<sup>st</sup> of January 2010) Spain chairs, thru the respective ministers, all councils of ministers (agriculture, environment, etc.), except the Foreign Affairs Council.

Meanwhile, Spanish Prime Minister and the Spanish Foreign Minister are members of the European Council chaired by Herman Van Rompuy, and the Spanish Minister of Foreign Affairs, member of the Foreign Affairs Council, chaired by Catherine Ashton. In addition, the Permanent Representative Committee (COREPER), responsible for preparation of the Council's works, will be led also, thru rotation, every six months by a representative of the State Member which will also preside the CAG, but the Political and Security Committee (PSC ) -

which monitors the international situation in areas covered by the CFSP - will be led by a representative of HR. Also, all other bodies designed to help organize the various Councils (working groups, committees etc.), except foreign policy, will be coordinated by the rotating Presidency. On the other hand, within the Commission, the over-lapping between the areas of foreign policy (humanitarian aid, enlargement and neighborhood policy) under the direction of commissioners with specific tasks and the domain of Mrs. Ashton - Foreign Affairs and Security Policy, member of both the Commission, and a representative of the Council of Ministers creates inevitable confusion. A CRPE report emphasized that, while the Lisbon Treaty seems to have simplified the fragmented organization of EU foreign policy between the Commission and the Council, within the Commission, on the contrary, seems to have exacerbated, "because now, paradoxically, are more commissioners dealing with external matters "and is" unclear how the extended group of Commissioners with mandates on external relations will operate and what will be their relations with the High Representative<sup>11</sup>". For instance, "humanitarian aid" was separated in the new Commission's "Development" portfolio and was created a new post of Commissioner for the "Humanitarian Aid and Crisis Situations Response." Moreover, within the new Barroso Commission, the portfolio "neighborhood policy" will no longer be administered by the High Commissioner, although in the former commission it was a part of the portfolio of Benita Ferrero-Waldner. In the new formula, the neighborhood policy was not longer expanding, which was an occasion of speculations and expectations of the states covered by this policy. We left at the end of this analysis, the European Commission's President<sup>12</sup>, always been an extremely important actor in the institutional architecture of the EU. Under the Lisbon Treaty, how to elect the President has changed: the European Council at the time of its nomination, should take into account the results of elections of the

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<sup>11</sup> Paul Ivan et al. „The European Union is adapting to the Lisbon Treaty”, *The Romanian Center for European Politics, Policy Memo* 6 (2010): 5.

<sup>12</sup> Gabriela Drăgan, „The Lisbon Treaty – a new step in creating a United Europe?”, *Political Sphere vol. XVIII*, 5 (2010): 15, accessed on 13<sup>th</sup> of march 2016, [http://www.sferapoliticii.ro/sfera/pdf/Sfera\\_147.pdf](http://www.sferapoliticii.ro/sfera/pdf/Sfera_147.pdf).

European Parliament and carry out the necessary consultations. The mutation produced, finds a study by the Department for European Affairs, approaches the appointing process of the President of the Commission of the procedure to appoint prime ministers in the various State Members. On the other hand, the increased involvement of the Commission in the meetings of other institutions, as can be drawn from the meetings so far with President of the European Council and the President of the European Parliament can be evaluated favorably. However, the position of the President of the Commission is required to be redefined, since President Barroso it is not only one the acting in the "Union's interest". In conclusion, the picture of the main EU institutions, like a photo in full process of development, still maintains in a gray area the new characters introduced by the Lisbon Treaty, the image of European Council President and the High Representative for Foreign Affairs and Security Policy partly overlapping over a little older shapes, belonging either to the rotating Presidency or the High Representative for Common security and Defense Policy. With a delimitation of competences insufficiently clarified, mainly for general affairs and foreign policy, the new system promoted by the Lisbon Treaty - says A. Missiroli , "is no less complex and layered than the previous one" and to make it work it will be "no easy task".

Lisbon Reform Treaty resumes, on a significant extent, the innovations brought thru the project of the Constitutional Treaty in 2004. Thus, mainly, are noteworthy: the introduction of the double majority vote (even if its implementation was delayed until 2014, with the possibility of invoking the Nice Treaty vote system until 2017 and the Ioannina<sup>13</sup> mechanism); extending the sphere of application of the majority voting, both in domains currently being the subject to unanimity voting procedure (immigration, asylum, Europol, Eurojust, border control, High Representative for CFSP initiatives, structural funds and cohesion etc.), as and in domains in which the current Treaty of Nice does not include them in the sphere of Community intervention(energy, tourism, sport, the own resources of the EU, space policy, civil

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<sup>13</sup> I. Jinga, ,, The Lisbon Treaty: solution or a phase in the institutional reform of the European Union?", *The Romanian Magazine of Community Law*, 1 (2008): 17-18.

protection, structural co-operation in defense area, services of general interest, humanitarian aid, voluntary withdrawal of a State Member of the Union etc); maintaining the principle of 'one state, one commissioner "until 2014, after which the Commission will be reduced to two thirds of the States Member of the European Union, applying the principle of equal rotation; extending the competences of the European Court of Justice, mainly in achieving the area of freedom, security and justice; creation of the post of President of the European Council with a term of 2.5 years renewable once; investing with single legal personality for the EU, which will enable it to affirm and to increase the effectiveness of an European "modus operandi" on the international stage , and strengthen the "Community method" applied in the CFSP and JHA domains (the other "two pillars "of the community, along with the Internal Market); establishment of the post of High Representative of the Union for Foreign Affairs and Security Policy, who will also qualify as a vice president of the European Commission, will chair the External Relations Council and will coordinate the European External Action Service (EEAS)<sup>14</sup>.

**The Reform Treaty** clarifies and regulates the categories and areas of competence of the European Union by introducing a new Title I (Articles 2-6). Thus, Article 2 provides that:

1) "When the Treaties confer the Union exclusive competence in a specific area, only the Union may legislate and adopt binding acts from a legally point of view, the states member can do so only if empowered by the Union or for applying Union acts ";

2) "When the Treaties confer the Union a competence shared with the States Member in an specific area, the Union and the States may legislate and adopt legally binding in this area. The States shall exercise their competence to the extent that the Union has not exercised its competence ";

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<sup>14</sup> Andrei Popescu, „The Lisbon Treaty – a modifying and reformatory treaty of EU”, *Legislative Newsletter*, 1 (2008): 6, accesed on 13<sup>th</sup> of march 2016, [http://www.clr.ro/eBuletin/1\\_2008/Buletin\\_1\\_2008.pdf](http://www.clr.ro/eBuletin/1_2008/Buletin_1_2008.pdf).

3) "States Member shall coordinate their economic and employment policies under the conditions set out in this present Treaty, for which the Union shall have competence";

4) "The Union shall have competence ...to define and implement a common foreign and security policy, including the progressive defining of a common defense policy";

5) "In certain areas and conditions under the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the States, without thereby superseding their competence in these areas ..." <sup>15</sup>

Article 3 lists the areas of exclusive jurisdiction: "The Union shall have exclusive competence in the following areas:

- customs union;
- establish the competition rules needed for the functioning of the internal market;
- monetary policy for the States Member whose currency is the euro;
- conservation of marine biological resources under the common fisheries policy;
- common commercial policy '.

Article 4 fixes mixed competences:

1) "The Union shall have competence shared with the States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6";

2) "Shared competence between the Union and the States applies in the following principal areas:

- internal market;
- social policy;
- for aspects defined in the present Treaty;
- economic, social and territorial cohesion;
- agriculture and fisheries, except the conservation of marine biological resources;

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<sup>15</sup> Andrei Popescu, „The Lisbon Treaty – a modifying and reformatory treaty of EU”, *Legislative Newsletter*, 1 (2008):8, accesed on 13<sup>th</sup> of march 2016, [http://www.clr.ro/eBuletin/1\\_2008/Buletin\\_1\\_2008.pdf](http://www.clr.ro/eBuletin/1_2008/Buletin_1_2008.pdf).

- environment;
- consumer protection;
- shipments;
- trans-European networks;
- energy;
- area of Freedom, Security and Justice;
- common safety concerns in public health matters, for the aspects defined in the present Treaty ";

3) "In the areas of research, technological development and space, the Union shall have competence to carry out actions ... without being able to have the effect of preventing the States Member to exercise jurisdiction";

4) "In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy ... without preventing the States Member to exercise jurisdiction".

Article 5 states that "States Member shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies ... The Union shall take measures to ensure coordination of employment policies labor ... Union may take initiatives to ensure coordination of the States' social policies ".

Based on art. 6 The Union shall have competence to carry out actions to support, coordinate or supplement the actions of Member States. The areas of such action, at European level, are<sup>16</sup>:

- protecting and improving human health;
- industry;
- culture;
- tourism;
- education, professional training, youth and sport;
- civil protection;
- administrative cooperation ".

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<sup>16</sup> Andrei Popescu, „The Lisbon Treaty – a modifying and reformatory treaty of EU”, *Legislative Newsletter*, 1 (2008): 9, accesed on 13<sup>th</sup> of march 2016, [http://www.clr.ro/eBuletin/1\\_2008/Buletin\\_1\\_2008.pdf](http://www.clr.ro/eBuletin/1_2008/Buletin_1_2008.pdf).

The protocol regarding the role of national parliaments in the European Union, which was originally introduced by the Treaty of Amsterdam, is restated entirely by the Lisbon Treaty. It is divided into two headings: information destined for national parliaments and inter-parliamentary cooperation. Relative to the first aspect, according to art. 1, the consultation documents of the Commission (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission also sends the national parliaments the annual legislative program and also, any other instrument of legislative planning or political strategy, simultaneously sending them as well to the European Parliament and the Council, according to art. 2, the draft laws addressed to the European Parliament and the Council, shall be forwarded to national Parliaments.

Draft legislative acts originating from the Commission shall be forwarded directly by the Commission to national Parliaments, at the same time as to the European Parliament and the Council. The draft legislation drawn up by the European Parliament shall be forwarded directly to national parliaments to the European Parliament. Draft legislative acts originating from a group of States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council. In turn, national parliaments can address, under Article 3, the President of the European Parliament, the Council and, respectively, the Commission a reasoned opinion on whether a draft legislative act is in accordance with the principle of subsidiary, and also with the procedure laid down in the Protocol regarding the application of the subsidiary principles and proportionality. It provides for a period of eight weeks between the date when a draft legislative act is made available to the national Parliaments in the official languages of the European Union and the date the project in question is included on the provisional agenda of the Council, for its adoption or the adoption of a position within a legislative procedure. Exceptions are possible in emergencies, whose reasons are stated in the act or position of the Council. Except in cases of emergency, duly motivated, it cannot reach any agreement on a draft legislative act during those eight weeks. Except in cases of duly justified urgency, are observed

for ten days between the placing of a draft legislative act on the provisional agenda of the Council and the adoption of a position.

Likewise, according to art. 5 of the Protocol, the agenda and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft legislative acts, shall be forwarded directly to the national Parliaments, at the same time as to the Governments of the Member States. Even if the European Council intends to make use of Article 48 par. (7) the first or second paragraph of the Treaty on European Union, the national Parliaments shall be informed on the initiative of the European Council at least six months before taking a decision (art. 6).

Unlike the Constitutional Treaty, the Lisbon Treaty maintains as law regulations as well, the directives. Maintaining the current outlook comes amid a complex process of simplification of Community legislation. If in terms of directives, which, ultimately, can only be applied after incorporation, by the will of the national legislature, in law, no amounts outstanding issues in perspective arises - still - the issue of community regulations. Declared or not, loudly or in whisper, the question remains: how far (to what extent?) the Community regulations will take us? In any case, it is said, we will not regulate the labor of the secretaries of local offices from villages. The answer was not likely to appease the spirits. From the perspective of the Treaty we can assist, in time, at the increasing Europeanization of national law. There were made some serious steps in this matter, in an area that, a few years ago, appeared that could not be affected (influenced) by Community law, such as criminal law (admitting minimum requirements for its harmonization at least in matters terrorism, organized crime and human trafficking), or creating a legal Community area (especially for tracking down the fraud on the Community funds) or in civil law area (draft European civil Code). In other words, we wonder how far we can go with the harmonization of laws? We cannot harmonize the whole community right of states because each state has its own personality and specific, and

there was the view that the Community legislated too much<sup>17</sup>. Since Romania is among the countries that had ratified the Treaty establishing a Constitution for Europe, by Law no. 157/2005 of accession to the European Union, our country was interested in taking over a larger extent, of innovations brought by the Constitutional Treaty. Romania, along with other 15 States Member by one of the 64 statements accompanying the Lisbon Treaty, declare that the flag with a circle of twelve golden stars on a blue background, the anthem "Ode to Joy" from the Ninth Symphony of Ludwig van Beethoven, the motto 'United in diversity', the euro as the currency of the European Union and Europe day on May 9, continues to be symbols of common belonging to EU citizens and their allegiance to it<sup>18</sup>.

## CONCLUSION

The process of building Europe is, obviously, a constantly evolving process. Recent decades have marked the review, relatively frequent, the original treaties by the Single Act (1987), Amsterdam (1999), Maastricht (1993), Nice (2003) and, more recently, Lisbon (2009). The last review, in particular, was the result of a long and laborious process, marked by rejected referendums (Constitutional Treaty in France and the Netherlands, the Reform Treaty in Ireland), tough negotiations, crisis. Certainly, the current Lisbon Treaty, like those that preceded it, is only a compromise between different EU States. Undoubtedly, however, in a Union with 27 members (and even more if the enlargement process will continue) such a compromise will be increasingly difficult to achieve. As observed by Gian Luigi Tosato "Union did not reach the final destination, but its methods regarding the revision of the founding treaties probably yes." Taking into account both during the "accidental road" of the current Treaty, but also by the current

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<sup>17</sup> Sir David Edward, intervention within the Congress of the European Law Academy, „L’avenir de l’Europe – une perspective juridique”, (the Congress of the European Law Academy, Trier, 27-29 September 2007).

<sup>18</sup> Andrei Popescu, „The Lisbon Treaty – a modifying and reformatory treaty of EU”, *Legislative Newsletter*, 1 (2008): 11, accesed on 13<sup>th</sup> of march 2016, [http://www.clr.ro/eBuletin/1\\_2008/Buletin\\_1\\_2008.pdf](http://www.clr.ro/eBuletin/1_2008/Buletin_1_2008.pdf).

political and economic climate of extreme tension, the possibility of renegotiating the treaty in the next period appears implausible. On the other hand, since many question marks are persisting about how will the Union operate in the future, especially in the two positions newly created, President of the European Council and High Representative for the Common Foreign and Security Policy, amendments on the current Treaty, regarding the functioning of both institutions, or further specifications by various other specific normative documents, appear inevitable. With a high probability<sup>19</sup>, by the end of this year, amid experience that will be accumulated from running two rotating presidents, Spanish and Belgian, will be initiated interventions towards achieving "fine-tuning" in highly complex European institutional facility.

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<sup>19</sup> Gabriela Drăgan, „The Lisbon Treaty – a new step in creating a United Europe?”, *Political Sphere vol. XVIII*, 5 (2010): 16, accessed on 13<sup>th</sup> of march 2016, [http://www.sferapoliticii.ro/sfera/pdf/Sfera\\_147.pdf](http://www.sferapoliticii.ro/sfera/pdf/Sfera_147.pdf).

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# THE IMPACT OF THE EUROPEAN UNION ON NATIONAL INSTITUTIONS AND POLICIES

Mihai -Adrian DAMIAN <sup>1</sup>

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**Abstract:**

*One of the most interesting things about the EU is its huge significance in terms of actuality. For instance, the influence of the EU is being felt in an increasing number of areas with increasing effect, not only in politics and commerce, but also in everyday life within member states. Indeed, things have progressed so far that it is simply no longer possible to understand the political system of a member state without having knowledge of the EU. Important decisions are no longer being made in isolation in the parliaments of the member states, but in Brussels.*

*The purpose of this paper is to perform a complex and detailed research of the topic - EU impact on National Policies and Institutions. The EU has taken up a position between research into political systems and international politics. It is becoming increasingly clear that the gap between the two is beginning to disappear.*

**Key-words:** *European Union, National Policies, Institutions, European Coal and Steel Community, the Parliament*

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## INTRODUCTION

At the base of the whole European construction was the European States Member's willingness to work together to achieve common interests. The origins of the European Union are closely linked to the Second World War. Typically, 1950 is considered the "start" of this construction, namely when the French foreign minister, Robert Schuman, proposed the involvement of several European countries into a deeper cooperation project. Negotiations between the six founding countries are formalized in the Treaty establishing the European Coal and Steel Community (ECSC Treaty) signed in Paris in 1951 (entered into function in 1952). The Treaty's objective was economic expansion, increasing employment of labor and living standards through a common market in

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coal and steel. Taking the example of the success of the establishing Treaty of the ECSC, the founding states decide to extend cooperation in other economic sectors, so that in 1957, in Rome, occurs the Treaty regarding the establishment of the European Economic Community (TEEC) and the Treaty establishing the European Atomic Energy (EURATOM) (effective in 1958). The Main references regarding the European policies are found within the Treaty constituting the European Economic Community, stipulating among other things, the creation of a common market and the progressive approach to the economic policies of the States Member<sup>2</sup>.

Creating a common market is not just about removing the barriers to the free movement of goods and completing the customs union but also the liberalization of other sectors and the establishment of the common policies in strategic areas such as agriculture, trade, transport, competition (art. 3 TEEC, IER, 2003, p. 4). A few years later (1962), the European Union had defined and introduced a common agricultural policy, which had defined the model of the first method of European policy-making, the traditional community method. In 1965 it signed the Brussels Treaty (effective in 1967), which sought a merger of the whole rules of the three treaties into one, which resulted in achieving the establishing Treaty of a Constitution for Europe (not yet ratified) . Regulations on Europe's policies are made through the Schengen Agreement (1985), supported by the adoption of the implementary Convention of the Schengen Agreement (1990), that bring clarification on visa policy (art. 7 of the Convention) and respectively , on the Executive Committee and national policies on asylum (art. 132 of the Convention).

The Single European Act (SEA), signed in 1986 and effective in 1987, marks a new stage in the European construction and hence in European policies. Article 20 provides for the introduction of a new

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<sup>2</sup>Ani Matei and Tatiana-Camelia Dogaru, „Reform of the process of public national policies under the incentive of europeanization. Changes made in the institutional and legislative sphere of public policies in Romania”, *Theoretical and applying Economy*, Vol. XVIII (2011), No. 1(554): 76.

chapter in the EEC Treaty regarding cooperation in the sphere of economic and monetary policy (Economic and Monetary Union). Another novelty brought by the Single European Act is the introduction of the EEC Treaty the following policy areas: economic and social cohesion (art. 23, SEA), research and technological development (Art. 24, AUE), the environment (art. 25, SEA). Title III of the same document defines the objective of European cooperation in foreign policy, namely, "the formulation and implementation of a European foreign policy of the High Contracting Parties, members of the European Communities." Continuing analysis of the evolving European construction, we emphasize that a defining stage in its construction is the fall of communist regimes in Central and Eastern Europe, which had led to a process of rethinking the structure of the European Community towards the establishment of a political union and the economic and monetary union. The result is exploited by the Treaty of Maastricht in 1992 (effective in 1993), amending the Treaty of Rome of the EEC and creating the European Community (TEC). The Treaty is known in the literature as the Treaty on European Union (TEU). Founding Treaties EURATOM and ECSC have been modified only to the extent necessary to put their institutional provisions in harmony with the changes to the EC Treaty.

The next key moment of the reform process is the signing of the Treaty of Amsterdam, in 1997 (effective in 1999), through which occurs the strengthening of the TEC and TEU. The Amsterdam Treaty has intensified European integration, particularly by formally establishing the principles of liberty, democracy and respect for human rights and creating a foundation for a common policy on freedom, security and justice. It also paved the way for institutional reform at European level, by strengthening the role of the European Parliament. The institutional reform initiated by the Treaty of Amsterdam to incorporate countries belonging to the Eastern Europe was embodied in the Treaty of Nice. A necessary step in the evolution of European construction is the Treaty of Nice, 2001 (effective in 2003). Its development was spurred by the prospect of accession of new States Member and strengthening the European structure to meet the criterion of efficiency. As a continuation

of this reform was drafted the treaty establishing a Constitution for Europe, signed in 2004 in Rome by 25 heads of state and governments. The project aimed to replace all the treaties signed, with the exception of the EURATOM Treaty<sup>3</sup>.

The most recent reform document is represented by the Treaty of Lisbon, 2007 (effective in 2009). In its draft phase, the treaty was contained as the Reform Treaty, intended to replace the treaty establishing a Constitution for Europe, which was abandoned due to rejection by the Netherlands and France. Among the objectives, it includes promoting the EU as an international actor, rejoin foreign policy instruments at its disposal both in developing and adopting new policies.

The Changes on the Romanian political scene, but also the international and European level had an impact on the process of national public policies. Both for Romania and for the 26 European nations at least two systems of public policies cohabitate - the national and European system. The erosion of national sovereignty implies the erosion of exclusive competence of States Member of deciding on national policy. In developing process of the European policy, it matters that EU institutions and States Member, whose role and influence varies depending on the type of competence. For example, in taxation, fees, nation states have the most power, unlike the competition, where the EU has stronger competences than States Member. The European Union strengthened its competences also on environmental policy to that notes an evolution of EU competence. However, one thing is certain: both before 1990 and after, the public administration have the choice of taking or not taking a particular action to solve a public problem. The main difference lies in the different perspective on decision making. In the post-December period, the public policy process formalizes in a unilateral process (top-down), rigid and hyper. During the transition period, the vertical power was dissociated, and under pressure from various interest groups and civil society<sup>4</sup>, the mechanisms of making

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<sup>3</sup> Matei and Dogaru, „*Reform of the process*”,77.

<sup>4</sup> Vlăsceanu, M., „The Social Policy and the Nonprofit Sector”, in Zamfir E., Zamfir C. (coord.), „*Social Policies: Romania in European Context*”, (Bucharest: Alternative), 67-74.

public policy is carried out increasingly more horizontal. The results of radiographing the evolution of public policies in Romania, shapes two distinct reform phases: during 1991-2000 and 2000-2010.

With the denunciation of the totalitarian regime in 1989 starts the opening of the political system towards liberalization and public participation. As a result of the economic liberalization, the political pluralism and the diversification of methods of public choice, also appears the growing demand for public policy<sup>5</sup>.

Confirmation of the new beginning takes place in 1991, with the adoption of the Constitution by which Romania becomes a "state of right" (Romanian Constitution 1991, art. 1, par. 3). In the context of the objective of this analysis, it is considered relevant the exposure of several key moments of historical evolution of the Romanian state, circumscribed the period under consideration. In this regard, we consider 1993, at which Romania signed the Association Agreement with the EEC and EAEC, obtaining the status of an associated state. The 1993 highlights derives from EU enlargement and defining access conditions to membership in Copenhagen. In 1995, Romania submitted an application for candidacy, and two years later, in 1997, upon receipt of a favorable opinion of the European Commission, moved from associated state status to the candidate status. As a consequence of accepting the request for membership, the European Council announced that from the end of 1998 the Commission will conduct periodic monitoring reports of Romania's progress in relation to the Copenhagen criteria. Returning to the sphere of public policy theorists have appreciated the period 1990-1995 as a period of "unstructured search". Through a metaphorical formula we could say that only now are "discovered" public policies meanings offered by the pioneers of science policy<sup>6</sup> (translation 2000).

During this period some institutions have been rebuilt, while others were borrowed and adapted from the Western democracies and national culture.

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<sup>5</sup> Matei and Dogaru, „*Reform of the process*”, 97-98.

<sup>6</sup> Lasswell, H.D. „The Policy Orientation”, in Lerner, D., Lasswell, H.D. (eds.) „*The Policy Sciences*” (Stanford University Press, 1951), 3-15.

The intervention of the unions and the employers intensifies in the public policy process and public policy communities are founded, by specialists. Unlike modern societies, original communities were closed networks which included, in principle, specialists - civil servants specialized in various fields and transverse representatives of economic environment - from state owned enterprises, private enterprises and, in some instances, representatives of the main trade union groups<sup>7</sup>.

Dye, describing a more general context of public policy said: "Public policy formulation takes place within bureaucratic governments, offices of interest groups, in legislative committee rooms, in meetings of specialized committees<sup>8</sup>". In line with our approach, we think that the assertion of Dye (2008) is a suggestive description for the national context on the period under review. Specific to the mentioned period is restorative-distributive nature of public policies, along with more legalistic nature thereof - in other words, are omitted and avoided practices and analytical instruments other than those provided for specific regulatory instruments. Officially, the European Council decides to open accession negotiations with Romania in 2000, after the analytical examination of the communitary *acquis* and drafting position papers for each chapter.

Accession negotiations started in 2000 find their completion in 2004. In 2005, it's positioning Romania among countries that have closed all negotiation chapters, aspect that facilitates the signing of the accession treaty with the European Union. Two years later (2007), the new quality of Romania (EU state member) is institutionalized. Especially in this period, Romania is trying to comply with EU practices and models. Reforming the public policy cycle covered the transition from normative-legal approach to analytical and managerial. Regarding the perspective on the size of the structural dimension, it's remarkable the

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<sup>7</sup> Crăciun, C. (2008). „*The transformation of the Romanian Government. Challenges for the managerial policies*” in Crăciun, C., Collins, P.E. (eds.), „*The public policies management: Transformations and perspectives*” (Iași: Polirom, 2008), 43.

<sup>8</sup> Dye, Th. *Understanding Public Policy* (translation 2008) (London: Prentice Hall, 1995), 40-41.

creation of new organizational structures, otherwise considered as main actors active in this area.

The main authorities involved in public policy formulation process are<sup>9</sup>:

➤ The main authorities involved in public policy formulation process are:

➤ General Secretariat of Government → Department of Public Policy;

➤ Ministries → public policy units in ministries;

➤ Permanent inter-ministerial councils;

➤ Non-governmental organizations, institutes and research centers.

Since November 2003, within the General Secretariat of Government, the Public Policy Directorate was created initially as the Public Policy Unit of the Prime Minister Decision no. 258, with the mission to "improve the system of development, coordination and policy planning at the central level". In order to achieve its mission, the Directorate of Public Policy has outlined the following objectives:

➤ effectiveness of public policies;

➤ increasing the transparency of decision-making;

➤ superior grounding policies (eg impact assessment of budgetary, economic, social, etc.);

➤ improving consultation between central government institutions;

➤ creating the connection between policy planning and budgeting;

➤ developing methodologies for monitoring and evaluation of public policies.

Ministries have, among other things, the task of drafting proposals for public policies, to implement public policies and monitor implementation and results. Therefore, the ministries must appeal to the feedback function to achieve continuous improvement implementation and development of new policy proposals. These tasks are fulfilled by the policy units within each ministry. According to GD no. 775/2005, public policy units are set up within the Ministry by order of the head of the institution, and in their composition can be found the public managers, integration counselors, contractual personnel and civil servants.

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<sup>9</sup> Matei and Dogaru, „*Reform of the process*”, 97-98.

## CONCLUSION

The analysis showed that the reforms in the sphere of public policy has been driven primarily by the desire of joining the EU and the requirements of membership. The implications of the European Union in the development of national public policies were not of a "hard" nature, opting to use practices of guidance and coordination, avoiding coercive practices. Recall that although it is estimated that at European level there is an attractive place for unification policy, models of their development varies from one state to another because of different realities of the States Member, culture, traditions, resources, level of economic development, mechanisms and instruments promoted by national public policies.

Currently Romania, on the one hand, deepens, like other States Member, the achievement of Community policies, and, on the other hand, shall coordinate/corroborate policies related to jurisdiction, in accordance with the Open Method of Coordination. Some of the changes involved in the public policy process is due transposition into national domestic order of directives, regulations or decisions of the Union, otherwise the European Court of Justice.

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# STIPULATION FOR ANOTHER – AN APPARENT OR REAL EXCEPTION TO THE PRINCIPLE OF RELATIVITY OF CONTRACT EFFECTS IN THE CIVIL CODE OF 2009?

Nora-Andreea DAGHIE<sup>1</sup>

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## **Abstract**

*Although not regulated in the Civil Code of 1864, the stipulation for another has always been accepted by our doctrine as the only real exception to the principle of relativity of contract effects, being considered that the third party beneficiary of the stipulation acquires rights without having participated in the contract conclusion. According to the provisions of art. 1286 para. (1) of the Civil Code 2009, the right stipulated in favour of the third party is however subject to the latter's approval. Is the third party beneficiary's consent a condition of validity of the stipulation for another or does it just reinforce a pre-existing right, giving it full efficiency?*

**Key-words:** *the principle of relativity of contract effects, exception, stipulation for another, acceptance of the stipulation, legal value*

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## **INTRODUCTORY ISSUES. THE PRINCIPLE OF RELATIVITY OF CONTRACT EFFECTS AND THE EFFECTS OF THE CONTRACT IN RESPECT OF THIRD PARTIES**

Article 1280 of the Civil code continues the content of art. 973 of the Civil code of 1864 in an affirmative-positive formulation, (“Conventions only have effects between the contracting parties”), imperatively determining that a contract produces effects only between parties, unless otherwise provided by law<sup>2</sup>. In other words, the contract gives right to subjective rights and obligations only for the parties thereto. Furthermore, the contents of the principle of relativity is highly

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<sup>2</sup> Cristina Elisabeta Zamșa, *Effects of civil obligations* (Bucharest: Hamangiu, 2013), 27.

accurately expressed by the Latin adage *res inter alios acta, aliis neque nocere, neque prodesse potest*.

The principle of relativity of contract effects finds its justification in two essential ideas<sup>3</sup>:

- on the one hand, the volitional nature itself of the civil juristic act requires such a principle, in the sense that, if it is nature for a person to become debtor or creditor since he/she expressed his/her will to this end, it is also natural that another person should not become debtor or creditor without his/her will;

- on the other hand, the opposite solution could harm the freedom of the person.

Although the contract effects are produced only between the parties, this does not mean that a contract has no significance for third parties, that they could ignore or overrule it. On the contrary, the contract, as a social reality (as a legal situation), shall be binding also on any persons not knowing it, in regard to the rights and obligations incumbent on the contracting parties<sup>4</sup>.

Consequently, it should be distinguished between the principle of relativity of contract effects and the effects of the contract in respect of third parties; a contract cannot generate, in principle, any subjective rights and obligations for one third party, but instead, the rights and obligations of the contracting parties shall be observed by the third parties, as well. This may result, for instance, in the possibility to invoke the contract, against third parties, as a title under which a right in rem or a right of claim.

The reliance of the contract effects shall be provided under art. 1281 of the Civil Code, according to which, “the contract shall be binding on third parties, which cannot infringe the rights and obligations arising from the contract. Third parties may not rely on the contract effects, however, without being entitled to request its performance, except as otherwise provided by law”.

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<sup>3</sup> Gabriel Boroi and Carla Alexandra Angheliescu, *Civil law manual. The general part*, (Bucharest: Hamangiu, 2012), 221.

<sup>4</sup> Boroi and Angheliescu, *Civil law manual. The general part*, 222.

Specifically, the effects of the contract in respect of third parties shall refer to the right of the party to invoke the respective contract against the third party which could make demands in relation to a subjective right acquired by the party under the respective contract, and the unenforceability of the contract against third parties shall mean the absence of such a right<sup>5</sup>.

In order to operate, the effects involve that the third parties know the contract, and this action may be performed both as a result of registering the contract through advertising systems, and automatically, by operation of law, when law does not require any advertising formalities<sup>6</sup>. Hence, in compliance with the provisions of art. 902 para. 1 of the Civil code, “the rights, acts or other legal relations provided in art. 876 para. (2) shall become binding on third parties exclusively by record, unless it is proved that they have been known by other means, except as otherwise provided in by law that their simple knowing is not sufficient to substitute the lack of publicity”.

References to effects are also made in the matter of assignment of claims (“The assignment shall be binding on the guarantor if only the formalities provided for the effects of the assignment in respect of the debtor were fulfilled also in respect of the guarantor itself” – art. 1581 of the Civil Code) or in the matter of special contracts (“in special cases provided by law, the sale can be bound on third parties only after the fulfilment of the respective publicity formalities” – art. 1675 C. civ.).

It should be noted that, when the question arises as to the contract effects in respect of third parties, from the point of view of these third parties, the contract seems to be only a legal situation, therefore, as a legal act *stricto sensu*. At least two important consequences shall result from the circumstance that in respect of third parties, the contract shall be deemed as a simple legal act<sup>7</sup>:

- in case a third party infringes a right belonging to one party to a contract or if prevents one of the contracting parties from performing

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<sup>5</sup> Boroi and Angheliescu, *Civil law manual. The general part*, 222.

<sup>6</sup> Sache Neculaescu, *Sources of obligations in the Civil Code art. 1164-1395*, (Bucharest: C.H. Beck, 2013), 437-438.

<sup>7</sup> Boroi and Angheliescu, *Civil law manual. The general part*, 223.

the obligation incumbent on it under the respective contract, then the third party's tort shall incur, not the contractual liability, as this last liability shall rest only with the contracting parties;

- when the third party is interested in standing on a contract to which it was not a party, the respective third party may use any means of evidence to prove it, as the restrictive rules provided under art. 309 of the Code of civil procedure were not applicable to it.

### **STIPULATION FOR ANOTHER – EXCEPTION TO THE PRINCIPLE OF RELATIVITY OF CONTRACT EFFECTS**

Those cases in which the contract effects are produced against other persons who have not participated in the conclusion of the contract shall represent exceptions to the principle of relativity of contract effects; namely, the bilateral legal act gives rise to rights in favour of other persons than the parties or gives rise to certain obligations falling on other persons than the parties.

The review of the exceptions to the examined principle involves to distinguish between the active and passive side of the mandatory legal relation, with the addition that, so far, the doctrine has unanimously considered that, in principle, only the active side can deal with exceptions to relativity, which means that a person may acquire – as a rule – only rights arising from a contract in the conclusion of which he/she has not participated - and to which he/she has not acceded -, and not obligations<sup>8</sup>.

Under the previous regulation – the Civil Code of 1864, the exceptions to the principle of relativity were divided into apparent and actual exceptions in the relevant literature, however, there was no unitary view in respect of the inclusion of certain situations in the category of actual or apparent exceptions. The majority opinion was in the sense that the only actual exception to the principle of relativity of contract effects would be the stipulation for another.

The stipulation for another (also referred to as the contract in favour of a third party), namely the contract whereby one party (the promisor) undertakes an obligation towards the other party (the

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<sup>8</sup> Zamşa, *Effects of civil obligations*, 28.

stipulator) to provide services in favour of a third party (third party beneficiary), without the need for the latter to take part in the conclusion of the respective agreement either directly, or represented by the stipulator, was unanimously considered, since he was not expressly regulated by law, as a real (actual) exception to the principle of relativity of contract effects, as it was admitted that the civil subjective right of the third party arose directly and in virtue of the agreement entered into between the stipulator and the promisor, and only the exercise of this right depended on the will of the third party beneficiary<sup>9</sup>. The acceptance of the stipulation by the third party beneficiary was intended only for acknowledging and reinforcing the right arising in its favour, with the consequence that a possible refusal caused the ineffectiveness of the stipulation, which was to be performed in favour of the stipulator.

The new Civil Code does not only generally regulate the stipulation for another (art. 1284-1288), however, after it provides that, “by the stipulation effect, the beneficiary acquires the right to directly request the provision of services to the promisor” [art. 1284 para. 2 of the Civil Code], it shall require that, “in case the third party beneficiary does not agree to the stipulation, its right is considered as never to have existed” [art. 1286 para. 1 of the Civil Code], which means that the establishment of the direct and final subjective civil right in the patrimony of the third party beneficiary shall depend on the acceptance of this right by the third party beneficiary, and the non-acceptance of the stipulation shall be of the nature of a resolutive condition<sup>10</sup>. For instance, the specific purpose donation agreement. In this case, the promisor (grantee) undertakes towards the stipulator (donor) to offer, to make or not make something in favour of the third party beneficiary. Hence, X (the grantee-promisor) receives from (the donor-stipulator) a vehicle and undertakes towards the latter to pay to T (the third party beneficiary) the amount of EUR 2,000.

In terms of validity of this contract, the general validity conditions required under art. 1179 para. 1 of the Civil Code shall be fulfilled (capacity, consent, object and grounds and if appropriate, the formal issues) and the following specific conditions:

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<sup>9</sup> Boroi and Angheliescu, *Civil law manual. The general part*, 229.

<sup>10</sup> Boroi and Angheliescu, *Civil law manual. The general part*, 229.

- the will to stipulate should be certain, unquestionable, it should unequivocally result that the third party beneficiary acquires the stand-alone subjective right to claim to the promisor to provide services in its favour;

- the third party beneficiary should be established or at least definable upon conclusion of the stipulation and it should exist when the promisor has to perform its obligation. Consequently, the third party beneficiary may be a future person, as well (art. 1285 of the Civil Code). For instance, in a transport contract, the consigner may indicate to the carrier to deliver the goods to a consignee which shall be individualized subsequent to starting the transportation, however, until the performance of the obligation to deliver the goods to their place of destination. Moreover, this is the case of the insurance contract against tort liability, when the third party beneficiary is established only at the time of occurrence of the insured risk; in respect of the validity of the stipulation for another within an insurance contract, it is necessary that the third party beneficiary of the insurance payouts should be established upon occurrence of the insured risk, at the time of arising of the insurance payment obligation.

- the consent of the third party beneficiary [art. 1286 para. 1 of the Civil Code].

Most of doctrinaires nowadays consider that the acceptance of the offered right by the beneficiary, as a stipulation effect, shall not represent a validity condition, but only a condition of the stipulation efficiency. From this perspective, the stipulation is provided independently of any expression of will of the beneficiary, however, it can produce effects if only the person appointed by the stipulator and by the promisor agrees to the right provided to him/her<sup>11</sup>. The third party beneficiary's acceptance just reinforces a pre-existing right, giving it full efficiency. The effect of the third party beneficiary's is retroactive, as its right is considered to

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<sup>11</sup> Paul Vasilescu, *Civil Law. Obligations*, (Bucharest: Hamangiu Publishing House, 2012), 477; Ion Dogaru and Pompil Drăghici, *Civil law. General theory of obligations*, (Bucharest: C.H. Beck, 2014), 192; Iosif Robi Urs and Petruța-Elena Ispas, *Civil law. Theory of obligations* (Bucharest: Hamangiu, 2015), 138.

have existed from the time of the valid conclusion of the stipulation<sup>12</sup>. If the third party beneficiary does not accept the stipulation, its right shall be considered not to have existed.

In our view, the lawmaker's expression of 2009 ["If the third party beneficiary does not accept the stipulation, its right shall be considered to have never existed" - art. 1286 para. 1 of the Civil Code] shall raise the beneficiary's acceptance to the rank of validity condition. The right provided in favour of the third party is subject to the latter's approval, which is the expression of its freedom of will, a principle excluding the idea that a right could be inserted in one person's patrimony without his/her will. Precisely to produce the character-related effects of the stipulation, the right provided to the beneficiary should be accepted by it. Only after the third party beneficiary accepted the right due to it according to the stipulation, it shall dispose of all legal means which any contractor has at its disposal for the purposes of benefiting from its right.

Our understanding is that the role of the third party beneficiary, according to the new regulation, changes the view on the legal nature of the stipulation for another. The New Civil Code acknowledges an active role for the beneficiary's consent in relation to the civil subjective right arising in its patrimony. Consequently, in the event that the beneficiary dies before the acceptance, the right has never existed in his/her patrimony and, amongst its consequences, we can notice two of them: non-transfer of the right to the successors and the impossibility of pursuing by the unsecured creditors<sup>13</sup>.

The contract in favour of a third party shall result in establishing legal relations: between the stipulator and promisor; between promisor and the third party beneficiary; between the stipulator and the third party beneficiary. Amongst them, *the relations between the promisor and the third party beneficiary* are relevant for the issue approached herein.

The third party beneficiary has the possibility to accept or not the stipulation made in his favour. In case the beneficiary accepts the

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<sup>12</sup> Neculaescu, *Sources of obligations in the Civil Code art. 1164-1395*, 459.

<sup>13</sup> Cristina- Elisabeta Zamșa, „Stipulation for another” in *New Civil Code. Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2014), 1428-1429.

stipulation, a mandatory legal relation arises between him and the promisor, in the sense that the third party beneficiary acts as creditor, and the promisor act as debtor. Hence, although the third party beneficiary is not a party to the contract, if he accepts the stipulation, he shall acquire the right to directly request the promisor to provide services. As this right is not part of the stipulator's patrimony<sup>14</sup>, the third party shall not abide the creditors' and his heirs' competition.

The third party may seek compensation for damage caused as a result of the non-performance, but it cannot request the rescission (termination) of the contract since it is not a party to the respective contract. In the event of the death of the third party beneficiary, his rights and accessory shares shall be transferred to his successors.

Instead, the promisor can invoke against the third party beneficiary all the exceptions which it could oppose to the stipulator according to the contract, for the purposes of explaining his refusal of performance (art. 1288 of the Civil Code).

## **CONCLUSIONS**

The careful examination of the regulation of the stipulation for another in the Civil Code of 2009 allows us to find that it can be no longer considered as a real exception to the principle of relativity of contract effects. According to art. 1286 para. 1 of the Civil Code, the non-acceptance of the stipulation by the third party beneficiary shall result in the non-existence of the right in his patrimony. At present, the mechanism of the stipulation for another is depending on the third party beneficiary's reaction, on his consent. The lawmaker shall amend thence the traditional concept of the doctrine, specific to the Civil Code of 1864, according to which the third party's right directly originates from the contract entered into between the stipulator and the promisor, without the need for his consent. In the present configuration, the stipulation for

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<sup>14</sup> The fact that the right is not part of the stipulator's patrimony, may also be deduced from the provisions of art. 1287 para. 1 of the Civil Code, according to which "the stipulator is the only entitled to revoke stipulation, as his creditors or heirs are not able to do this".

another can be no longer qualified as “a legal image *sui generis*”<sup>15</sup>, original just because the contract entered into between the stipulator and the promisor shall give rise to a right in favour of a third party, which is not a party to that contract. The basis of the beneficiary’s right to directly request to the promisor to provide services shall lie in the mandatory legal relation established between those two legal entities upon conclusion of the stipulation and of its acceptance by the beneficiary.

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<sup>15</sup> Ionuț-Florin Popa, „Stipulation for another”, in *Elementary Treaty of Civil Law. Obligations*, ed. Ionuț-Florin Popa et. al. (Bucharest: Universul Juridic, 2012), 216.

# RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT IN CIVIL AND COMMERCIAL MATTERS

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**Abstract:**

*A particularly important aspect in legal relations with foreign element is the recognition and enforcement of foreign judgments in Romania. The term foreign judgment refers to the contentious or non-contentious acts jurisdiction of the courts, the notary or any competent authority. The two procedures of recognition and enforcement of foreign judgment are related to the effects of judgment, namely: the judgment is authentic act, has the force of res judicata and enforceable. Recognition of foreign judgments is to consider the positive and negative conditions provided by law, but the court will not proceed to examine the substance of a foreign judgment and either to modify it. For approval of forced execution, the court should consider the same conditions positive or negative prescribed by law and for recognition of foreign judgments. Additionally, declared enforcement, required the proof of the enforceability of the foreign judgment issued by the court which pronounced it.*

**Key-words:** *Recognition and enforcement of foreign judgments in civil and commercial matters*

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## INTRODUCTION

A particularly important aspect in the case of legal relations with foreign element is the recognition and enforcement of foreign judgments in Romania.

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For determining the application field of the provisions contained in the Civil Procedure Code in Book VII, Title III, must be defined the term of foreign judgment.

The concept of foreign judgment relates to jurisdiction contentious acts or non-contentious jurisdiction acts of the courts, of the notarial or of any competent authorities<sup>3</sup>.

In the hypothesis where the judgment is pronounced in a Member State of the European Union applies these procedures for recognition and enforcement of judgments regulations of the European Council regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Member State citizens should benefit from the effects of the judgments pronounced in Member States in the case these legal relations because otherwise, order the person to appeal again to the court of the Member State will make enforcement, would attract the infringement of the free movement the persons who will be related to a specific instance, though they already obtained a judgment in another court.<sup>4</sup> Under this aspect, it is necessary removing the formalities and additional costs, because every European Union citizen to benefit from the judgment pronounced in another state<sup>5</sup>.

Currently, recognition and enforcement of a foreign judgment pronounced in a Member State is governed by European Council Regulation (EU) no. 1215/2012, whose provisions applies only to legal proceedings instituted against authentic acts drawn up or registered officially and to judicial transactions approved or concluded on 10 January 2015 or thereafter.

To the judgments pronounced in judicial actions instituted, to authentic acts drawn up or registered officially and to judicial

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<sup>3</sup> Gabriel Boroi et al., *Noul Cod de procedură civilă. Comentariu pe articole. vol.II* (Bucharest: Hamangiu, 2013), 731.

<sup>4</sup> Andreea Tabacu and Eugen Chelaru, „Procesul civil internațional, competența, recunoașterea și executarea hotărârilor străine potrivit Regulamentului comunitar nr. 44/2000”, *Revista Română de Drept Privat, nr. 5* (2009).

<sup>5</sup> Andreea Tabacu and Eugen Chelaru, „Procesul civil internațional...”

transactions approved or concluded before January 10, 2015, the Regulation (EC) No. 44/2001 applies.

Mentioned regulations do not apply in particular in tax, customs or administrative matters either of State liability for acts or omissions in the exercise of public authority (*acta jure imperii*).

According to art. 2 of Regulation (EC) No. 1215/2012, "Judgment" means a judgment pronounced by a court of a Member State, regardless of its designation, including a decree, an order, an ordinance or a warrant of execution, as well as a decision on the establishment by a registrar of the court costs.

Regarding the recognition and enforcement of foreign judgments pronounced in a Member State, "judgment" includes interim and conservation measures ordered by a court which is competent to judge the case in substance.

The concept does not include interim measures, including conservation, ordered by such a court without summoning the defendant, unless the judgment which comprises the measure is notified or communicated to the defendant prior to enforcement.

The two procedures of recognition and enforcement of foreign judgment are related to the effects of judgment, namely the judgment is authentic act, has the authority of *res judicata* and enforceable.

The new Code of Civil Procedure relates expressly to the authority of *res judicata* effects regulated in order to avoid a new process on the same issue, this being the purpose judgments recognition procedure in other states.<sup>6</sup>

In order for a foreign judgment to produce effects in Romania, it will be subject to judicial control procedures.

There are also foreign judgment is are not subject to any control procedures, being recognized by operation of law. Most often, it is the foreign judgment rendered in matters of personal status of private individuals.

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<sup>6</sup>Andreea Tabacu, *Drept procesual civil* (Bucharest: Universul Juridic, 2015), 32.

According to Article 1 of Regulation (EU) no. 1215/2012, this does not apply in respect of:

(a) marital status and capacity of private individuals, patrimonial rights arising out of a matrimonial regime or of relations deemed by the law applicable to them as having comparable effects to marriage;

(b) bankruptcy, proceedings relating to liquidation up of insolvent companies or other legal persons, Settlement agreements, concordats or analogous proceedings;

(c) social security;

(d) arbitration;

(e) sustentation obligations arising from a family relationship, blood relation marriage or affinity;

(f) wills and succession, including sustentation obligations arising from a decease.

Regulation Brussels II bis (CE) nr.2201 / 2003 stipulates that does not require any procedure for updating the civil status of a Member State in matters of divorce, legal separation or annulment of marriage that cannot be subject to right of appeal under the law of that Member State.

In the same respect are also the provisions of the article 17 and 23 of Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to sustentation obligations.

The consequence is that these decisions cannot be taken through the procedure of recognition and declaration of enforceability of foreign judgments. De jure recognition usually takes place even in the absence of a legal framework between Romania and the State in which the judgment was issued, without requiring reciprocity.<sup>7</sup>

According to the provisions of art. 1095 Civil Procedure Code, foreign judgments are recognized by operation of law in Romania, where it refers to the personal status of citizens of the State where they were pronounced or if being pronounced in a third State, they were recognized first in the State of nationality of each part or the default of recognition

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<sup>7</sup> Gabriel Boroi et al., *Noul cod de procedură civilă*, 734.

were pronounced under the law determined as applicable according to Romanian private international law are not contrary to public order of Romanian private international law and has been respected the right of defense.

In order for a foreign judgment to be recognized in Romania following conditions shall be met: the decision to be final according to the state where it was pronounced; the court which pronounced had, according to the law of the headquarters state, the competence to judge the process without being based solely on the presence of the defendant or some of his goods, not directly related to the dispute in the headquarters state of the respective jurisdictions; there is reciprocity as regards the effects of foreign judgments between Romania and State of the court which pronounced the judgment.<sup>8</sup>

A first condition for recognition a foreign judgment requires it to be final under the law of the State where it was issued. Finality of the judgment is judged by the law of the State where it was pronounced.<sup>9</sup>

Evidence of finality can result from documents and / or from certain circumstances. Thus, the judgment could be labeled finality. It also could result from a certificate that was not appealed within the legal deadline. But it may emerge also from support for the part was not legal summoned or even provisions of a legal foreign text brought before the court. If regarding the enforceability of the foreign judgment there is an express obligation of proof, is not the same concerning the definitive character.<sup>10</sup>

The undefinable character of the foreign judgment arising out of omission summons person who has not attended the Process in front of foreign court, can be invoked only by that person. Such an attitude, to not

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<sup>8</sup>High Court of Cassation and Justice, Civil Section and intellectual property, civil decision no. 3423 of 11 April 2011 in Andreea Tabacu, *Drept procesual civil*, 32.

<sup>9</sup>Ioan Leș, *Noul cod de procedură civilă. Comentariu pe articole*. (Bucharest: C.H. Beck, 2013), 1376.

<sup>10</sup>Gabriel Boroi et al., *Noul cod de procedură civilă*, 734.

invoke the absence of summons, it is equivalent to an adhesion of that part to the pronounced judgment.<sup>11</sup>

Each Member State at the establishing jurisdiction of their own courts must consider the possibility of national recognition of judgments abroad.

Romanian Courts are required to undertake verifications related to jurisdiction of the foreign court. Concretely, a jurisdiction based solely on the presence of the defendant or his goods not directly related to the litigation in the State of headquarters of that jurisdiction is not enough.

The modes to determine the rules of international jurisdiction are different: either are specified distinct competencies either negatively, are excluded certain competences. Spread is the mirror principle, according to which a judgment is recognized when the cause may be the jurisdiction state of the recognition if was applicable the latter right. The mentioned principle exclude from recognition the judgment pronounced with infringement of their exclusive jurisdiction.

What is to be verified is the international jurisdiction, the territorial or material having no importance nor the fact that the court has jurisdiction obtained following a legal provide or on conventional way.<sup>12</sup>

A specific provision is that if a judgment was pronounced in default of the part who lost the case, it must be noted also that the part concerned was handed timely the summons for the term debate in substance and the act of instituting the proceedings and was given the opportunity to defend themselves and exercise the right of appeal against the judgment. Abovementioned demands must be included in the content of the foreign judgment.<sup>13</sup>

The third condition for recognition of the foreign judgment concerns the reciprocity condition regarding the effects of foreign judgments between Romania and the State which issued the decision.

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<sup>11</sup>Ioan Leș , *Noul cod de procedură civilă*, 1376.

<sup>12</sup>Gabriel Boroi et al., *Noul cod de procedură civilă*, 735.

<sup>13</sup>Ioan Leș, *Noul cod de procedură civilă*, 1377.

At European level, regulations proclaims as a matter of principle the mutual trust in the administration of justice in the Member States.

Because recognition of producing the effects provided by law need that recognition not be refused by the Romanian authorities to intervene only in cases where: a) the judgment is manifestly contrary to public private international law; b) judgment in a matter where the persons have not been obtained open their rights for the sole purpose of evading the law applicable under owing to Romanian private international law; c) the process has been settled between the same parts by a judgment, even not final, the Romanian courts or pending cases in front of them at the date of complaint to the foreign court; d) it is irreconcilable with an earlier judgment pronounced them abroad and liable to be recognized in Romania; e) the Romanian courts had exclusive jurisdiction for proceedings; f) the right to defense was infringed; g) the judgment may be subject to appeal in the state where it was issued.<sup>14</sup>

According to Regulation (EU) No 1215/2012, refusing to recognize a judgment: if such recognition is manifestly contrary to public policy (*ordre public*) of the requested State; in the case that the judgment was tried in absentia, if the document instituting the proceedings or an equivalent document was not notified or communicated to the defendant in good time and in such a way as to enable him to prepare his defense, unless that the defend didn't challenged the judgment when it was possible to do so; if the judgment is irreconcilable with a judgment pronounced between the same parts in the member state requested; if the judgment is irreconcilable with an earlier judgment pronounced in another Member State or in a third country between the same parts in an action having the same object and the same cause, provided that the earlier judgment fulfills the conditions necessary for its recognition in Member State.

Regarding the first ground for refusal, the criterion by which it can determine the intervention of this means refusing to recognize is that of

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<sup>14</sup>Andreea Tabacu, *Drept procesual civil*, 32.

the relation intensity case with Romanian legal order and the severity of the effect so produced.

Infringements to public order of private international law through foreign judgment may concern procedural issues, materials, as well as those conflicts.<sup>15</sup>

Through the second ground for refusal of recognition aims to prevent public order violations of Romanian law by removing the applicable law.

Subjects in which parts cannot freely dispose of their rights are regarding the status and capacity of the person, personal non-property rights.

The third reason for refusal of recognition assumes that the process between the parties was settled by a judgment, even not final or is Romanian courts on trial their trial in front of when foreign court is initiated of proceedings.

As mentioned above, the purpose of recognition of the foreign judgment is acquired by of foreign judgment of *res judicata*. If the Romanian courts have settled the case, opposes recognizing the exception of *res judicata prior*.

In doctrine was pointed out that this situation can be solved taking into account the principle of priority, the opposite - last in time rule and those of preeminence of national judgment.<sup>16</sup>

A variety of prior reason is the situation where both foreign the judgments are irreconcilable, the one whose recognition is further desired. It is necessary that the earlier judgment which wants to be recognized to be susceptible of recognition in Romania, even if there is not a request to that effect.

Infringement of the rights of defense of person against whom the recognition is sought is another reason for refusing the recognition. The right to defense is not respected if the communication summons and

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<sup>15</sup> Gabriel Boroi et al., *Noul cod de procedură civilă*, 735.

<sup>16</sup>Gabriel Boroi et al., *Noul Cod de procedură civilă*, 739.

other procedural acts was done with infringement legal dispositions or without season has been rejected the request for legal assistance.

If the judgment was pronounced in default of the part who lost the process, it must be noted also that the part concerned have been handed in good time both the summons to limit debate in substance and the act of notification of the court and it was given the opportunity to defend themselves and exercise the right of appeal against the judgment. If it is determined that the part did not benefit from such guarantees, the recognition court will reject the request.<sup>17</sup>

The last reason for refusing to recognize the foreign judgment, aimed the judgments which are not definitive, so are excluded from recognition those judgments who enjoy the provisional authority of *res judicata*.

The court granted with the request for recognition will analyze only the recognition conditions, including the reasons for refusal, but the court will not proceed to substantive examination of a foreign judgment nor to its amendment.

The court initiated with a request for recognition of a foreign judgment is not required to exercise a judicial control on its legality and merits. In other words, the foreign judgment in Romania enjoy the intangibility.<sup>18</sup>

In this regard are the provisions of Regulation (EU) no. 1215 of 2012 which provide that in any case the judgment pronounced in a Member State may not be subject to review in substance the requested Member State.

At the same time the court cannot refuse to recognize due to the solution reached by the court which pronounced the judgment.

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<sup>17</sup>Gabriel Boroï et al., *Noul Cod de procedură civilă*, 741.

<sup>18</sup>S. Zilberstein, *Procesul civil internațional*, 111 and High Court of Cassation of Justice, civil and intellectual property section, Decision no. 3423/13.04.2011 în Leș Ioan, *Noul cod de procedură civilă*, 1380.

A verification in substance of the foreign judgment would mean the infringement of foreign court's jurisdiction, which would be tantamount to infringement of foreign state sovereignty.

Recognition of foreign judgments can be made about the main or incidentally.

The request for recognition of a foreign judgment formulated about the main falls within the competence of the tribunal in the jurisdiction where he is domiciled or, where appropriate, registered office the one that refuses to recognize the foreign judgment.

The request for recognition will be made in compliance with the conditions provided by art. 194 of the Civil Code and shall be accompanied by the following documents: a copy of the foreign judgment, the proof definitive nature of it, copy of proof of summons serve and notification act communicated to the part that has been missing from the foreign court, or any other official document attesting that the summons and complaint act were known in due time by the part against whom the judgment was pronounced and any other act likely to prove, for completeness that the foreign judgment fulfills the conditions provided by law to be recognized.

The second way of recognition the foreign judgment implies to initiate the proceedings of a Romanian court, which raises the exception of *res judicata* of a foreign judgment, thus tending to paralyze Romanian court proceedings. Romanian court will pronounce by a judgment, after following all the rules and requirements above.<sup>19</sup>

If the defendant of the judgment whose recognition has been requested agree to uphold the action and this can be proven, the request can be granted without summoning the parties.

As regards the character of Enforcement Order of the foreign judgment, Code of Civil Procedure regulates the procedure of *exequatur*.

Foreign judgments which are not willingly to be executed by one of the parts, they can be brought out about enforcement.

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<sup>19</sup>Andreea Tabacu, *Drept procesual civil*, 33.

Exequatur is legal procedure by which the foreign judgment is declared enforceable by the court of the State where enforcement will be done.

Foreign judgments which have taken precautionary measures and those pronounced with provisional enforcement cannot be enforced in Romania. The reason of promoted clue by the legislator lies in the urgency and provisional character of the measures taken by the foreigner judge.

Jurisdiction settlement of the request belongs to the Tribunal in whose enforcement is to be made.<sup>20</sup>

For approval of enforcement, the court must analyze the same conditions positive or negative provided by law and for recognition of foreign judgments.

Additionally, for approval of enforcement, it is required the proof of the enforceability of the foreign judgment issued by the court which pronounced it.

Unlike the procedure of recognition, the declaration of enforced always occurs summoning the parties.

The declaration of enforceability may be also partial, when the foreign judgment contains solutions on several heads of claim, which are dissociable.

The enforceable title is issued only on the basis of the final judgment declaration of enforceability.

Recognition and enforcement of foreign judgment are conditions of the efficacy of such a judgment in a third State.

## **CONCLUSIONS**

Synthesizing, the two procedures of recognition and enforcement of foreign judgment are related to the effects of judgment, namely the judgment is authentic act, has the authority of *res judicata* and enforceable.

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<sup>20</sup>Andreea Tabacu, *Drept procesual civil*, 33.

In order for a foreign judgment to take effect in Romania, it will be subject to judicial control procedures.

There are also foreign judgment which are not subject to any control procedures, being recognized by operation of law. Most often, it is the foreign judgment rendered in the matter of personal status of private individuals.

The court vested with the request for recognition or exequatur, recognition will analyze only the recognition conditions, including the reasons for refusal, but the court will not proceed to substantive examination a foreign judgment nor to its modification.

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# ROMANIAN LEGAL SYSTEM'S APPROACHING TO THE ANGLO-SAXON LEGAL SYSTEM. VIEW OF THE NEW CIVIL CODE OVER AGENCY CONTRACTS AND FIDUCIARY

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Horatiu MARGOI <sup>2</sup>

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## **Abstract:**

*The new Romanian Civil Code introduced legal institutions that were nonexistent in our legislation or poorly represented, giving in this manner an oxygen resource to the business environment.*

*Agency contracts are created as legal instrument with a highly important role for business activity, given that they are the basis of the professional intermediation. In order to improve the apprehension of the notion and applicability of this type of contract, legislation have changed in time, including from the perspective of the New Civil Code. Another newly introduced legal institution is Fiduciary. The regulation was drawn up on the basis of the model of the French Civil Code. The article covers elements of the Romanian legislation, with special emphasis on comparison with the Common Law trust and other regimes that adopted or worked out legal institutions similar to the trust. The mechanisms by which social and economic relationships will be strengthened depend of the law maker's capacity to create an optimal juridical environment.*

*Increasing the number of the law's instruments and applying them wisely are the new demands of the actual necessities.*

**Key-words:** *the agency contract, the right of representation, fiduciary, trust, settlor.*

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## **INTRODUCTION**

The purpose of the study is to try to analyse contracts of agency and fiduciary newly introduced into Romanian legislation by the New Civil Code.

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In ensuring this, we will try to shape the research the level of approaching these notions legal dimension found in the Anglo-Saxon law.

Without a unanimity of views on the advisability of introducing a new Civil Code, in terms of undeniable viability of the precedent Civil Code that marked a century and a half of existence, it was considered as necessary to adapt our legal system to the realities of the European legal space and the social trends international economic.

Unable to ignore the need to create or adapt, by various processes, legal instruments indispensable claiming they present new demands.

## **GENERAL ASPECTS REGARDING THE CONTRACT OF AGENCY**

The agency contract represents an indispensable part of the existing social order and it is recognized in all modern systems of law<sup>3</sup> having different functions both in public and private law, in commercial matter in particular as allowing the principal to extend his sphere of activity by one person who acts in his own name or in the name of the client in order to serve the interests of the second<sup>4</sup>.

The need for such contract of personal representation is justified, inter alia, as a result of the extension of the company business`'s and especially of the corporations, in other areas than those where carry out their works which conducted even to conclude contracts at a distance, because have grown in size the activity on the capital market or the conclusion of international contracts between parts from different states.

Firstly, the concept of representation occurred due to specific situations determined by social needs and the doctrine of legal representation has a different development in time and space even in a single system of law.

Although in the roman law seems unthinkable an agent to conclude for a third party<sup>5</sup> (“alteri stipulario nemo potest”), in time was recognized

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<sup>3</sup> Paul Mc Carthy, *Materials for the study of the law of Agency and Business organizations* (Hailesclase University, Faculty of Law, I(1991): 1.

<sup>4</sup> Dan-Alexandru Sitaru, *Intermedierea in activitatea comerciala* (Bucuresti: Hamangiu, 2012), 219.

<sup>5</sup> Reinhard Zimmermann, *The law of Obligations. Roman Foundations of the Civilian Tradition*, (Oxford: Oxford Press, 1996), 34.

the principle “who acts for himself through another person, acts for himself”<sup>6</sup>.

Agency contracts are the creation of Anglo-Saxon system of law which contrary to the Continental law, did not regulate distinctly the suit of intermediary contracts<sup>7</sup> but it represents an unitary concept of the intermediation in all forms of representation, both regarding the direct and also indirect representation<sup>8</sup>.

Intermediation contains in Anglo-Saxon system of law all forms of expression for representation: *negotiorum gestio*, contracts for work, indirect tort, contract of employment, excepting the civil mandate which is not recognized in this system. In the Romanian law the contract of agency has some characteristics that are close to other contracts of intermediation as: disclosed agency, commission contract, expedition contract, intermediation contract which also have as object to facilitate the establishment of a legal contractual relationship by a third party between other two subjects of law but are different through the continuity of the legal operations which should be fulfilled by the agent and the specific legal characteristics that outlines the legal regime<sup>9</sup>.

## **THE FEATURES OF THE CONTRACT AGENCY IN THE NATIONAL LEGISLATION OF ANGLO-SAXON ORIGIN**

Firstly regulated by the provisions of Law no. 509/2002 on permanent commercial agents - a legal act of alignment at the provisions of Council Directive 86/653<sup>10</sup> which is also inspired by the agency contracts from Anglo-Saxon law -, currently the legal basis of the agency contract in the domestic law is on articles 2072-2095 of Civil Code.

In Anglo-Saxon law terminology agency means “legal relationship established through a mandate given by a person named principal to

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<sup>6</sup> Basil S. Markesins and R.J.C. Munday, *An Outline of the Law of Agency* (United Kingdom: BritBooks, 1986), 3.

<sup>7</sup> Marilena Ene, „Contractul de agentie comerciala in Uniunea Europeana”, *Revista de drept comunitar* 11 (2001): 33.

<sup>8</sup>Sitaru, *Intermedierea in activitatea comerciala*, 322; Flavius Baias et al, *Noul Cod civil. Comentariu pe articole* (Bucuresti: C.H. Beck, 2012), 1609.

<sup>9</sup> Stanciu Carpenaru, „Contractul de agentie in reglementarea Legii 509/2002”, *Curierul Juridic* 11(2003): 85.

<sup>10</sup>Sitaru, *Intermedierea in activitatea comerciala*, 220.

another person named agent which accept to act in his name”<sup>11</sup>, agreed by the parties: a) through a real mandate named actual authority which has a variety of forms: agency act of the parties, agency by agreement, agency by consent or b) by legal presumption of representation named apparent authority or c) the mandate is implied in the conduct of the principal in the case of agency by estoppels.

The agency contract takes into consideration all situations in which the agent concludes legal acts in *nomine proprio* and on behalf of the principal or in the name and on behalf of the principal, *nomine alieno*, when the agent is mandated only to negotiate according with the mandate received.

When third party deduces the existence of the principal by the agent actions, the principal become a part in the contract with the third and in which situation is realised a disclosed agency; if on the basis of the mandate given to the agent the principal become a part in the contract concluded with the third independently of the principal conviction, this is an undisclosed agency.

In accordance with article 2072 of Civil Code, the contract of agency is a onerous contract concluded between Professionals with the scope that the both parties to obtain pecuniary purpose and supposes the mutual agreement through which a party named principal mandates constantly<sup>12</sup> the other party, the agent, to negotiate and to conclude legal acts in the name and on behalf of principal, with loyalty and care, in change of a remuneration.

Also in the Romanian law, the contract of agency is consensual, the simple mutual agreement of the party being necessary and enough for the validity of the contract, the writing form being asked only *ad probationem* and the object of the contract can be the negotiation of contracts by the agent with thirds in the benefit of the principal or can be the concluding of the contracts by the agent with the thirds in the name and/or on behalf of the principal which approached him by the second case of mandate with representation.

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<sup>11</sup>Mircea N. Costin and Calin M. Costin, *Dictionar de dreptul afacerilor*, (Bucuresti: Hamangiu, 2012), 50; Florin Motiu, *Contracte speciale- in Noul Cod Civil*, (Bucuresti: Wolters Kluwer, 2010), 268.

<sup>12</sup> Flavius Baias et al *Noul Cod civil. Comentariu pe articole*, (Bucuresti: C. H. Beck, 2012), 1609.

In comparison with Romanian law, in Anglo-Saxon law, the notion of contract of agency is larger and includes also the case on the agent concludes legal acts in *nomine proprio* and on behalf of the principal without to disclose the identity of the last.

In the national law the agent corresponds to the notion of general agent of which mandate is given by the principal to accomplish continuously legal actions and not a mandate to a certain legal action.

As compared to the general agent, it is distinguished in the Anglo-Saxon law the category of special agent that is mandated to accomplish only one business.

The ratification of the acts that the agent concluded<sup>13</sup> without having a mandate issued by the principal or exceeding the limits of the mandate and if the liability of the principal occurred by the inherent powers of the agent it is a right given to the principal by the Romanian legislator like in the English law being necessary to be accomplished the condition of ability of the principal to conclude the respectively act in the absence of the agent.

The obligations of the parties are also influenced by the Anglo-Saxon law. So, the agent has the obligation of loyalty and to act in good faith; is denied to act in the interest of the adversary and he must notify the principal of the relevant information that can impact the decision of the second to conclude or not the legal acts with potential clients, for prevent the damages and to ensure the most favourable conditions for the principal.

Also the principal has a series of obligations to the agent, with influences from the English law, as to pay the agent for his services done in his favour and to reward the agent for the patrimonial advantages due to his activity of intermediation and to pay the loss for the termination of the contract and to supply to their agent the information that hold that are necessary for fulfilment of the contract.

The mandate given by the principal to the agent to fulfil a business represents an application of the contract of agency in the Anglo-Saxon law and has a more complex character which involves a wider sphere of action because supposes to accomplish all acts required for that business

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<sup>13</sup> Sitaru, *Intermedierea in activitatea comerciala*, 237.

(implied authority), or usual (usual authority) or those in accordance with customs of the place (customary authority).<sup>14</sup>

On the capital market we meet the contract to supply services of financial investments regulated by the provisions of Regulation no 32/2006 regarding financial investments services from which the intermediary enter into transactions with financial instruments and securities of the client what has the nature of a contract of intermediation and concludes in the name and on behalf of the client a contract of purchase and sale of financial instruments and securities from another intermediate who acts also in the name and on behalf of his client. Similar to the contract of agency, the intermediate acts with carefulness and in a diligent manner with the purpose to maximize his client`s profit.

## **GENERAL ASPECTS REGARDING FIDUCIA AND TRUST**

The notion of fiduciary predominantly from Etymologically, has its roots in the Great Roman law system, however, to the development of these species contributed Legal "grafting" a much broader notion of Trust, belonging to the Great Anglo- Saxon Law System.

Both Fiducia and Trust are legal institutions whose uniqueness has raised some controversies that start from the apparent incompatibility common to both systems of law: nature indivisible or exclusive ownership respectively, recognizing the coexistence of two property titles concurrently, on the same good or heritage.

The special ownership structure was proven to find a more fertile territory, from a legal point of view, in Common Law countries belonging to the community as well as those with mixed legal systems.

The Institution of Trust belongs to the law subsystem called equity comprising a set of rules adopted in common law to render it more flexible for the Common Law, according to which the rightful title has no legal value and is only recognized as a legal title.

By Trust we understand a form of contractual relations, under which a heritage or just certain assets that will form the trust fund can be transferred. Those contractual relationships are established between the following parts:

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<sup>14</sup> Costin and Costin, *Dictionar de dreptul afacerilor* , 51.

- Beneficiary - the person in whose interest the trust is established.
- Settler - is a person who transfers the right of ownership to another person (or many), called trustee. If the Settler's identity is confidential, the trustee of the trust may set a unilateral declaration.
- Trustee - is an individual or a legal entity, which owns and manages the assets of the trust in the interest of users, depending on conditions.

Within contractual duties are established, determining the period, income distribution and capital. In most jurisdictions there is the possibility for these conventions not to be registered by the state bodies, allowing full confidentiality<sup>15</sup>.

After transferring the right, common law trustee is recognized as the owner of the property and equity as holders of so-called legal title (legal title). It gives a specific role and very strictly regulated in respect of fiduciary duties they advertise property management, only for the benefit of the beneficiaries. The latter, in turn, are the title holders of so-called fair (equitable title), which entitles them to benefit from the administration of the property by the trustee for the benefit of their<sup>16</sup>.

In doctrine, the trust was compared with a fruit whose outer shell is owned trustee's unlike actual content of the fruit, owned beneficiary<sup>17</sup>.

## **THE EVOLUTION OF THE TWO LAW INSTITUTIONS WITHING THE INTERNATIONAL CONTEXT**

Trust website has proved to be a legal instrument adapted to the social and economic situations able to propel the economy, prompting its faithful or particular takeover in the legislation of many countries, located in the geographical areas and periods more or less close.

The European territory of the countries with a mixed legal system in Scotland has developed in a personal manner, the concept of trust, since the eighteenth century, can be considered, rightly, leads the way<sup>18</sup>.

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<sup>15</sup> *Anglo-Saxon Trust Concept*, accessed February 25, 2016, url: <http://blaustein.pro/resources/articles-and-rewiew/169-anglo-saxon-trust.html>

<sup>16</sup> Rodica Constantinovici, „Equity si Trust”, *Dreptul* 1(2004) : 205

<sup>17</sup> Constantinovici, „Equity si Trust”, 205.

Two centuries apart, in legal systems belonging to South Africa, Quebec, Louisiana and Sri Lanka, it has been felt the need to introduce the legal institution of the trust.<sup>19</sup>

The economic bloom registered by Japan marked the introduction, in the year 1922, of the institution of trust on the Asian continent as well, and the first European continental country it was introduced in was Liechtenstein, in 1926.

The inflows of North American capital determined the development of the central and south - american monetary-banking systems. This economic situation caused an 'epidemiologic' spread of the trust (adopted under the name of fideicomiso) which started in 1923, in Columbia, and continued spreading until the end of the first half of the 20th century, the states of Panama, Chile, Mexic, Bolivia, Peru, Costa Rica, Venezuela, Nicaragua, Guatemala, Ecuador and Honduras<sup>20</sup>.

The economic momentum recorded by Japan marked the introduction, in 1922, the institution of the trust on the Asian continent and the first country in continental Europe is Liechtenstein, which was introduced in 1926<sup>21</sup>.

In countries like Russia transfer legal title to the trustee is not allowed<sup>22</sup> or it is not clearly defined, as in the PRC.<sup>23</sup>

Regarding the concept of trust, Quebec legislature adopted a particular form adopted and the Czech Civil Code, 2014.

The Dutch law system applies bewind institution that looks similar to the characteristics of the trust. In this legal structure, the beneficiary is the legal owner of the property, trustee with only some rights.<sup>24</sup>

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<sup>18</sup> Thomas Broun Smith, *Studies of critical and comparative law*, (Edinburgh: W. Green & Son Ltd., 1962), 22.

<sup>19</sup> Honoré Tony, *On Fitting Trusts into Civil Law Jurisdictions*, accessed in February 12, 2016, url: <http://users.ox.ac.uk/~alls0079/chinatrusts>.

<sup>20</sup> Sánchez Vilella, „The Problems of Trust Legislation in Civil Law Jurisdictions: The Law of Trusts in Puerto Rico“, *Tulane Law Review*, 19 (1945): 383 and Alfaro Ricardo J., „The Trust and the Civil Law with Special Reference to Panama“, *Journal Of Comparative Legislation And International Law*, 3-4(1951): 29.

<sup>21</sup> Francesco Schurr, *Trusts in the pricipality of Liechtenstein and similar jurisdictions: aspects of wealth protection, beneficiaries' rights and internationale law*, (Baden- Baden, Wien: Zürich, 2014), 31.

<sup>22</sup> Zlata Benevolenskaya, „Trust Management as a Legal Form of Managing State Property in Russia“, *Review Of Central And East European Law* 35(2010): 68.

<sup>23</sup> Lusina Ho, „Trust Law in Asian Civil Law Jurisdiction“, *Journal of law studies* 1 (2004): 294; Kenneth G. C. Reid „*Chinese conceptualization of Trust*“ (University of Edinburgh, Law School: Working Paper 06 (2011). Accessed on february 22, 2016, Doi: <http://ssrn.com/abstract=1763826>. 9.

- In European legal space Trust are three models:
- The British model adopted and the Italian Civil Code (the fiduciary)
- The German model (Treuhänderverhältnis - or, more simply, Treuhand)
  - resembles the institution of Anglo-Saxon trust, being adopted and Hungary, in 2013. The difference is that Treuhänder holds legal title, while the beneficiary has no as real in relation to the assets managed<sup>25</sup>.
- The French model, and Romania adopted by the New Civil Code

### **ASPECTS REGARDING THE REGLEMENTATION OF FIDUCIA IN THE NEW ROMANIAN CIVIL CODE**

Title IV of the book III, "About goods", the new Civil Code introduces Fiducia Romanian legal system, characterized as an institution with a complex and original goods in the context of applicable regulations. Persons engaged in the operation the trust are the settlor (corresponding to settler site in version Anglo-Saxon), trustee (corresponding trustee's) and the beneficiary, the settlor must be the rights holder, trustee at that acquires and exercising them, and the recipient of the benefit which the rights are exercised by the Trust<sup>26</sup>.

All subjects the trust can be separately or simultaneously, multiple.

The object of the transfer of ownership can be real or claim rights, guarantees or any other property rights that existed at the time of transfer or will exist during the trust

The purpose of the trust is crucial exercise of rights by the Trust only in favor of the beneficiary, regardless of its quality overlap with the settlor.

The original text contained wording that it manages, the effect of changing art. 773 New Civil Code by Law no. 71/2011 and has been replaced with the phrase scattered undertakes for possible

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<sup>24</sup> M. J de Waal, „Trust Law” in *Elgar Encyclopedia of Comparative Law* (Cheltenham, Northampton: Jan M. Smits, 2006), 759.

<sup>25</sup> Eugen Dietrich Graue, „Trust-Like Devices Under German Law”, in W. A. WILSON, *Trusts and Trust-Like Devices, United Kingdom Comparative Law* (London: Chameleon Press Limited, 1981), 72.

<sup>26</sup> F-A Baias et al, *Noul Cod Civil Comentariu pe articole*, (Bucuresti: C. H. Beck, 2012), 638.

misrepresentation of limiting the right of disposal of the property included in the fiduciary patrimony of the trustee- viewed individually<sup>27</sup>.

In acceptance of newly introduced institution in the Civil Code Trust is considered a true owner of the property subject to the trust and, as such, may exercise all content entering the property, according to art. 555 New Civil Code<sup>28</sup>.

This attribute does not inhibit the distinction of fiduciary property rights of those belonging to own the trust.

Conclusions regarding the viability of the adopted form of the Fiducia- from a comparatist perspective

A few remarks deserve to be made by way of comparison, between legal institutions Trust and Trust and, source leading to their first major differentiation.

Thus, while the Anglo-Saxon trust may have four sources: law, contract, donations and testament, fiduciary adopted by our Civil Code is allowed only if the law springs from and contract. So, we can shape distinctions between the two systems law about legal concepts analyzed.

By excluding, as the source of the trust of the possibility of its determination by donation, of whatever nature - inter vivos or mortis because - under penalty of nullity, the legislature clearly expressed their will to prohibit the use of fiduciary operation the purpose of circumvention provisions of liberalities matter.

Despite the undeniable source of inspiration represented by the Civil Code of Quebec, the trust institution of the New Civil Code novel is taken from the French, in consideration of an alternative trust's distancing from the Anglo-Saxon.

It can be said that the legislature had a considerable reserve novel in the ability to be trustworthy has potential trustee.

Because France has given a very restrictive interpretation of the trust legislative, meaning that the persons able to act as the Trust is very restricted, Romania, tributary yet its umbilical connection line of the Civil Code, decided to adopt a similar legal position.

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<sup>27</sup> Baias et al, *Noul Cod Civil Comentariu pe articole*, 638.

<sup>28</sup> Baias et al, *Noul Cod Civil Comentariu pe articole*, 638.

Another important differentiator is that, trust site, the Anglo-Saxon conception, besides reliable effective, puts emphasis on the notion of discretion, another which was not accepted, not in the slightest degree, of our legislation.

For reasons of caution exaggerated legislature chose a novel advertising that can be interpreted as unacceptable Trust's system, given the multiple binding forms, the IRS registration in the Land Registry, the Registry of Securities Guarantees. In terms of excessive publicity, which leaves no content idea of discretion and confidence limited arena for carrying out the trust may remain unpopulated.

## CONCLUSION

The practical utility of this legal construction is beyond any reasonable doubt is confirmed by secular space indispensable to the existence of legal overseas. And although we tend towards economic prosperity similar to the US or, for example closer, German, Romanian lawmaker proved an apprehension hard to explain in his approach of a freshen New Civil Code with an institution so necessary environment declining financial development by this legal instrument.

In this context, the practical applications of the long-awaited the trust tend to their late appearance, not only because of the novelty of the legal as well, especially because of the lack of conviction of those which should be addressed, in terms of concrete benefits of this institution.

One can predict a multitude of studies with this object that will not materialize in practice. Relevant example is the Civil Code of origin (art. 2011 to 2024) which adopted the changeover in 2007 but, until today, although they have published hundreds of titles of scientific papers on the subject, the French Court of Cassation was not submitted any disputes with such an object<sup>29</sup>.

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<sup>29</sup> Ion Turcu, „Restrângerii ale unitatii patrimoniului prin tehnica fiduciei”, accesed on February 3, 2015, url: <http://www.juridice.ro/244256/se-poarta-fiducia.html>.

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# EXAMINATION OF THE LEGALITY OF THE ADMINISTRATIVE ACTS

Florina MITROFAN<sup>1</sup>

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**Abstract:**

*The examination of the legality of the administrative acts is of high importance in a state of law, by placing at the disposal of the subjects of law of an efficient mean for the prevention of possible abuses from the administrative authorities or the removal of the consequences of such abuses. Also, it is created the possibility to restore the rule of law, by reinstating the previous situation and sanctioning those who issue administrative acts by abusively using the attributions given by the law.*

**Key-words:** *examination of the legality, administrative acts, administrative contentious.*

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## INTRODUCTION

The legal control of the legality of the acts issued by the administration is stated as constitutional principle by Art 107 of the Constitution of 1923<sup>2</sup>, which stated that were excepted from the legal control only the acts of governing and the acts of military commandment.

The Constitution of 1948 stated that the courts could verify the legality of the administrative acts only when the law expressly stated this possibility.

By the entrance into force of Art 103 of the Romanian Constitution in 1965<sup>3</sup>, the principle of the legality of the administrative acts became a constitutional principle.

Law No 1/1967 exempted from the legal control multiple categories of administrative acts of jurisdiction.

Law No 29/1990<sup>4</sup> (modified by Law No 59/1993<sup>5</sup>) extended the

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<sup>2</sup> Published in the Official Gazette of Romania, Part I, No 282/29 March 1923.

<sup>3</sup> Published in the Official Gazette of Romania, Part I, No 65/29 October 1986.

<sup>4</sup> Published in the Official Gazette of Romania, Part I, No 122/8 November 1990.

area of the administrative acts which could have been subjected to the legality control, by including in the area of the administrative acts subjected to control the acts of jurisdiction.

The control for the legality of the administrative acts is performed either by direct action under the administrative contentious, or within the defense used by a party in litigation in front of a court (exception for illegality).

The legality of the administrative act is analyzed from the perspective of the substantial law, which were in force at the moment of its issuance or its adoption, and not of the normative acts in force at the date of the solution of the action in administrative contentious.

Regarding the direct action, it may have as effect the total or partial cancellation of the administrative act being contested, the obligation of the defendant administration to repair the moral and material prejudices caused for the plaintiff.

Regarding the exception of illegality, Law No 554/2004<sup>6</sup> has brought substantial modifications regarding this judicial institution, in the meaning that if prior to its entrance into force could have been attacked both the administrative acts, as well as the administrative operations, after its entrance into force, the legality of an administrative act could have been investigated at any moment during a trial, as exception, ex officio or at the express request of the interested party.

From all of the above, it results that the exception for illegality cannot be invoked regarding the administrative operations.

Admitting the exception for illegality cannot have as effect the cancellation of the unlawful administrative act, but not taking into consideration the act whose legality has been attacked.

Prior to the entrance into force of the Law No 554/2004, the performance of the judicial control using the exception for illegality was invoked by the notified court, without declining its competence in the

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<sup>5</sup>Published in the Official Gazette of Romania, Part I, No 177/26 July 1993.

<sup>6</sup>Published in the Official Gazette of Romania, Part I, No 1154/7 December 2004.

favor of the court for administrative contentious.

Law No 554/2004 established the procedure for solving the exception for legality in two phases, thus: invoking the exception in front of the court during a pending litigation and trialing the exception by the court for administrative contentious.

Moreover, the law states the conditions in which this control shall occur and the procedure for deciding upon it.

A paragraph of Art 126 of the Romanian Constitution of 1991<sup>7</sup> is dedicated to the administrative contentious, which performs the control of the administrative acts; it cannot be involved in the relations with the Parliament, nor in the military commandment acts. The administrative contentious receives the competence to solve the requests filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional. This text creates at least the hope for a fair practice of governing by governmental ordinances.

Art 126 Para 6, Thesis II of the Constitution does not state for contentious courts the competence to examine the constitutionality of the statutory orders or some of their provisions, this attribution being offered to the Constitutional Court. In other words, in such case the person aggrieved may address the competent court with an action for administrative contentious and may invoke in the same action the exception for legality<sup>8</sup>.

The revised Constitution has inserted a new paragraph, namely Para 6 of Art 126 (former Art 128), which states in its first thesis that the judicial control, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. Law No 554/2004 on the administrative contentious states in Art 5

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<sup>7</sup> Published in the Official Gazette of Romania, Part I, No 233/21 November 1991, republished in the Official Gazette of Romania, Part I, No 767/31 October 2003.

<sup>8</sup>Decision No 660/4 July 2007 of the Constitutional Court, published in the Official Gazette of Romania, Part I, No 525/2 August 2007.

Para 2-3 two more examples: cannot be attacked by way of the contentious business the administrative acts for whose modification or cancellation the organic law states another judicial procedure; the administrative acts declaring the state of war, siege or state of emergency, those regarding national security and defense or the acts issued for the reestablishment of public order, as well as for the removal of the consequences caused by natural calamities, epidemics, epizooties, shall only be attacked for excessive use of power<sup>9</sup>.

The institution of the administrative contentious is the judicial “guardian” of the citizen in front of the abusive behavior of the mayor, the town council, the president of the county council’s president, the prefect, the minister, thus of all authorities of the public administration, including the Government. This is why it is essential for the Constitution to expressly state the categories of administrative acts of the public authorities which are exempted from the court’s control of contentious, with the purpose of not allowing the parliamentary majority, for political reasons, group interests etc., to enlarge the area of exceptions, up to their transformation into a rule, as it happened by Law No 1/1967 of the old political regime<sup>10</sup>.

By Decision No 342/17 March 2009<sup>11</sup>, the Constitutional Court has ascertained that the provisions of the Law No 554/2004, transposing the Art 52 Para 2 of the Constitution, according to which the conditions and limits on the exercise of this right [of the person aggrieved by a public authority] shall be regulated by an organic law, allow the attack of a normative administrative act using the direct action, within which the plaintiff shall request and benefciate, as well as the person invoking the exception for illegality according to Art 4 Para 1, from the performance of the control of legality of the court.

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<sup>9</sup> V. M. Ciobanu în *Constituția României – Comentariu pe articole*, coordinators: I. Muraru and E. S. Tanăsescu (Bucharest: C.H. Beck, 2008), 1238.

<sup>10</sup> M. Constantinescu et al, *Constituția României revizuită – explicații și comentarii* (Bucharest: All Beck, 2004), 270.

<sup>11</sup> Published in the Official Gazette of Romania, Part I, No 276/28 April 2009.

Though the Court noticed that, regarding the determination of the object of the exception for illegality, there is, under the aspect of drafting, a miscorrelation between Art 4 Para 1 which exclusively refers to the “unilateral administrative act having an individual feature” and Para 2 of the same article, which aims the exception for illegality of an “unilateral administrative act”, without distinguishing regarding the invoking of the exception for illegality between the normative and the individual one; the administrative act, as defined by Art 2 Para 2 Let c) of the Law No 554/2004, comprises both the “unilateral administrative act with individual feature”, as well as the “unilateral administrative act with normative feature”. From this point of view, the Court considers that this miscorrelation between these two paragraphs of Art 4 bring in debate, on the one hand, an issue of interpretation and application of the law, and on the other hand, an issue of regulation, both aspects stepping out of the area of competence of the Constitutional Court.

From the Decision No 914/25 June 2009<sup>12</sup> results that the Court noticed that the provisions of Art 23 of the Law No 554/2004 on administrative contentious stated, at the level of the organic law, the *erga omnes* effects of the definitive and irrevocable judicial decisions which annulled, completely or partially, a normative administrative act. The opposability of this type of decisions towards all the subjects of law is insured, specifically, by the publishing in the Official Gazette of Romania of the judicial decisions regarding normative administrative acts issued by the Government and the other organs of the central public administration, namely in the official gazettes of the counties of those decisions regarding the annulment of different acts of the local public administration, corresponding to counties, towns and communes. The utility of these publications is incontestable, considering the fact that, by their nature, the normative administrative acts address to an indeterminate number of subjects of law.

Art 24 of the Law No 554/2004 considers the situation in which in the burden of a public authority has been established the obligation of to

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<sup>12</sup>Published in the Official Gazette of Romania, Part I, No 544/5 August 2009

do consisting in the conclusion, replacement or modification of an administrative act, the issuance of another document or the performance of certain administrative operations. This criticized provision introduces a mean of constraint of the managers of public authorities for the application of the decisions ruling in this regard, by offering, once more, efficiency in their fulfilment.

The Court ascertains that the two legal texts forming an object of the exception do not affect the equality of citizens in front of the law and the public authority, being applicable for all those found in cases stated by the legal norms, without creating a discriminatory legal treatment applicable only for certain subjects of law. This is why the criticized texts of law are in accordance with the jurisprudence of the European Court of Human Rights and of the Court of Justice of the European Communities invoked by the exception's author.

Also, the Court ascertains that the criticized texts of law do not limit, by any means, the free access to justice and do not lead to the defeat of the principles stated by Art 124 of the Constitution, which are at the base of justice, being an expression of the guarantee stated by Art 126 Para 6 of the fundamental law regarding the control of the administrative acts using the contentious, under the conditions of a fair trial which meets the exigencies of Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

By Decision No 10/2015<sup>13</sup> for solving certain matters of law, the High Court of Cassation and Justice has established that "Art 23 of the Law No 554/2004 on the administrative contentious, with subsequent modifications and amendments, is interpreted in the meaning that the definitive/irrevocable judicial court decision which totally or partially annulled a normative administrative act, shall generate effects also regarding the individual administrative acts issued on its base which, at the moment of the publication of the court decision for annulment, are appealed in pending litigations".

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<sup>13</sup>Published in the Official Gazette of Romania, Part I, No 458/25 June 2015

Decision No IV/23 June 2013<sup>14</sup>, the Supreme Court of Justice has decided that the mayor does not have the quality to appeal in contentious the decisions adopted by the town council, this right belonging only to the prefect; from the above mentioned decision it results that this impossibility is imposed to the mayor, as an executive authority of the same legal person, namely the town council, the decision not being in the meaning that this right would exclusively belong to the prefect.

By Decision No 314/14 June 2005<sup>15</sup> the Court has stated that the Prefect, in the virtue of his quality as local representative of the Government, has the possibility to appeal in contentious the administrative acts of the local or county's public administration authorities, if he considers them to be unlawful. This attribution of the prefect is performed based on the administrative tutelage which "assumes the right for control of the Government or of another authority of the state administration over the acts of the elected local authorities, which function in the virtue of the principle of local autonomy". The institution of the administrative tutelage is stated by Art 123 Para 5 of the Constitution, "The Prefect may challenge, in the administrative court, an act of the County Council, of a Local Council, or of a Mayor, in case he deems it unlawful. The act thus challenged shall be suspended *de jure*"; or, the legal text which represents the object of the exception only reiterates the above mentioned constitutional provisions. In the content of the Decision No 137/7 December 1994<sup>16</sup>, the Constitutional Court also states that "in a rule of law it is unconceivable that an unlawful act of a local authority to not be challenged in front of the court by the prefect, as representative of the Government, considering the fundamental mission of the Government to insure the application of the laws".

By Decision No 11/2015<sup>17</sup> for solving certain matters of law, the High Court of Cassation and Justice, in interpreting Art 3 of the Law No

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<sup>14</sup>Published in the Official Gazette of Romania, Part I, No 690/2 October 2003

<sup>15</sup>Published in the Official Gazette of Romania, Part I, No 694/2 August 2005

<sup>16</sup>Published in the Official Gazette of Romania, Part I, No 23/2 February 1995

<sup>17</sup>Published in the Official Gazette of Romania, Part I, No 501/8 July 2015

554/2004, stated that “it is recognized for the prefect the right to challenge in front of the court for administrative contentious the administrative acts issued by local public authorities, in the meaning of Art 2 Para 1 Let c) of the Law No 554/2004, with subsequent modifications and amendments”.

Regarding the exception for illegality, stated by Art 4 of the Law No 554/2004, the Court, by its Decision No 219/7 March 2006<sup>18</sup> ascertains that the text of law does not purloin from the judicial control any kind of administrative act; on the contrary, it states a supplementary guarantee in this meaning and it is nothing else than the expression of the constitutional text of Art 126 Para 6 which states that, of principle, the judicial control for administrative acts of public authorities, using the administrative contentious, is guaranteed.

The Court also observes that there is no constitutional text stating the challenge of the legality of an administrative act using only a direct action according to Art 7 and 11 of the Law No 554/2004, thus the legislator, according to Art 126 Para 2 of the Constitution, is entitled to state any procedure compatible with the previously mentioned article.

However, the difference of regulation regarding the term for challenge of the legality of an administrative invoking the exception for illegality or a direct action is owed only to the fact that, for the first case, the solution of the first instance court depends on the solving of the invoked exception, and the legislator has understood to place another efficient procedural mean at the reach of the person in order to challenge the possible unlawfulness of the administrative act.

The Court mentions that the criticized text of law is applied for all those aimed by the hypothesis of the norm, non-discriminative and without exceptions, being a concretization of the right to a fair trial and does not violate the exercise of the right to defense, because the parties, throughout the trial enjoy certain procedural guarantees by which they can prove their claims, as well as the groundlessness of the claims invoked by the adversary.

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<sup>18</sup>Published in the Official Gazette of Romania, Part I, No 297/3 April 2006

## CONCLUSION

The conclusion emerging is that by its wide jurisprudence, in the area of the administrative contentious, the Supreme Court has fully proven that the purpose of the Law on the administrative contentious is fulfilled by the effects generated by the decisions ruled in this matter.

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# THE INSURANCE CONTRACT AND THE PUBLIC FREEDOMS IN THE EUROPEAN AREA

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**Abstract:**

*The European Union is a partnership in which the Member States pool their skills to achieve common goals, established by the Maastricht Treaty [signed by the European Council on 7 February 1992 in Maastricht (Netherlands) and entered into force on 1 November 1993].*

*Among the objectives of this Treaty, there is the one to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union.*

*The European Union respects the identity of the Member States, whose systems of government are founded on democratic principles. Similarly, the fundamental rights are respected, in the manner that they are guaranteed by the European Convention on Human Rights.*

*In the European territory, the insurance sphere experienced a gradual evolution, characterized by both identical issues and differences, depending on the legal system of each Member State.*

*It is true that the insurance domain was established around Europe, but it got developed and up to date inside this continent, thus the Europe insurance market is a global influence, as viewed especially from the insurance of persons and goods perspective.*

*The doctrine and the relevant literature defined the insurance discipline as a socio-economic activity which aims to protect individuals and legal entities, (also known as insured) against various factors and various risks, and which is achieved by companies, specialized groups, (known as insurers).*

**Key-words::** *insurance contract, human rights, public freedoms, right to life, freedom of movement, property protection*

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## INTRODUCTION

The European Union is a partnership in which the Member States pool their skills to achieve common goals.

The European Union was established through the Maastricht Treaty [signed by the European Council on 7 February 1992 in Maastricht (Netherlands) and entered into force on 1 November 1993], and was founded on The European Coal and Steel Community, The European Economic Community and The European Atomic Energy Community, genuine international organizations formed after the rigors and principles<sup>2</sup> of the international law.

Among the objectives of this Treaty, there is the one to "promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union" (art. B of the Maastricht Treaty), this objective being translated into reality by the fact that in time, The European Union expanded with new member states, paying attention to the sovereignty of those member states over their territories and conducting political, judicial and security cooperation, also in areas such as environment protection, education or health.

The European Union respects the identity of the Member States, whose systems of government are founded on democratic principles. Similarly, the fundamental rights are respected, in the manner that they are guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of the Community law.<sup>3</sup>

The European Convention on Human Rights, also known as the Convention for the Protection of Human Rights and Fundamental

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<sup>2</sup> The principles of the public international law are those rules characterized by a high level of generality and objectivity, based on which states are building their international relations. For example, I can mention the principle of sovereign equality, the principle of equal rights and self-determination of people, etc contained in the UN Charter.

<sup>3</sup> Octavian Manolache, *Tratat de drept comunitar, Ediția 5* (Bucharest: C. H. Beck, 2006), 11.

Freedoms was signed much earlier, on 4 November 1950 in Rome, and entered into force on 3 September 1953 with the submission<sup>4</sup> of the tenth instrument of ratification by the Duchy of Luxembourg (previously, the Convention had been ratified by: The United Kingdom in 1951; Norway, Sweden and West Germany in 1952, Ireland, Greece, Denmark and Iceland in 1953).

Subsequently, the Convention has been enhanced through the incorporation of 14 additional Protocols, through which there were identified rights and freedoms that did not exist in the initial version and who brought some changes (for example, the Protocol no. 6 abolished the death penalty, originally intended as an exception in art. 2 of the Convention).

A detailed look at the Convention can lead us to the conclusion that it is impartial, illustrative and not mandatory or, as it has been stated in the relevant literature<sup>5</sup>, it rather protects the fundamental rights of any person against the activities of the contracting states than it creates subjective and reciprocal obligations between the signatory states.

In the evolution of society, out of the need for protection of man and his acquired assets against natural disasters (earthquakes, fires, floods), accidents and illnesses, out of the need for establishment of livelihoods as a result of the decrease or loss of working capacity due to accidents, disease or fulfillment of a certain age, the insurance activity arose, subsequently transposed through the insurance contract.

On the European territory, the insurance domain experienced a gradual evolution, characterized by both identical issues, and especially differences, depending on the legal system of each Member State.

It is true that the insurance sphere occurred around Europe (specifically in The Lower Egypt, when the inhabitants of this powerful empire created an aid funding consisting of people's contributions to cover the damage caused by various natural disasters such as earthquakes, floods, fires, etc.), but it has been developed and upgraded

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<sup>4</sup> Radu Chiriță, *Convenția Europeană a drepturilor omului. Comentarii și explicații. Vol. I* (Bucharest: C. H. Beck, 2007), 5.

<sup>5</sup> Chiriță, *Convenția Europeană a drepturilor omului. Comentarii și explicații. Vol. I*, 7-8.

*within* the continent, thus the European insurance market is a global influence, as seen especially from the perspective of people and goods insurance.

The European Union directives governing the insurance activity are nothing more than European Community principles or general rules, serving to coordinate (and not subordinate) the insurance norms that are part of Member States law and to simplify the international trade operations.

Given the existence of fundamental rights and freedoms, we can say that the assurance occurred, was created to protect at least a part of these fundamental values against risks that can impact very serious. What characterizes these risks is uncertainty, incertitude, and the fact that from the moment they occur, they cannot be removed.

The insurance development was strongly influenced by the existence of people's rights and freedoms, bowing on the premise that everyone needs protection, regardless of its position: natural person, legal person, citizen of the state of origin, foreign citizen, stateless or having dual citizenship.

● **The value of the contract.** In the current EU sphere, as seen through the law of the Member States, and which is acquainted with a continuous change, life and freedom are the most important values or powers of self-determination that the individuals possess, giving them the ability, the opportunity to choose, without pressure or constraints from others, but only according to their own ideas.

For example, in the Romanian relevant literature<sup>6</sup> it was stated that "freedom, or the natural possibility to do whatever one likes, is the normal condition of man".

At this juncture, the contract, one of the most important institutions of civil law and an essential economic activity legal mechanism, which has seen extensive changes over time, from the beginning of the old Romanian law until the present time, is the expression of individual freedom.

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<sup>6</sup> D. Alecsandresco, *Principiile dreptului civil român, vol. III* (Bucharest: Tipografia Curții Regale, 1926), 5.

Proof of the significance and value of the contract, on a national level, is the discovery of the wax tablets in Roșia Montană, between the years 1786 - 1855, dated from the existence of the Geto - Dacian people, during the application of Roman law in Dacia. On these tablets, also called "trptych", various contracts were written, including the sale - purchase, lease, loan or deposit, therefore having not only the role of producing legal effects, but also the role of a document containing the will of the parties.

● **The insurance. Concept.** The insurance is a social and economic activity that aims to protect individuals and legal entities (as insured) against different risks or different factors, performed by companies and specialized groups (as insurers). At the same time, through the insurance operation, following a damaging event, the insurer indemnifies the insured for an amount of money known as indemnity or insurance premium.

Offering another definition<sup>7</sup>, the insurance is a service provided under a specific contract between *the insured* (individual or legal entity), and *the insurer*, whereby the insurer provides protection for called risks, pledging to defend the amount of damage within the insured sum of money and under the laid down conditions, in exchange for the insurance premium payment by the insured.

Finally, according to the French doctrine<sup>8</sup>, the insurance is a convention whereby, in exchange for a premium, *the insurer* commits himself to indemnify *the insured* in case of a random risk enshrined in that particular convention.

● **Basis principle.** At the center of the insurance activity lies the mutuality principle, provided indirectly by the Romanian Civil Code also<sup>9</sup>, în the 1171 article, following the definition of the mutually binding contract. According to this principle, each insured party participates, contributes with a low-value sum of money to the foundation of the insurance fund, from which the damage is eventually covered. Because

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<sup>7</sup> Lia Luca, *Ghid pentru asigurări și reasigurări în Uniunea Europeană* (Bucharest: Tribuna Economică, 2010), 24.

<sup>8</sup> Yvonne Lambert - Faivre, *Droit des assurances* (Daloz, 2001), 38.

<sup>9</sup> Law no. 287/2009, republished in M. Of. no. 505 from 15th of July 2011.

he pays a sum of little importance compared to its needs of protection, the policyholder (the insured) will receive in return the guaranty to be compensated, recompensed, rewarded in the event of occurrence of a loss.

● **Relevant provisions, in summary.** Currently, on a national level, provisions relating to the insurance business are included in various legal acts, of which we can remind Law no. 136/1995 on insurance and reinsurance<sup>10</sup>, Law no. 32/2000 regarding the activity and the supervision of mediators in insurance and reinsurance business<sup>11</sup>, Law no. 237/2015 regarding the autorisation and the supervision of the insurance and reinsurance activity<sup>12</sup> and, of course, the Romanian Civil Code.

● **The Europeanu Union. Diversity.** On a european standard, among the legal acts regulating the insurance business, we can mention Directive 73/239/EEC of 24 July 1973 on the coordination of law, rules and administrative provisions relating to the taking up and pursuit of direct insurance, other than life insurance, published in the Official Journal no. L 228 of 16 August 1973, Directive 83/2002 of 5 November 2002 concerning the life assurance, published in the Official Journal no. L 345 of 19 December 2002, or Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, of 25 November 2009.

● **Legal definitions.** The insurance activity is materialized in the form of the insurance contract, whose legal definition is provided by the Romanian Civil Code, in the art. no. 2199: "Through the insurance contract, 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 taken place, to pay an allowance, where necessary, to the insured, the insurance beneficiary or the injured third party".

At the same time, Law no. 237/2015 defines the insurance domain as an activity conducted in or from Romania, which refers, mainly, to the offering, mediation, negotiation, performing of insurance and reinsurance contracts, collection of premiums, damage abolishing, decline and

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<sup>10</sup> Published in Monitorul Oficial no. 303 from 30.12.1995.

<sup>11</sup> Published in M. Of. no. 148 from 10.04.2000.

<sup>12</sup> Published in M. Of. no. 800 from 28th of october 2015.

recovery activity, as well as the investment or utilisation of own funds, which were attracted by the carried out activity [art. 1 alin. (2) pct. 5].

From this sufficiently detailed last definition, it appears that Law no. 237/2015 regulates only the insurance activities taking place on the Romanian territory, whether the insurer is a Romanian or foreign legal entity, activities that focus on perfecting an insurance contract and who are reflected by this contract.

## **THE INSURANCE CONTRACT AND THE RIGHT TO LIFE**

● **The right to life. Regulation.** The right to life is the first right governed by the European Convention on Human Rights, in its second article: "Everyone's right to life shall be protected by law...". On the domestic law level, the Romanian Constitution governs, with top billing, this particular right in the very first article of Chapter II (*Fundamental rights and freedoms*) from Title II. It's the article 22 that we're talking about, entitled *The right to life and to physical and mental integrity*: "(1) The person's right to life and right to physical and mental integrity are guaranteed".

It is interesting to say that in the Constitutions of other Member States of the European Union, the adduction of this right stems from the broad interpretation of the law articles, and not directly (for example, The Constitution of The Italian Republic<sup>13</sup> stipulates, in article no. 2, that "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed...", drawing the conclusion that the right to life is included in this multitude of rights; The First Title from The Basic Law for the Federal Republic of Germany<sup>14</sup> is entitled "Basic rights" and, although in art. no. 1 par. no. (2), it is mentioned that "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world",

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<sup>13</sup> Constitution of the Italian Republic, accessed 10.03.2016, <https://constitutii.files.wordpress.com/2013/01/costituzoneitaliana-rumeno.pdf>.

<sup>14</sup> The Basic Law Tor the Federal Republic of Germany, accessed 10.03.2016, <https://constitutii.wordpress.com/2013/02/01/legea-fundamentala-pentru-republica-federala-germania/>.

furthermore, the right to life cannot be found among the next articles; it appears that it is a part of all the human rights). In The United Kingdom, The Human Rights Act 1998, a juridical source of the constitutional institutions of this state, appoints that "In this Act, *the Convention rights* means the rights and fundamental freedoms set out in:

- (a) Articles 2 to 12 and 14 of the Convention,
  - (b) Articles 1 to 3 of the First Protocol, and
  - (c) Article 1 of the Thirteenth Protocol,
- as read with Articles 16 to 18 of the Convention."

Hence, in this category we can include the right to life.

● **The right to life's importance.** Regardless of how it is brought to the fore, directly or indirectly, alone or together with other rights or freedoms, the right to life appears as essential in the fundamental rights and freedoms scheme, protected by the European Convention on Human Rights (hereinafter ECHR) and by Member States' Constitutions, for without the dedication and protection of this right, the protection of other rights would remain pointless<sup>15</sup>.

Life is one of the fundamental values, for who's protection the state itself was constituted.

Regarding this latter issue, in defending the right to life, the state has both a negative obligation (it must naturally refrain from affecting the right to life, death cannot be caused to anyone intentionally) and a positive obligation (the state must take all necessary steps to protect life).

● **The insurance's role.** In the protection of the right to life, the insurance contract, more precise - personal insurance, acquires a role taken into account, which reflects precisely this positive obligation of the state.

By the word "everyone", the ECHR has considered the notion of natural man regarded as a human and an individual being, especially that in par. (2) art. 2, exceptions relate also only to a human person: self-defense, lawful arrest or preventing the escape of a lawfully detained person and repression of a violent disorder or an insurrection.

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<sup>15</sup> Corneliu Bîrsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe articole. Volumul I. Drepturi și libertăți* (Bucharest: All Beck, 2005), 156.

This idea is given a constitutional level, in art. 22 of the Romanian Constitution, who prohibits torture, inhuman or degrading treatments and death penalty, in order to protect individuals.

In the personal insurance contract, the insurance beneficiary can only be a natural person, this contract being concluded, on the one hand, to restrict the negative consequences caused by natural phenomena, accidents, illness and, secondly, to pay the insured sums in case of events such as death, loss of ability to work or reaching retirement age.

Personal insurance includes both life insurance and health or travel insurance. In this case, art. 34 of the Romanian Constitution provides for the state's positive obligation to adopt public health ensuring measures.

Par. (3) of this article refers to the organic and ordinary laws to organize the medical care and social security system for sickness, accidents, maternity and recovery, control of the exercise of medical professions and paramedical activities, as well as to take any other protective measures of physical and mental health of the person.

According to art. no. 2227 of the Romanian Civil Code, through the personal insurance contract, the insurer undertakes to pay the insurance indemnity in case of death, arrival at a certain age, total or partial permanent disability or in case of other similar causes, according to rules adopted by the state authority in whose jurisdiction, in line with the law, is situated the supervision of the insurance business activity.

In a detailed way, through life insurance, after the death of the insured party, the beneficiary is paid with the amount mentioned in the insurance policy. Life insureded is justified<sup>16</sup> from an economic perspective, if one of the family members earns an income, and the others are partially or totally dependent on that income. The financial impact casted on the family, after the death of a person, is not uniform, but varies greatly depending on the structure of the family in question.

Therefore, by means of personal insurance, the state protects the life, physical and mental integrity and health (all of these the forming right to life) of individuals to specific risks: death, injury, temporary or permanent incapacity, illnesses, hospitalization, unemployment etc.

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<sup>16</sup> Dan Anghel-Constantinescu et al., *Tratat de asigurări* (Bucharest: Semne 94 SRL, 1999), 97

The personal insurance contract pursues, besides the protection of the person and his cronies's life (especially family members), also the contribution of the society to this protection. This type of contract is a possibility whereby society protects both itself and the individuals composing it.

Related to this, in the relevant literature was stated that if the society can survive in the absence of the right to privacy, freedom of expression or the presumption of innocence observance, not exercising the right to life can lead to endangering the existence of the human species.<sup>17</sup>

The insurance contract is another step forward made by states in protecting the right to life, as their obligation to adopt all necessary measures to protect the life of persons under their jurisdiction, which therefore implies for these states the foremost duty of ensuring this fundamental right by adopting more comprehensive and more concise legislation regulating as many human relationships as possible.

## **THE INSURANCE CONTRACT AND THE FREEDOM OF MOVEMENT**

• **The freedom of movement. Regulation.** The freedom of movement is provided in art. no. 2 of Protocol no. 4 to the ECHR, this Protocol recognizing other rights and freedoms than those included in the Convention and in the First Additional Protocol to the Convention.

The freedom of movement from this Protocol must not be confused with the liberty enshrined in ECHR art. no. 5. This latter article guarantees everyone the right to liberty and security of person, further stating that no one shall be deprived of his liberty after taking the detention or arrest force, ant then enumerates some exceptions. Therefore, art. 5 ECHR refers to the physical liberty of person, while art. 2 of Protocol. no. 4 ensures, differently, "another right related to the idea of freedom, namely the right to freedom of movement or the freedom of movement."<sup>18</sup>

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<sup>17</sup> Chiriță, *Convenția Europeană a drepturilor omului*, 83.

<sup>18</sup> Bîrsan, *Convenția Europeană a Drepturilor Omului*, 1108.

Article 2 of Protocol. 4 provides both the right to movement within a country (inside its territory) and the right to movement in other foreign countries (in an interstate frame).

In this subject we're interested especially in the movement of people between states, because different risks, barriers or difficulties that cannot be initially provided may appear under this basis.

The right to leave any country, contained in par. no. (2), is not to be necessarily interpreted as having a permanent characteristic, although at a first glance it may seem so. Even from the definition given in the Explanatory Dictionary of the Romanian language, it appears that a person goes somewhere, departs from something<sup>19</sup>.

At the fundamental level of our country, the freedom of movement is provided by art. 25 of the Constitution, having an identical content to that provided at a European level: a person can travel both in Romania and abroad (outside of the Romanian territory).

However, unlike art. 2 of Protocol. no. 4, the Romanian Constitution is more explicit regarding the verb "to leave", which although it is not mentioned, it specifies, in par. no. (2), that "every citizen is guaranteed the right to establish his domicile or residence anywhere in the country, to emigrate, and to return to his country." Thus, a person can leave the country both permanent and temporary (business travel, study travel, vacation etc.).

The Italian Constitution, in art. no. 16, provides that all citizens are free to leave and return to the territory of this state, subject to the fulfillment of some legal obligations.

Article 19 of the Spanish Constitution governs the freedom of movement for all Spanish citizens, benefitting from the right to freely enter and leave Spain, as provided by law <sup>20</sup>.

● **The insurance's role.** In the relation between insurance business and freedom of movement, the particularities of the travel insurance

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<sup>19</sup> Explanatory Dictionary of the Romanian language, accessed 08.03.2016, <https://dexonline.ro/definitie/a%20parasi>.

<sup>20</sup> The Spanish Constitution, accessed 10.03.2016, <https://constitutii.wordpress.com/2013/01/15/constitutia-regatului-spaniei/>

contract, which protects both human value and property (his assets) are brought in close - up.

Moving on, further clarifications should be made.

A travel insurance is necessary, therefore recommended to all people traveling abroad. Whether it's a business travel, a holiday or any other type, the travel insurance creates a sense of confidence, safety from any danger.

After concluding a travel insurance contract, the cases in which accidents or illness occur while on a specific trip (in the present case, abroad) are covered. Individuals traveling outside the state of origin are insured regardless of the movement method: land (by car, by bus or by train), marine (by boat) or air (by plane).

As for the illness, it was defined as the significant change in the physical health of the insured party and it was stated that in the contract of insurance, sickness is not covered unless it is linked to a preexisting event of a known disease or malformations for which prescribed treatments were made.<sup>21</sup>

Depending on the insurer, the travel insurance can include:

a) medical insurance (outpatient treatment of the insured, medication, expenses for transportation by ambulance services), insured dead body repatriation;

b) accident insurance (disability or death due to an accident);

c) baggage insurance (damage, destruction or loss of property due to accidents suffered by the insured, fire, explosion, earthquake, flood, theft, robbery, etc.);

d) civil liability insurance to third parties (damage caused by the insured party to third parties).

## **THE INSURANCE CONTRACT AND THE FREEDOM OF CONTRACT**

● **Prolegomena.** Regardless of the opinions of specialists on the contract law, all democratic systems of the Member States include the

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<sup>21</sup> Violeta Ciurel, *Asigurări și reasigurări: abordări teoretice și practici internaționale* (Bucharest: All Beck, 2000), 469.

idea of freedom of contract, if not at a constitutional level, then certainly at an organic law level.

According to art. no. 1169 of the Romanian Civil Code, "the parties are free to enter into any contracts and to determine their content, within the limits of law, public order and morals".

From the content of this article it may be deduced, broadly, that the human will is what creates the right, drawing the legal effects of a legal act - in this case the contract. So, the will is autonomous because it has the power to generate the contract without any coercion, pressure or competition. It's all about a logical argument in a standard form: people are free - people have will - so the will is free.

In this way, in the European territory, the principle of autonomy appeared, based on important philosophical, moral, economic and political arguments. For example, philosophically, they said, since antiquity, that man is by nature a free being, and that his freedom can only be limited by his power and will. Human seizure by society, however, has kidnapped the absolutism of this freedom, making him willingly give up on a part of his freedom in order to establish and maintain social order. It is what Jean Jacques Rousseau asserted, in a more dramatic manner, it is true, in his famous work, "*Of the social contract, or Principles of Political Right*" ("Man was born free, but he is in chains everywhere").

Morally, the contract expresses the interests of the contracting parties result. It makes sense that nobody wants what does not conform to its interests. In support of this assertion is art. 1266 par. (1) Romanian Civil Code: "Contracts shall be construed as consensus between the parties, and not in the literal sense of the words". Between the parties' interests there must exist a balance, in the same way that, in the civil right, parties are situated on legal equality, enjoying the same rights and obligations and having the same opportunities for their exploitation.

● **Shortly, about the freedom of contract.** According to the freedom of contract:

- any person can enter into a contract, or, in a more detailed way, no one can be forced to engage in contractual relations, as no one is granted the right to compel another to conclude an agreement;

- each individual has the right to choose, by himself, the contract participants and establish with them the content of the future contract, namely the rights and obligations which are they are entitled to, respectively kept to (the policyholder is free to choose the insurance company with which he would like to conclude the contract) . It can be brought into discussion, here, art. no. 12 of the Romanian Civil Code, who, in par. (1), provides that "Anyone may freely dispose of his assets, unless the law expressly provides otherwise" or art. 26 of the same Civil Code: "The rights and civil liberties of individuals and the rights and civil liberties of legal entities are protected and guaranteed by law", even if both articles contain general terms;

- parties are free to choose the form of the future contract.

● **The insurance contract's state.** The relationship between the freedom to contract and concluding an insurance contract, however, is acquainted to some particularities:

- in the situation of a compulsory insurance (such as liability insurance for damage caused by vehicle accidents), individuals from a state are forced to conclude such contracts, even being compelled by the law;

- the insurance contract is a contract of adhesion, most of its clauses being determined by the insurer; the opportunity to negotiate the terms (the clauses) of this contract is quite limited;

- therefore, it appears likely that at least one party's will is likely to regress or even to be excluded from the pole position of perfecting the contract, or<sup>22</sup> altered by the psychological or economic imperative of concluding the contract.

## **THE INSURANCE CONTRACT AND THE PROPERTY RIGHT**

● **Guarantee and protection of the property right. Regulation.**

Protection of property is set out in art. 1 of the Protocol to the ECHR, stating that every natural or legal person is entitled to the peaceful

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<sup>22</sup> Gh. Piperea, *O stafie bântuie Europa: terorismul contractual*, in *Revista Română de Drept al afacerilor* no. 5/2014, accesat 10.03.2016, <http://www.wolterskluwer.ro/info/articole/o-stafie-bantuie-europa-terorismul-contractual-i/>.

enjoyment of his possessions. A first exception to this rule is set, farther away, in par. no. (2): "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". Of course, as an exception also, these preceding provisions shall not, in any way, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (par. no. 3).

The first paragraph of this article imposes the obligation of the Contracting States to respect the right of property belonging to individuals, legal entities, nongovernmental organizations or groups of individuals, within the meaning of art. 34 of the Convention<sup>23</sup>.

The concept of "possessions", which has an autonomous scope, is understood in a more wider way, designating all goods having a patrimonial value: any economic interest that has a heritage value should be considered as a possession within the meaning of art. 1 of this Protocol. The notion of "possessions" includes all interests resulting from the economic relations of an individual: in other words, it exceeds even the property right, aiming notion of heritage.<sup>24</sup>

The heritage belongs to any natural or legal person and includes all of his rights and duties that can be monetised.

The French relevant literature<sup>25</sup> defines the heritage as that set of assets and liabilities belonging to a person, together constituting a universality of law, ie one unit, a legal unit.

Protection of property right is also provided at a fundamental level. In art. 44 par. (2) of the Romanian Constitution it is specified, very clearly, that private property is guaranteed and protected equally by law, irrespective of its owner (Romanian or foreign natural person or legal

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<sup>23</sup> Bîrsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe articole. Volumul I. Drepturi și libertăți*, 968.

<sup>24</sup> Jean-Francois Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 559.

<sup>25</sup> Jean Carbonnier, *Droit civil. Tome 3. Les Biens, 19e edition refondue* (Paris: Presses Universitaires de France, 2000), 3.

entity). Also, art. 136 par. (2) provides that public property is guaranteed and protected by law.

Going down the classification of normative acts scale, at the level of organic law, the Romanian civil legislature provides more legal means of protection of property right, such as the recovery action (art. 563 of the Civil Code.), the deniers action (Art. 564 C. civ.), the confessor action (art. 696 C. civ., art. 705 C. civ., art. 757 of the Civil Code. etc.), the delimitation of property boundaries action (art. 560 of the Civil Code.) etc.

● **The insurance contract's role.** As a general rule, the issue of the right to assets respect is brought to discussion especially between individuals and state relationships. Having that in mind, the performing of a property insurance contract refers exactly to those relationships, the insurer being represented by companies, constituted as legal entities, and the insured being any natural or legal person.

In support of this assertion is Law no. 237/2015, which defines the insurer as a straightforward life insurance or straightforward general insurance company, authorized to operate in accordance with the provisions of this law [art. 1 para. (2) pt. 3].

Although property insurance is to protect the policyholder himself, this protection occurs against the risks hanging over the property (fire, flood, theft etc.) whose total or partial destruction would create negative consequences for the insured heritage.<sup>26</sup>

The object of this type of insurance covers both movable and immovable, tangible or intangible goods, no matter their destination (civil, commercial, administrative, etc.). In the doctrine<sup>27</sup> it was claimed that goods which are state or administrative - territorial central and local units public property can be insured because the insurance is an act of a good's management, not its provision.

## CONCLUSIONS

In the category of normative acts of international human rights protection, a special place is occupied also by the European Convention

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<sup>26</sup> Vasile Nemeș, *Dreptul asiguraților*, ed. a 4-a (Bucharest: Hamangiu, 2012), 256.

<sup>27</sup> Nemeș, *Dreptul asiguraților*, 256.

on Human Rights which, due to the rapid evolution of society and the trends and practices of the legal systems of the Member States, has undergone numerous changes.

Each Member State has the obligation, on one hand, to respect the rights enshrined in the Convention and, secondly, to remove the negative consequences if these rights have been violated.

In the member states of the European Union, the insurance business is included in the education, tradition and even in the lives of citizens which are part of these states, and the insurance contract plays a significant role in protecting these fundamental values, along with many other institutions of civil law, but also in other branches of the law.

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# NON-RETROACTIVITY AND RETROACTIVITY THROUGH THE MEDIUM OF NEW REGULATIONS

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**Abstract:**

*Non-retroactivity of criminal law stems from the principle of legality of criminal offenses which states that one can not be held liable for committing an act that at the time of committing, it was not stipulated as a crime. Under the principle of non-retroactivity of criminal law is guarranteeing the freedom of citizens which gives substance to safety of social relations,in that the state,by organs of coercion can not claim citizen a law that was not yet edicted, by organs of coercion can not claim citizen compliance of a criminal disposal not yet edicted. The rule of non-retroactivity of criminal law is one which may be derogated from in exceptional situations, such as the one of more favorable criminal law and interpretative criminal law. Retroactivity of criminal law appears as a necessity with the changement of social and economic conditions, deeds incriminated by criminal law suffering changes in the degree of social danger, meaning its shriinking.The retroactivity of criminal law is an exception from the principle of criminal law activity that establishes the general rule criminal law takes effect only for the future.*

**Key-words:** *principle, non-retroactivity, retroactivity, criminal law, desincrimination, effects.*

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## INTRODUCTION

A criminal law usually applies to crimes from the moment of taking effect and until end of validity. Nevertheless, if this is the rule,it is natural to question to what extent is the law susceptible to exceptions and most important if it is possible that law may apply to deeds committed prior to the coming into force of the law.

Given that the principle of legal criminal offenses and punishment requires that the imputed offense and corresponding penalty to be prescribed by law at the date of offense, the answer seems to be negative.

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The expressly consecration of the principle of non-retroactivity of criminal law strengthens the rule of criminal law activity.

Non-retroactivity of criminal law derives from the principle of legality of criminal offenses which states that one can not be held liable for an offense that at the moment of doing, it was not provided as an offense<sup>2</sup>.

Retroactivity of criminal law is a consequence of the principle of legality of criminal offenses and punishment (*nullum crimen sine lege praevia, nulla poena sine lege praevia*).

Under the principle of non-retroactivity of criminal law is guaranteeing the freedom of citizens which gives substance to safety of social relations, in that the state, by organs of coercion can not claim citizen a law that was not yet enacted.

The principle of legality of criminal penalties implies the creation of a legal framework for the punishment of certain facts, the absence of this legal framework draws impossibility of applying a criminal penalty. Thus, before imposing penalties, the law must warn *lex moneat, priusquam feriat*.

According to the Constitution, the law only commands for the future, except for the more favorable criminal law. Therefore, the rule is non-retroactivity of criminal law, and any exceptions must register in the content of the concept of criminal law more favorable within the meaning of the constitutional text.

The value of non-retroactivity of criminal law constitutional principle follows from the international treaties and conventions on fundamental rights that Romania has ratified and which themselves have constitutional law over domestic law.

No one can be convicted of any act or omission which, at the time it was committed did not constitute an offense under national or international law. It also can not apply a more severe penalty than the one that was applicable at the time of the offense.

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<sup>2</sup> M. Zolyneak and M. Michinici, *Criminal law. General part*, (Iași: Chemarea, 1999), 131.

Art. 11 para. 2 of the Universal Declaration of Human Rights states that 'no one shall be convicted of any act or omission which did not constitute the time when it was committed acts of criminal nature, under national or international law ".

The new Criminal Code regulates the non-retroactivity of criminal law as a consequence of the principle of legality of incriminations and penalties. Thus, the reasoning of non-retroactivity of criminal law is the legal security of the citizen and the approval of his fundamental rights - fundamental objectives of what must be the rule of law which would be jeopardized if the law would sanction what was not prohibited when the act was being committed<sup>3</sup>.

### **THE CONDITION FOR IMPLEMENTATION OF THE NON-RETROACTIVITY OF CRIMINAL LAW PRINCIPLE**

In the history of totalitarian regimes existing throughout the twentieth century, not infrequently, it was resorted to retroactive criminal law provisions, even in the circumstances the criminal law stipulated that general principle of non-retroactivity.

Before the adoption of the Romanian Constitution of 1991, non-retroactivity of criminal law was not a constitutional principle, so that in exceptional cases the legislature could render the retroactive criminal laws, but such a measure had to be justified by the requirements of the historical moment and shown expressly set out in the law which gave it this character.

We believe that even reasons of public order or the gentleness of law that retroactivates are not sufficient and solid arguments to legislate criminal law provisions with retroactive content.

Retroactivity of criminal laws can have severe consequences on the rights and liberties.

With the adoption of the Constitution, the principle of non-retroactivity of the law has become a principle of constitutional strength, with all the consequences from this: sanction for non-compliance with this principle of criminal law draws unconstitutionality of laws once

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<sup>3</sup> V. Pasca, *Course general part of criminal law*. Vol. I, (Bucharest: Universul Juridic, 2010), 79.

adopted and the nullity of material acts or substantial law drawn in violation the principle of non-retroactivity of the law criminal.

Retroactivity of criminal law comes from the principle of legality incriminations and punishment *nullum crimen sine lege praevia, praevia* and *nulla poena sine lege* complementary to activity of criminal law principle, emphasizing once again its importance.

Non-retroactivity of criminal law rule is a rule which may be derogated from in exceptional circumstances, such as the more favorable criminal laws and the situation of interpretative criminal laws.

The new Criminal Code regulates the non-retroactivity of criminal law, under section legality of incriminations.

Criminal law stipulates facts constituting the offense.

No person can be punished for a criminal offense that was not under the criminal law at the time when it was committed.

Romanian legislator creates by that rule interdependency between the principle of legality and non-retroactivity, saying the two principles shall be construed together.

That no person may be punished criminally for an act which was not under the criminal law at the time when it was committed, completes the principle of legality of incriminations and per a contrario, any act sanctioned which was not under the criminal law at the date of committing, comes out the sphere of legality, being unlawful and unfounded.

Given the new regulation retroactivity of criminal law has greater legal force, immediate sanction of the violation is the illegality incrimination.

According to Article 2 entitled Legality of Criminal Sentences of new Criminal Code, para. 2: "can not impose a penalty or can not take an educational measure or a security measure if it was not under the criminal law at the time the act was committed."

Art. 2 para. 2 governs the sphere of non-retroactivity of criminal law when applying penalties, educational measures and safety measures.

If the penalty or security measure or educational measure was not under the criminal law at the date the action was being committed, then applying it is impossible and the sanction of it is nullity.

Regulating the general framework of legality of criminal offenses and legality of sanctions with non-retroactivity of criminal law is of great importance that legislature gives the scope of criminalization and punishment of crime, which can not retroactive pain of illegality thereof. Romanian legislature thus reiterates principle of that before sanction, the law must warn moneat lex priusquam feriat.

In case of contiuous crimes,continued or usual if perpetration began under the old law that does not incriminate ,continued under the new law, the offender will be punished, but only for acts committed after the entry into force of the new law, thus non-retroactivity of criminal law refers to acts committed before its entry into force criminalizing such acts.

## **RETROACTIVITY OF CRIMINAL LAW**

Retroactivity of criminal law means expanding the empire of the law or its effects on acts committed before the entry into force of the law.

This extension can only exceptional, diverting be justifiably, the non-retroactivity of criminal law<sup>4</sup>.

Retroactivity of criminal law appears as a necessity with the change of social and economic conditions, facts alleged by a penal law subject to changing the degree of social danger in the sense of decreasing.

Retroactivity of criminal law is an exception to principle of criminal law that establishes activity as a general rule that criminal law takes effect only for the future.

Like any exception, retroactivity principle is of strict interpretation which is why, although contrary to the principle of non-retroactivity that activity and its criminal law, this principle is not a contradiction in the mind of the legislator and does not create an inequality in the criminal law system.

The principle of retroactivity of criminal law means a situation of extra-activity of the new criminal law that applies with exceptional character and deeds committed before the entry into force of the new law in two specific situations:

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<sup>4</sup> Pascu I., *Criminal Law. General Part* (Bucharest: Hamangiu, 2008), 96.

1. In case of the new criminal law that decriminalizes act up until the specific date constituted crimes *abolitio criminis*. Therefore, the principle of retroactivity of criminal law envisages the assumption to decriminalize the act by the new law, the law that criminalized the act came in force previously.

2. A second hypothesis of retroactivity of criminal law is that when is currently running main punishments, educational measures or security measures imposed under the old law, these measures cease on the entry into force of the new law. The new removes the consequences of the old one in which the act was incriminated. Retroactivity of criminal law is an exceptional remedy, justified by the defense of social values and social reality in terms of product changes that impose criminal policy changes through the decriminalization of acts which no social threat. The new Penal Code governing the retroactivity of criminal law.

### **RETROACTIVITY OF CRIMINAL LAW DESINCRIMINATION**

The new Criminal Code regulates the the retroactivity of criminal law in art. 4 entitled Application of criminal law decriminalization. By modifying the The new Criminal Code, the legislature aspires to provide importance to the retroactivity of criminal law meaning only retroactivity of criminal law desincrimination.

Retroactivity becomes of strict interpretation both formal and substantial unequivocally only to retroactivity decriminalization law.

The content desincrimination of criminal law stipulates that a particular act or certain acts are no longer crimes. In context to what a socially dangerous act which was due to changes in socio-economic conditions, may alter the seriousness abstract in the sense of minimizing, making it necessary to remove it from the sphere of illicit crimes. Removing criminal offenses from the sphere of illicit is done through a decriminalization bill.

Decriminalization appears to be a typical case and in any retrospective application of criminal law, whereas if the legislature has not held that that act would undermine the values protected by the

criminal law, the continuation of the old law for acts committed under her empire, lacks justification<sup>5</sup>.

Decriminalization law may include provisions to eliminate some requirements from the objective side, the subjective side, subject and object of crime. We believe that removing such a quality of perpetrator (of clerk or military military) contained in the new law can be considered a criminal decriminalization time

It can also be altered form of guilt required by law for the offense, ie changing the conditions required for the offense to be committed with intent, recklessly or intentionally exceeded (praeterintenție).

Retroactive character of the law of desincrimination is justified by the fact that you can not watch and judge an act which under new law enforcement lost criminal character, since there is no longer a legal basis to follow that act as not can continue serving a sentence for an offense that in the new law is not criminalized.

As regards the repeal of an offense criminalizing this act does not amount to decriminalization, it is possible that the act be referred to another criminal provision.

Așa cum am mai arătat, nu întotdeauna legea de abrogare a normei de incriminare dezincriminează fapta, de cele mai multe ori dispozițiile normei abrogate se regăsesc în cuprinsul altor texte de lege.

Prin urmare, în aplicarea legii penale, judecătorul trebuie să verifice condițiile de dezincriminare a unor fapte, deoarece este posibil ca unele infracțiuni să se regăsească fie în alte acte normative, chiar și sub o altă denumire.

As I have said, not always the law repealing the criminalization decriminalizes the act, most often the provision of the norm repealed are included in other legislation contents.

Therefore, during the application of criminal law, the judge must check the desincrimination of facts, it is possible that certain offenses are to be found in other acts, even under a different name.

After desincrimination law was adopted, it can cause the following effects:

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<sup>5</sup> Basarab M. et al., *Criminal Code commented*, (Bucharest: Hamangiu, 2007), 47.

a) if it occurs before been conviction, that during prosecution, will rule removal from criminal prosecution or be class cause, and during the trial will decide the payment, since the act is no longer under the criminal law according to art. 10 letter b Criminal Procedure Code;

b) if the law occurs after final conviction, the penalty will not enforce, and if its implementation started, shall cease. It will cease and execution complementary whether they were pronounced educational measures and measures of safety because there is no legal basis for their implementation;

c) if the law of desincrimination occurs after the execution of main and complementary punishments cease all consequences of a conviction. In this case decriminalization operates as a real rehabilitation;

d) if the deed was later decriminalized punishment pronounced in a series of offenses as a result of merging decriminalization will be dissolved, remaining in the competition other crimes, less crime decriminalized.

The law has the effect of desincrimination and removal of recidivism because a conviction for an offense which was decriminalized can not generate relapse.

Given that, it has committed a new crime, after previously committed a criminal offense in May which was decriminalized, it may decide to suspend parole or suspension of sentence under supervision.

Criminal law decriminalization has more powerful effects than the law of amnesty, because decriminalization affects the enforcement of safety measures and education, while amnesty law does not.

## **RETROACTIVITY OF THE LAW THAT STIPULATES SECURITY MEASURES OR EDUCATIONAL**

The law stipulates security measures or educational measures also applies to offenses which have not been definitively judged until the entry into force of the new law.

Retroactivity of these laws is due to the legal nature of the criminal law measures they cover.

According to the New Criminal Code of safety measures are aimed removing a state of danger and prevent the conduct under criminal law.

Safety measures are taken against the person who committed an offense under the criminal law, unjustified.

Safety measures can be taken also if the perpetrator does not apply a penalty.

Safety measures are:

- Order to medical treatment;
- Hospitalization care;
- Prohibiting employment of functions and professions;
- Special confiscation;
- Extended confiscation.

Safety measures are sanctions being taken against persons who have committed offenses under the criminal law, having the character of means to prevent the commission of new offenses in the future.

By their for defense, security measures protect society against acts committed by certain people who have come in such situations either because of diseases they suffer from either failure or insufficient training in the work they perform, what they do to make it unfit for held positions or activities provided, disabilities manifested during committing the fact<sup>6</sup>.

Educational measures are applied to juvenile offenders, aiming at rehabilitation in the best conditions of juvenile offenders, the new law which provides educational measures within which factors are involved with increased educational values will apply to offenses committed under the old law criminalized.

According to the New Criminal Code educational measures are non-custodial or custodial.

Non-custodial educational measures are:

- a) civic training course;
- b) supervision;
- c) depositing the week end there;
- d) daily assistance.

Custodial educational measures are:

- a) internment in an educational center;

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<sup>6</sup> V. Pasca and R. Mancaș, *Criminal Law. General Part*, (Bucharest: Lumina Lex, 2003), 82.

b) internment in a detention center.

Criticism of non-retroactivity of the law that stipulates educational and safety measures is that the retroactivity of the law an exception must be interpreted strictly or, retroactivity law providing safeguards also educational measures is not within the exception provided for in art. 15 of the Constitution. Thus, it appears that the retroactive application of criminal law in these institutions is unconstitutional.

Retroactivity the two categories of law is limited solely to the situation of facts which have not been definitively judged until the entry into force of the new law that stipulates safety precautions and education, which means that the law does not work if enters into force after the final judgment facts<sup>7</sup>.

According to Article 2 para. 2 of the The new Criminal Code, a penalty can not apply or can not take an educational measure or detention if it was not under the criminal law at the time when it was committed.

The provision of art. 2 para. 2 of the new Criminal Code is the expression of legality of sanctions in criminal law also criminal law embodies the activities only for the future, any exception to this principle is the strict application and interpretation.

The Romanian legislator sought to establish these provisions to avoid the misuse of the principle of retroactivity, to create premises for the proper application of the principle of legality of incriminations and the principle of activity of criminal law and to ensure respect for the rights of individuals who have committed offenses which did not provide for measures educational or safety at the date of their commission.

## CONCLUSION

Analyzing the new Criminal Code follows that the legislature decided to decriminalize some offenses that are not dangerous specific social or are overtaken by the realities of social life, or has not taken certain offenses already provided for in special laws, arguing that criminalizing an act in a single act is sufficient.

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<sup>7</sup>Boroi A., *Criminal Law General Part According to the New Criminal Code*, (Bucharest: C. H. Beck, 2010), 63.

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1. The Constitution of Romania;
2. The new Criminal Code;

# PRINCIPLE OF CRIMINAL LAW ACTIVITY IN THE LIGHT OF THE NEW PENAL CODE

Ivan ANANE<sup>1</sup>

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## **Abstract**

*The criminal law applies to offenses committed in time as it is in force. To determine the duration of activity of law that is important to retain the date of its entry into force and the date the law comes in force. The law required to be applied immediately, fully and continuously, ie the whole time is in effect for all cases arising under its criminal law specifically applies to all offenses committed as long as it is in force. The existence of the law until its entry into force is marked by four stages of Constitutional law adoption, promulgation, publication of the law and enforcement of the law. Entry into force of the rule of law as the limit of the initial criminal activity, criminal law proceedings, and the output of force is the final moment, the moment that marks the end of the application of this law. Determining when the offense is very important because it sets depending on whether it was committed while a certain law was in force and, therefore, subject off limits her or her action.*

**Key-words:** *principle, criminal law, duration, limits, repealing, moment.*

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## **INTRODUCTION**

The activity of criminal law is a principle derived from the constitutional rule of law stated in The Constitution of Romania which provides that the law only for the future, except for the more favorable criminal law.

The new Criminal Code regulates the activity of criminal law which provides that the criminal law applies to offenses committed in time as it is in effect.

The principle activities of the criminal law is constitutional order forcing itself the legislative power, under penalty unconstitutional laws passed, to pass laws that have only in the future<sup>2</sup>.

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<sup>2</sup> V. Pașca and R. Mancaș, *Criminal law.general part*, (Bucharest: Lumina Lex, 2003), 152.

The consequence of failure to comply with the constitutional provision unconstitutional norm attract criminal sanction that has past, ie what took place before the entry into force of the new law.

Constitutional rules are essential, from which no derogation is possible, therefore the principle of activity the criminal provision has a fundamental character, derogations from this principle is expressly and exhaustively provided by law, the exemptions allowed from it relates only to the law most favorable criminal can activate or ultra-retroactive, as appropriate, paving the way respect of the rights and fundamental freedoms.

Thus, the only exception to the principle activity is the application of criminal law more favorable criminal law for the succession of two criminal laws, one of which is more favorable to the situations that occurred in the past.

The constitutional rule is that the criminal law disposes only in the future, any violation of this rule may attract penalty of law unconstitutional and exceptions are expressly and exhaustively provided even constitutional rule and refers to the application of more favorable criminal law for acts committed in the past.

The efficiency of criminal laws in defense of social values is determined by four elements (factors, phenomena): time, space, facts and people. In terms of time, the criminal law is effective since its entry into force<sup>3</sup>.

Duration law should not be confused with the age of the law, the latter being considered since the law is born which is the promulgation of it, and from the promulgation until its entry into effect may take a significantly period of time, especially when the law stipulates its entry into force at a later date of publication. To determine the duration of activity of of the law, is important to retain the date of its entry into effect and the date the law comes out from the effect.

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<sup>3</sup> G. Antoniu et al., *Preliminary explanations of the New Criminal Code Legal*, (Bucharest: Universul Juridic, 2010), 42.

Legislative practice has settled the rule that most important criminal laws or penal codes or even some extra-criminal laws containing provisions of a criminal nature, should contain in their text, one date of entry into force subsequent to that of their publication.

The foundation principle of activity is that the criminal law, prosecution can not be done if the act was not under the criminal law, criminal law work being required by principle of legality of criminal offenses.

The principle activity of the criminal law distinguishes criminal law which limits existence since its entry into effect is brought to the attention of its intended recipients; thus the social values and the rule of law.

Society's position is underscored by the law in force at the time, to the facts which they consider crimes and how they are sanctioned.

The law must be applied immediately, fully and continuously, ie the whole time is in effect for all cases arising under its criminal law specifically applies to all offenses committed as long as it is in effect.

Art. 30 of the The new Criminal Code removes the strict nature of the rule *nemo censetur ignore*, bill by providing that it is not a criminal offense under the criminal law committed by the person who, at the time of perpetration, was not aware of the existence of states, situations or circumstances on which the criminal nature of the act.

The provisions of art. 30 refers to the aggravating circumstances which are removed if the perpetrator was unaware at the time of the offense, the aggravating character of them.

Applying the principle activity of the criminal law has a special significance in effectively combating crime as it is natural that crime would apply criminal law in force at that time, because it best expresses both the seriousness of the facts and the need to defend against social crimes.

## **DURATION AND LIMITS FOR IMPLEMENTING THE CRIMINAL LAW IN TIME**

The existence of the law until its entry into effect is marked by four stages of Constitutional law adoption, promulgation, publication of the law and enforcement of the law.

The entry into force of the rule of law applies as the limit the initial criminal activity, criminal law proceedings, and the output from the effect is the final moment, the moment that marks the end of the application of this law.

Any legal norm, and therefore the investigation will come into force will become active mandatory only from the date of bringing it to the attention of the public.

Effectiveness of the criminal law in time starts when came into effect, at which time becomes binding, and lasts until the moment when from the effect is removed. The existence of criminal law starts from the moment of its adoption and its legal effectiveness begins after promulgation after its publication in Monitorul Oficial.

We believe that the distinction between the two moments of existence of the criminal law - adopting and publishing - the criminal law becomes effective once it comes into force.

Precisely to avoid ignorance of the law by its recipients, the state performs an update to its knowledge, through means of informing the general public through the press, radio and television.

There are situations, those of laws more complex, a bigger expanse of large dimensions - the legislature, saying that it is necessary to leave to the population and those entitled and obliged to apply the law, a period of time greater than at publication until its entry into force, for a better understanding and knowledge of it, provided in its text an adequate later date on which it enters into force, becoming active.

For some laws that are fundamental to the conduct of social activities is customary, the legislative technique, to include therein a provision indicating a date of entry into force subsequent publication.

In conclusion, the entry into force of the law is achieved in two ways: either at the date law explicitly stated therein, usually in its final

provisions and its publication in the Official Gazette of the law, when in the law provided that.

Regarding the legal criminal norm, it is fundamental to regulate a certain type of relations and social relationships ensured by a certain social structure, which is also determined by certain social, economic, ethical, political, religious, meaning the essence, basis, motivation that law.

When basis of the law is being challenged by the reality of social life, it can not act only by adapting its institutions to substantial new social relations.

If it is not possible to amending or complementing the old law so that it can be applicable in the future or if its application is incompatible with its social existence, the legislature disposes the lapsing of law, namely the removal of all or part of the law.

Criminal law should not be the only way to edictare imperative rules of conduct during governance as how regulation will have a duration consistent generalization the essence of human behavior.

Lapsing of a criminal law is done in several ways<sup>4</sup>:

- repealing

- modification

- Arrival at term or termination of the exceptional circumstances that have led to a law.

Repeal of law is the prerogative of the legislator by a law with equal legal force (contrarius actus) disposes lapsing of the previous law, entirely or a part.

Repeal of law is the main way out of force of a law through another law with the same legal power.

Considering way of expression, repeal of laws may be express or tacit or implied.

The express repeal is a procedure which is being disposed, explicitly, that a certain law or provision of law is repealed.

Repeal tacit, it is that the new law does not look quite explicitly that an earlier law is repealed, but it follows implicitly from the context

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<sup>4</sup> V. Dongoroz et al., *Theoretical explanations of the Romanian Penal Code, General Part*, vol. I (Bucharest: Academiei, 1969), 64.

that the two laws regulates the the same subject under the principle of *lex posterior derogat priori*.

In terms of the extent of its effects may be total or partial repeal.

Repeal imply total removal from the force of a law in its entirety.

Regarding partial repeal, it covers only certain provisions of a law.

Non-applying criminal enforcement for a longer period a time, does not mean the lapsing of the respective national rules; acts committed in time that such a rule is in force will be penalized by the rules established by this this norm and the offender will be liable according to the criminal sanctions regime provided for by that time.

Not to be confused with the notion of repealing desincrimination. .

Decriminalization a provision criminalizing a particular act does not mean that that act was decriminalized, that rule may remain in the content of another legal text.

Law changed his name and place of incrimination, the content is the same.

The new Penal Code expressly provides that provisions of special laws shall be repealed by the entry into force, and their correspondent is part of its special contents.

The normative acts of the contents which were repealed certain provisions of the criminal law, as shown by way of example above, shall remain in force and will take effect in regard to them operating a partial repeal.

The most common form of removal of existing provisions by changing some parts of the criminal law is to amend the criminal law.

Do not use to express a change, playing only fragments or phrases in a text.

Modification must contain all the text in question, contained in article, paragraph or marked item of a list.

Modification or amendment of an act only if it does not affect the general concept or unitary character of that act, or if the whole or most of the legislation in question.

Act is replaced by a new regulation and will be entirely repealed.

Amending and supplementing certain acts by the effect of entry into force of the New Criminal Code, it is expressly provided for by the

legislature, showing that it is the content of each item from the content is changed or added special laws.

Lapsing of a law can be done by reaching within the expiry date of that law or the law, the way out of temporary laws which effect feature in itself therein indicating a time period in which the rule out of effect.

Another way out of the effect of laws is the disappearance of the conditions imposed adopting the standard in question.

This approach is characteristic for exceptional laws adopted by the occurrence of unforeseen circumstances which led to the adoption of such rules.

Some norms for reference in that particularise is completed by reference to other legal text whose provisions and incorporates them implicitly.

In this way, those provisions to which reference is made are considered to be in effect even if the law was repealed contained<sup>5</sup>.

Completing the repeal or amendment of rule by the legislature have direct effects on the rule a reference or repealing it or changing it, as necessary.

We believe that the rule follows the legal reference of the standard main principle we can say sequitur accesorium main reference standard following norm completing fate.

With respect to rules framework, known as criminal norms in white which enter into force following its publication in Monitorul Oficial, the effects themselves (incrimination moment from operating criminal liability) operating at the effective date of the rule and not completing the entry into force of the standard framework.

Conditions of criminality, criminal liability conditions and ways of committing the crime are specified within the norm completing.

## **INAPPLICABILITY OF LAW**

Status of standards applicable criminal is a new situation in which a penal law without being repealed, it can not be applied because it was ruled by the Constitutional Court decision that found unconstitutional

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<sup>5</sup> V. Pașca, *Lecture of Criminal law general part*. Vol. I (Bucharest: Universul Juridic, 2010), p. 72.

them and not fulfilled within 45 days after that law shall be deemed revoked<sup>6</sup>.

Constitutional Court decisions finding the unconstitutionality of a legal rule (law, ordinance, or other provision of the contents of normative texts) is binding from the moment of its publication in Monitorul Oficial and takes effect only for the future.

If the declaration of a rule of law as inconsistent with constitutional principles, operates an express repealing of that rule, if Parliament or the Government does not agree with the unconstitutional provisions of the Constitution.

We believe that the criminal law containing provisions more stringent should not retroactive, the law contains more favorable provisions, but ruled unconstitutional, must apply to all offenses committed during what was in force.

The reason this solution, besides the mandatory application of the more favorable criminal law, is that the person has committed an offense subject to a more favorable laws can not be held liable and sentenced after a stricter sanction regime.

## **THE MOMENT A CRIME TAKES PLACE**

Determining when crime takes place is very important because it sets depending on whether it was committed while a certain law was in force and, therefore, subject off limits it or it action.

Difficulties arise when the deeds start to be committed under the rule of law and exhausted under another law, such as crimes continue, continue, and usually progressive.

In the event of multiple criminal law, ie offenses that are beginning to be committed under a law, but is exhausted under another, whose consumption is spread over two or more law applicable law is that from the the time exhaustion offense , production last result.

The same concept, of unity illicit criminal acts adopted in the case a criminal venture - incitement, complicity - which will be judged by the law in force in time of the offense by the author.

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<sup>6</sup> A. Boroi, *Criminal Law general part, According to the new Criminal Code*, (Bucharest: C. H. Beck, 2010), 63.

It is not enough to determine the duration of activity of the criminal law to determine the law applicable to the criminal justice born of the offense because sometimes criminal activity takes place in the time period that may take any of the ways out of force of the law currently active commencement of criminal activity.

The issue is not in case of the crimes of instant consumption, that is consumed with committing the action or inaction, the law applicable to them is the one that was in force at the time recalled because not all cases when crime takes place coincides with the time consuming offense, respectively continuous offenses, and usually continued or progressive offenses as carrying out criminal activity requires a period of time, it is necessary to determine the time of the offense and therefore law applicable to the juridical report born of such offense.

Establish when the crime was consumed is of particular importance, as compared with this time, determining cases a succession of criminal law, the law applicable to the specific case, is check the incidence of normative acts of amnesty, calculate the limitation period criminal liability.

Regarding time of the offense, it is of particular importance because it determines whether the offense was committed during a law in force, ie within the limits of it action or outside them.

Depending on the time of the offense is criminal law enforcement, prescription flowing at this time, when crime takes place is important in terms of establishing guilt causes of impunity are incidents such as minority.

The crimes continued, continuous and usual are characterized by repeating at different intervals of time, under the same criminal intention, of acts each of the crime performs contents same offense.

Unlike the consumed offense, which is characterized by instantaneous consumption, crimes continuous, continue and is usually characterized by their performance that extends over time.

The offense is consumed after the first action or inaction, but exhausted until the time of the last action or inaction<sup>7</sup>.

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<sup>7</sup> V. Pașca, *Lecture of Criminal law general part*. Vol. I (Bucharest: Universul Juridic, 2010), 75.

Crimes continuous criminal activity are characterized by extension, the date being the date of termination crime takes place criminal activity.

Determination of the applicable criminal law is made at the time reported when exhaustion of criminal activity, that last act of all time committing criminal acts.

So the applicable law is in force at the time of termination of criminal activity, when exhausted as continuous crimes committed by defendant.

When timeframes are very small or plurality of similar acts is committed in the same circumstances, the offense can not continue, but we are in front of a simple crime unit.

In fact offense is depleted or exhausted outcome consumption rear track crime, constituting its last moment.

It is to amplify either follow the original (eg, if serious bodily harm, the victim dies, so it produce its worst constituting and when exhaustion of criminal activity at the time) or from the occurrence of another track (eg the offense of robbery victim dies).

Prior exhaustion of criminal activity of the crime is always crime, when crime exhaustion of criminal activity is particularly important to establish the legal classification of the offense committed, law enforcement amnesty, calculating the limitation for criminal liability, etc.

Exhaustion are likely outcome only certain offenses such as the crimes continuous, the crimes continued, the progressive and the usual.

In case of offenses usual the date of the crime taking place is time last act of execution.

The Criminal Code does not define is usual, but in part to special and other laws with criminal law provision are sufficient laws criminalizing of such legal forms of crime of unity.

Substantive components of the crime usually consists of an act or omission prohibited by law and requires, the following conditions: to consist of several pieces of equipment; these material acts, considered by themselves, have no criminal nature itself; Finally, the material acts to be committed repeatedly showing conditions that are customary or constitute an occupation.

Repeating the material acts is undoubtedly a general characteristic of all crimes usual, but as mere act material are not normally accustomed nor The practice, required explicit or implicit rules on the indictment because they involve more frequent and cohesion the material acts which constitute typical action.

In the number of documents required for the offense, the law makes no statement and would not have been possible, because the notions of committing repeatedly or occupation shall, on a case by case basis, a specific, a feature that exclude a priori resolution.

No familiarity, no The practice does not result only from the number of documents, but also how they have succeeded in time, ie from the interval separating them, which should not be too long, and from the character more or less systematic repetition.

The requirement habit of repeating acts under occupation or content always follows legal offense.

Once the material acts were repeated enough in conditions likely to express habit or The practice, the offense usually consumes.

If after reaching time-consuming, the author continues the perpetration of the same kind, such acts, regardless of their number, they are integrated into the content of the same offense, which will run when the perpetrator will commit the final act similar material to those who preceded him. Specific activity may be crime usually end either deliberately, by author, or by the action of judicial bodies.

Law enforcement criminal offenses usually will be, as the offense continues or the continued, taking into account the time it was committed last action or inaction<sup>8</sup>.

In case of inheritance laws, if criminal activity was extended after the entry into force of the new law - by definition, more severe - will apply the provisions of the latter.

By exception, will be incident the previous law, but only if under the new law was committed a single act or an insufficient number of acts to characterize or The practice habit.

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<sup>8</sup> M. Zolyneak and M. Michinici, *Criminal law. General part* (Iași: Chemarea, 1999), 130.

If the perpetrator of the offense usually start before age 18, but continued it and after becoming major criminal treatment will be applied what is provided by law for adult offenders.

Whenever criminal activity was extended after the adoption of an amnesty or pardon act, the perpetrator will not benefit from its provisions.

As regards the limitation of criminal liability, it starts to run from the date of completion of the last act of the action incriminated material component.

To determine the nature of the habit of a crime, all the material acts must be committed subject to a criminal law that criminalize them.

In the context of the criminal activities that characterize the crimes continued, continuous and usually conducted in a period of time in successive two or more criminal laws, the law applicable to all criminal activities is the law from the the time when the offense shall be deemed committed after awards abovementioned at the time that moment exhaustion of criminal activity, unable to rely more favorable law under which began criminal activity.

Complex offense type or basic form is characterized in that its content falls structure, as a constituent, action or inaction the crime is itself an offense under criminal law.

This form of complex crime arises in two ways: by bringing together two or more offenses punishable distinct criminal law, in which case they lose their autonomy criminal and formed the legislature, an offense separate set a time criminal separate (eg robbery); by absorption, in which case the form type consists of a single action or inaction which is itself a crime, but that, this time, the law adds some additional conditions that make the act as a whole to acquire another quality and other legal classification.

Complex offense, aggravated form of the offense qualified or there when complex enters into a criminal offense as aggravated circumstantial element, action or inaction complained that the act of its own.

The progressive offense is defined as the offense side of objective, after reaching time-consuming appropriate to the particular crime was amplified by nature, and without any intervention of the perpetrator,

causing new consequences hurtful, corresponding to a serious crime or a variant normative aggravated the same offense<sup>9</sup>.

Offenses progressive characteristic is that their material element is amplified gradually, but always amplification occurs without the intervention of the author.

There are two ways of progressive crime: first when amplification occurs through the nature of the act, without intervention of external forces, and second, when amplification occurs due to the addition of circumstances fortuitous that amplifies the result, for example, a fire neighbor initial intervention was amplified by causing the spread of fire to other buildings. It is noted that the outcome amplification without the intention of the perpetrator of the crime is the essential characteristic of progressive crime.

Because amplification of result gives rise to progressive crime it is necessary, on one hand, the likelihood of larger consequences resulting from the nature of the offense and, on the other hand, as a result enhanced to attribute the act the crime one has produced a legal classification particular, heavier than that which gave him the initial result.

The production of boosted outcome can follow immediately or after a relatively short period of committing the action or inaction, but he can occur and later, sometimes even after passing a great time of the crime base. Criminal liability of the perpetrator will be held against the worst result, if there are adequate subjective position of the perpetrator and if it is possible.

For the offenses to progressive crime when the date of execution by the offender acts materials that characterize the objective side does not coincide with the date of the final outcome, to put the question in relation to which of the two moments (the implementation of the action / inaction or producing final follow socially dangerous) incidents are criminal law provisions penalizing the offender.

The excess of competing criminal provisions, provides redundancy criminal justice system, being generator of confusion in judicial practice

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<sup>9</sup> C. Bulai and N. Bogdan, *Manual of criminal law. General part* (Bucharest: Universul Juridic, 2007), 139.

and constituting one of the ways by excess pollution legal incrimination, so it is desirable to avoid such situations.

We consider that the law applies to cases of progressive crime is the criminal law in force at the time of the alleged action or inaction, according to the theory of action.

The new Criminal Code adopts the same principle of criminal law enforcement, offenses progressive action according to theory, as well as for continuous crimes continued, and usually continued. Law applicable to incitement or complicity is the law in force at the time of the offense, if the offense is immediate or instant execution.

Therefore, the law applicable to incitement or complicity offender is applicable law, that the criminal law in force at the time of the offense by it, because if there is a unit of holding criminal offense.

## **COMPETITION OF CRIMINAL LAWS**

In the evolution of criminal law, there is competition of criminal law over time when two or more criminal laws regulates the same social relationships, one of the general criminal \_ being a law, criminal law and other special or exceptional<sup>10</sup>.

Special Law occurs after the general law and creates a special regime, imposing certain rules that will apply on some situations and for some time.

In event of multiple criminal laws is applied special law to the disadvantage of the outstanding general one or in relation to the special and general. Special laws always are completed with provisions of general law.

The subsidiarity principle requires the existence of two laws or norms governing the same subject, the subsidiary law, incorporatin its applicability to primary law whose application excludes the application of the former *lex primaria derogat subsidiary laws* .

Subsidiarity is used by the legislature expressly when desired resolving a contest of criminal provisions that by simultaneous application would generate an ideal contest of crimes.

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<sup>10</sup> M. Popescu, *Criminal lawl. General part* (Pitești: Independența Economică, 2008), 139.

Consumption would regulate criminal laws competition when described by a rule that is in fact absorbed by a set of other rule which has greater importance, *consumens derogat consumptae laws*.

## CONCLUSIONS

Excess of criminal provisions in a legal system may lead to some confusion in judicial practice and to non-unified judicial solutions, so it is desirable to avoid such situations.

When there is still a contest of criminal provisions, must find applicability the activity of principle of criminal law, which is one of constitutional order, which requires the unconstitutionality of rules that dispose to the past.

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### Legislation

- The Romanian Constitution
- The new Criminal Code

# THE CRIME OF "BUY INFLUENCE" IN THE NEW PENAL CODE

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**Abstract:**

*The entrance into force of the new Criminal Code – namely of the Law No 286/2009 – on the 1<sup>st</sup> of February 2014 has brought a series of modifications in the constitutive content of the offences stated by the old Criminal Code, also introducing some new ones. Also, this new legislative document took over a series of offences stated, until its entrance into force, by many special laws, grouping them in its content.*

*Under this aim we scored the introduction of the offense of buying influence in the content of the new Criminal Code - offense until 1<sup>st</sup> of February 2014 was laid down in art. 6<sup>1</sup> of Law no 78/2000 on preventing and combating corruption.*

**Key-words:** *crime; penal code, corruption, influence*

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## COMPARATIVE ISSUES IN REGULATION ON CORRUPTION BEFORE AND AFTER 1 FEBRUARY 2014

The legislature decided to dedicate the new Criminal Code express a distinct chapter corruption offenses. In this way it appears as the most important title in crimes falling. The decision to place the crimes of corruption in the foreground can be used without difficulty, given the magnitude of the phenomenon and the firm intention of the Romanian society to eradicate it.

The innovative elements of this chapter is to systematize and change in the approach to protecting social values specific to these rules incrimination.

Thus, the crime of buying influence was brought to the contents of the Criminal Code. In regulation prior to February 1, 2014, the offense found only in the special law, Law no. 78/2000 on preventing, detecting and punishing corruption in art. 6<sup>1</sup>.

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Among the controversial effects of the old positioning, the most important in terms of jurisprudence was the one on the confiscation offered to buy influence in the event of termination notification act before judicial bodies.

If the act fall within the provisions of the special law, the provisions on the return of influential given by the buyer produced its specific effects.<sup>2</sup>

On the other hand, if the crime of buying influence is committing to an official who does not come into Law no. 78/2000 on preventing, detecting and punishing corruption, then the act of buying influence was not typical and art. 6<sup>1</sup> para. (4) became inapplicable. Good was confiscated, being a good obtained by committing a crime of influence peddling under art. 257 para. (1) of the old Criminal Code, common object of restitution can not be provided in the special law (not applicable in this example).

By placing the crime of buying influence and was the place where that is in the Criminal Code, these inequities are eliminated, and Decision no. 59/2007 given by the High Court of Cassation and Justice in resolving the appeal on points of law regarding the scope of art. 6<sup>1</sup> para. (4) of Law no. 78/2000 no longer current.

In some penal systems, corruption is dealt with differently in relation to *the legality or illegality of attribution* required civil bribe-giver.

Previous Criminal Code have this feature just in case the offense of *receiving undue benefits*, while "rewarding" official act was done exclusively for legal fulfilled.

In the new Criminal Code, in principle, in terms of legal classification, indifferent circumstance if requested by bribe-giver official act is or is not a legal character.

From this rule there is an exception, that the acts committed by persons covered by art. 175 para. (2) the new Criminal Code respectively assimilated civil servants.

In this case, the legislature only sanctioned bribery in connection with the failure or otherwise fulfill the duties by persons treated as civil

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<sup>2</sup> Art. 6<sup>1</sup> para. (4) of Law no. 78/2000.

servants from the perspective of criminal law<sup>3</sup> and not in connection with the performance or speed up fulfillment of duties. Under this restriction, notary deed - person listed as civil servants provided by art. 175 para. (2) the new Criminal Code - to levy an emergency tax for faster authentication of an act will not meet the typical crime of bribery.

### **BUYING INFLUENCE IN THE NEW PENAL CODE**

Regarding the crime of buying influence, it is now criminalized in art. 292 of the Criminal Code. A first positive aspect relates to the fact that the legislature has decided, correctly, that this offense (which is closely related to the traffic of influence) to be in the same bill, namely the Penal Code, Chapter devoted corruption offenses. This decision will not only produce formal effect, but will produce significant consequences in relation to the causes of punishment, restitution in case of self-denunciation of goods given or received, etc.

I believe that in the light of reason incrimination, the act of buying influence was not criminalized in the previous Criminal Code, because probably legislature at the time is a seemed that there is a great distance between a person who wants to solve a problem with an official through discussions or transaction with a third person. This distance does not characterize either now or under the old Criminal Code offenses of corruption "classic".

I believe that the decision to criminalize the buying of influence trafficking offense bilateral influence is obvious in light of coherence and consistency of sanctioning such acts. Although steps are removed from the influence buyer when a potential breach of any service functions by a public official, these two offenses of violating reveals the same social values.

While both behaviors are acts preparatory to a possible future act of corruption, I believe that the two behaviors there is a difference in the intensity with which concretely endanger protected social value. This difference should be reflected in the special limits of sanctions applicable to the two works (identical limits in the current Criminal Code).

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<sup>3</sup> Art. 289 para. (2) of New Criminal Code.

Official concerned of the text in the new penal code criminalizing (ie clerk who wants to influence buying) is the public official as defined in art. 175 para. (1) and (2) of the new Criminal Code and not official, as it was in art. 6<sup>1</sup> of Law no. 78/2000 (as this law before amendment by Law no. 187/2012).

As noted above, on the wording change will produce major effects, because art. 308 of the new Penal Code stipulates that the text of incrimination also applies to acts committed by or in relation to persons who work, permanent or temporary, with or without remuneration, a commission of any nature in the service of individuals from those set out in art. 175 para. (2) of the Criminal Code.

Given the explicit provision for the offense of bribery of how the clerk can perform or not perform their duties, were imposed and updating text offense of buying influence.

In the previous regulation, the act is committing it to determine the official to do or not to do an act of service within its remit.

With the entry into force of the new Criminal Code offense provided by art. 292 para. (1) provides that the act is committed buyer influence to induce the public official it meet, not meet, to expedite or delay the performance of an act falling within its service duties or fulfilling an act contrary to these duties.

As noted, the information hinders rather than facilitates the application text and can cause controversy in legal practice for speeding hypothesis, which, although not found the purpose of the offense of bribery committed under art. 289 para. (2) the new Criminal Code, appears instead as motivation offenses of traffic of influence and influence buying.

Judicial practice will solve various situations that might create such cases, the purpose of jurisprudence which is to crystallize the many interpretations that would give such issues just imagined this moment.

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### **Legislation**

3. Law 286/2009 on the Criminal Code.
4. Law no. 78/2000 on preventing, detecting and punishing corruption.

# THE OFFENSE OF CHEATING. SHORT HISTORY. COMPARATIVE ANALYSIS OF LEGISLATION

Camelia ȘERBAN- MORĂREANU<sup>1</sup>  
Daniel CREȚU<sup>2</sup>

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## **Abstract**

*This article aims to treat the offense of cheating, not in a complex way, as she appears in treaties specialty, but by highlighting its main aspects, from the point of view of substantive criminal law, but also in terms of criminal law, indicating, where necessary, of the defining elements from the perspective of establishing a legal framework and correctly folding exact situation. The theme chosen will stop and upon a brief comparative analysis of the crime of cheating as it was referred to the Criminal Code in 1969 as Romanian legislature has sought to criminalize the new Criminal Code.*

**Key-words** : *crime, fraud, punishment, legislative change*

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## **INTRODUCTION**

About offense of cheating, as well as about all crimes committed against property has written extensively in the literature, certainly more on under the old legislation,<sup>3</sup> the crime being analyzed, especially in various criminal cases pending before the courts, there structure itself where it was superimposed on the offense committed by reason of determining whether or not criminal nature of action offender.

I mentioned that obviously the literature were more under the old Criminal Code, given the relatively short time that has passed since the

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<sup>3</sup> The Criminal Code of 1968 (Law no. 15 of 1968) came into effect in force on 1 January 1969, which is why it's known as the "Penal Code of 1969". The normative act was republished in the Official Gazette, Part I, no. 65 of 16 April 1997.

entry into force of the new Criminal Code<sup>4</sup>, sufficient, however, for the emergence of specialty papers defining, but and some crystallization of jurisprudence in terms of new legislation, namely the existing legal framework.

Criminal laws have always been criminalized and sanctioned, since ancient times, different types of acts committed against property, some more severe than others severely. As will be seen all through this analysis fall into the latter category and the current penal law offense of cheating is, the legislature and criminal policy reasons, fined more gentle.

Because in the past against the facts were very common heritage, it came to punishing increasingly harsher them. In a work specialty was referring to the fact that in the feudal period, which has gradually expanded crackdown criminal, petty theft were punished with flogging, but the third theft apply the death penalty (*rule tres furtileus*) penalty capital and it can be applied on the first offense if the theft was very serious.<sup>5</sup>

The same reference work also refers to the old Romanian law, which included rites Vasile Lupu and Matei Basarab, codices criminal by Alexandru Sturdza in Moldova and Barbu Știrbei in Muntenia, legislation that contained provisions on crimes against heritage.<sup>6</sup>

Romanian Penal Code of 1864<sup>7</sup> and most of 1936<sup>8</sup>, although largely copied foreign criminal codes have incriminated themselves in

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<sup>4</sup> Law no. 286 of 17 July 2009 on the Criminal Code, published in the Official Gazette, Part I, no. no. 510 of 24 July 2009 amended and supplemented to date by: - Law no. 27/2012 amending and supplementing the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 180 of 20 March 2012; - Law no. 63/2012 amending and supplementing the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 258 of 19 April 2012; - Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 757 of November 12, 2012.

<sup>5</sup> Gh. Nistoreanu et al., *Criminal Law, Special Part* (Bucharest: Nova Europe, 1997), 189.

<sup>6</sup> Gh. Nistoreanu, *Criminal*, 189.

<sup>7</sup> This law was promulgated on October 30, 1864 and entered into force on May 1, 1965, as modified successively by several laws, to March 18, 1936, when it was repealed by the entry into force criminal Code of 1936.

very severe offenses against property. Incidentally, the same attention was paid to heritage and previous laws, namely the Penal Code of 1826, applicable in Moldova and Muntenia in the Criminal Condica, from the time of Barbu Știrbei bill designed in the period 1850-1853, being force until 1865.

The aftermath of 1944 has led to legislation in full compliance with the political changes that occurred after that time, which continued under the rule of Romanian Criminal Code of 1968. In fact, since its entry into force, the body normative act was a discrepancy difference between the legal regime that applies to state property and private property who accompanied.

Only after 1989, namely the Constitution of 1991<sup>9</sup> was returned to legal decency that accompanied previous statutes of 1944, is owned equally protected. Otherwise called "Crimes against property" and Title III of the Criminal Code of 1969 arose as a result of the entry into force of Law no. 140 of 1996 amending and supplementing the Criminal Code.<sup>10</sup>

Under the old Criminal Code, according to the specifics of each of the crimes against property, given the material element, they were divided into three categories: **a)** offenses of theft, in falling stealing, robbery, piracy, concealment; **b)** offenses of fraud or breach of trust, fraudulent management, fraud, embezzlement and appropriation of property found and **c)** offenses of arbitrariness, a category in which we find destruction and disturbance of possession.<sup>11</sup> We believe that this classification is fully valid in terms of the new Criminal Code, of course,

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<sup>8</sup> Representative in its time, since, according to its name they wanted a genuine act of "unification law" and is best known as the "Code Carol II" was published in the Official Gazette, Part I, No. 73 of March 26, 1936.

<sup>9</sup> Constitution of 1991 in its initial form, was adopted at the meeting of the Constituent Assembly of 21 November 1991 was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and entered into force after its approval by the national referendum of 8 December 1991. It was also amended by the Law amending the Constitution no. 429/2003 published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003

<sup>10</sup> Published in the Official Gazette, Part I, no. 234 of September 8, 1997.

<sup>11</sup> Gh. Nistoreanu et al., *Criminal.*, 198.

with reference to each of the offenses heritage as they have been amended and which, especially in relation to the authors of the current Criminal Code were the explanatory memorandum discussion.<sup>12</sup> According to this latter act, drafting and adoption of the new Criminal Code was not a simple manifestation of political will, but rather, *"a corollary of economic and social evolution, and the doctrine and jurisprudence"*.

As we mentioned above, in the light of this Article shall require a content analysis of the offense of cheating in both versions of the legislation, the old Criminal Code and the new Criminal Code. Also in the explanatory memorandum, the authors demonstrate that the current Criminal Code drafting a new code was required, among other things, the need readjustment to normal sanctioning treatment.

It was here referring to the existing sanctions regime under previous legislation showing that the practice last decade has shown that increasing the punishment was excessive limits practical and effective solution to combat crime. It should be noted here that, indeed, if the Criminal Code from 1969 cases were very rare, even nonexistent lately, the courts pronounced sentences to be specially geared towards maximum. On the contrary, it was considered, mainly the principle of humanity, ruling criminal penalties rather falling in the first half of the range on penalties.

For the purposes of the above, as is well known, the offense of cheating under the provisions of art. 215 of the Criminal Code of 1969<sup>13</sup>

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<sup>12</sup> As it appears on the site <http://www.cdep.ro/proiecte/2011/100/00/0/em100.pdf>

<sup>13</sup> Art. 215 of the Criminal Code of 1969 " Cheating " (1) Misleading a person by presenting as true a false or misleading facts of a true facts in order to obtain for himself or for another benefit unjust and caused material damage if it is punished by imprisonment from 6 months to 12 years. (2) The cheating committed by the use of false names or attributes or other fraudulent means shall be punished with imprisonment from 3 to 15 years. If fraudulent means constitutes in itself a crime, the rules on competition offenses. (3) induction or maintenance error to a person on the occasion of the conclusion or performance of a contract, committed so that, without that error, the wrong would not be completed or executed contract under the terms, is punished with the punishment provided in the preceding paragraphs after distinctions shown there. (4) Issuance of a check on a credit institution or a person knowing that the capitalization of there the supply or the cover required and the deed to withdraw after issue the supply, in

provided, in the form of simple imprisonment from 6 months to 12 years, because the variants qualified aggravated imprisonment to reach and up to 20 years, as stipulated paragraph 5 where cheating that he had serious consequences or material damage exceeding 200,000 lei or a particularly serious disturbance to work.<sup>14</sup>

Moreover, a comparative analysis can distinguish that penalty limits of the old Criminal Code, concerning both the offense which concerns this article and other crimes against property, were sanctioned most drastic in comparison with other European legal systems, not to mention that there are states that have suffered throughout history, events similar to those in Romania 1950 and the following, referring here to the political regimes in place.

Unlike the previous regulation, the current Criminal Code provides for the content of Article 244 punishing crime of fraud with imprisonment from 6 months to 3 years (para. 1), and in aggravated form of the use of names or attributes falsehood or other fraudulent means (para. 2), minimum and maximum limits of the penalty shall be increased, being from 1 to 5 years.<sup>15</sup>

Attempting an explanation of the new penal policy, from the perspective of those specified in the Explanatory Memorandum to the new Criminal Code indicated that its draft aimed mainly following five objectives: **a)** to create a coherent legal framework in criminal matters,

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whole or in part, or to prohibit the drawee to pay before the end of the presentation in order shown in par. 1, if it has caused damage check owner, shall be punished with the punishment provided in par. 2. (5) The cheating that had serious consequences shall be punished by imprisonment from 10 to 20 years and removal of rights.

<sup>14</sup> Art. 146 of the Criminal Code of 1969 under the name marginal provide "very serious consequences" following: The serious consequences means a material damage exceeding 200,000 lei or a particularly serious disruption of business caused a public authority or any of the facilities which art. 145, or other legal or natural persons.

<sup>15</sup> Art. 244 new Criminal Code " Cheating " (1) Misleading a person by presenting as true a fact false or misleading of accepted truths, in order to obtain for himself or for another a patrimony unjust and if damage was caused, shall be punished with imprisonment from 6 months to 3 years. (2) The cheating committed by the use of false names or attributes or other fraudulent means shall be punished with imprisonment from one to 5 years. If fraudulent means constitutes in itself a crime, the rules on competition offenses. (3) Reconciliation removes criminal liability.

avoiding unnecessary duplication existing rules in force in the current criminal Code and special laws; **b)** simplify the rules of substantive law, designed to facilitate applied uniformly and expeditiously in activity of judicial bodies; **c)** ensuring the satisfaction of the requirements arising from the fundamental principles of criminal law enshrined in the Constitution and covenants and treaties on fundamental human rights to which Romania is a party; **d)** transposition in national criminal law regulations adopted in the European Union; **e)** harmonizing Romanian criminal law systems of other Member States of the European Union as a prerequisite for judicial cooperation in criminal matters based on mutual recognition and mutual trust.<sup>16</sup>

Under a first analysis, if only visual, note that current legislature sought to restructure the entire offense cheating, if only because they are criminalized now fewer ways than in the past.

The new Penal Code has agreed to sign up to assimilated cheating provided for par. 3 of the Criminal Code of 1969, no longer maintained the situation induce or maintain in error a person on the occasion of the conclusion or performance of a contract, further analysis in the field mentioning that he done so anyway because this version was included that provided for in paragraph 1 with more comprehensive. It is here met the principle governing the entire new Penal Code, aiming to be a simplification of the contents of criminal offenses, the desire for a more complete coverage and classifications of the various offenses committed.

Also in the Explanatory Memorandum argued that the crimes of trust provided and the old Criminal Code were introduced certain changes that they wanted to put texts in a position to better respond to the need to repress ways to commit such acts, as they were they unearthed by law.

Dismissed thus aggravating the provision offense of cheating the Convention cheating through checks and cheating that produced severe consequences of previous regulation. It should not be construed in any way as such statements that are not sanctioned by the criminal law, but on the contrary.

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<sup>16</sup> <http://www.cdep.ro/proiecte/2011/100/00/0/em100.pdf>

In the current Code, fraud is incriminated in a type variant and a variant aggravated punishment appropriate limits to which I referred earlier. Both versions reproduce faithfully to the content art. 215 par. 1 and par. 2 of the Criminal Code of 1969. The difference is that the expression "*unjust material benefit*" was replaced by "*patrimony unjust*". As stated, it called for the better in light of the consequences of the offense of cheating as an act against property.<sup>17</sup>

In both regulations of the offense, the previous and the current consumption occurs when executing the action intended is carried through and is produced in this way, and the immediate consequence, which is one specific offense of cheating, namely of misleading. Obviously there committing repeated acts of crime will assume the correlative a moment of exhaustion and its legal relevance in terms of criminal law.

And in case of new regulations, and in the other, the Code previously subject to special legal is given to those social relations of property issues whose birth, progress and development leads to the need for what literature originally named and lawmaker took thereafter as good faith and confidence that must accompany each different legal relationships that occur between subjects of law. The aim is to prevent damage that might occur, imposing protecting proprietary interest in any of its forms.

Given that, as I referred earlier, paragraphs 1 and 2 of art. 215 of the Criminal Code of 1969 are listed in the article content. 244 of the Criminal Code, it is obvious that the whole structure of the offense is the same and in terms of subjects and material object of the offense, but also in terms of content and the place of incorporation or subsequent offense.

Where special factors arise, according to the deed itself they can behave a different classification than the cheating. This is the case, for example, the active subject of the crime, which, if it has a certain quality, attracts a different framing. This happens when the active subject is an official public act of deceit committed by him in exercise of the powers of service leading to the existence of the offense of abuse of office, not

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<sup>17</sup> G. Antoniu et al., the *Explanations new penal code, Vol. III* (Bucharest: Legal Publishing House, 2015), 533

deceit. Also, if the act was committed in certain circumstances, such as more people are retaining certain aggravating circumstances, as if certain features may not be classified in any of the texts incriminating Criminal Code, but by committing them reveals a state of danger of the offender, the court will appreciate over them when determining the penalty to be applied.

Although it has shown that the structure of the offense is the same in both legislation when referring only to the first two paragraphs of art. 215 Criminal Code of 1969, over which they insist in this analysis, we consider it appropriate to refer, however, to practice rich of the High Court of Cassation and Justice which were analyzed abundantly constituent elements of cheating, the Supreme Court setting criteria identifying constituents in different areas, which were subsequently veritable sources of analysis and reference by lower courts. It thus established the High Court, by decision of reference<sup>18</sup> that is necessary to verify whether induction or maintenance error has had a decisive role in determining the person signing the contract, if the error in which a person is injured and is an essentially the act, resulting directly from the actions of the perpetrator, if presenting fraudulent, distorted or altered reality has been able to inspire the confidence of the victim and it is misleading, it entice or keep it in error previously produced, if possible retain unquestionably bad faith of the defendant, etc.

Also regarding culpability prosecuted to the facts of which it is accused, all Supreme Court held that the question of guilt is determined whether or not the intention accused of misleading the injured parties and that legal which involves taking samples to clarify misleading or fraudulent plan a subjective element.

Since the offense of deceit is directed against property and diminishing heritage of the victim must be anticipated by the accused and conduct of the accused person adapted to this purpose, the High Court stated that the intention of the subjective element of the offense of cheating involves attitude subjective against which the conduct of the accused person be criticized. Criminal liability occurs because the

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<sup>18</sup> Î.C.C.J., criminal section, Decision no. 390 of 23 January 2006, I.C.C.J., Criminal Division, Decision no. 1384 of 13 April 2010

accused used his ability to understand the facts in order and provision a fraudulent result. If the intent, to achieve the result fraudulent act is the very source of conduct. The evaluation criteria of guilt arising therefore the external behavior of the accused person, capable of clarifying the meaning and purpose of the actions taken by it. Motivation act of conduct is reflected by how the person acted.<sup>19</sup>

A concept within the meaning of the above is expressed in the practice of the Constitutional Court of Romania. Thus, the Constitutional Court stated in several decisions, all in the realm of the Penal Code of 1969, that the criminalization of the offense of cheating the offense committed by use of names or attributes falsehood or other fraudulent means, and the act of maintaining or inducing a person into error during the conclusion or performance of a contract, committed so that, without that error, the wrong would not be completed or executed under the terms of the contract, criticized the text of the law does not violate art. 11 and art. 20 of the Basic Law on "*international law and domestic law*" and to "*international human rights treaties*". In examining the constitutionality of incriminating text to the provisions of art. 45 on economic freedom and art. 135 par. (2) a) relating to insurance by the Romanian state freedom of trade, the Constitutional Court ruled that the material element of the offense of cheating has the prerequisite action, respectively omission, which induces the contractor for an error determining the conclusion or execution of the deed. If the error had not existed, the contract would not be completed or executed in the circumstances.<sup>20</sup> Cheating is revealed in the practice of the Constitutional Court as a serious antisocial acts against property, consisting of cheating in legal

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<sup>19</sup> I.C.C.J., Criminal Division, Decision no. 2040 of 12 June 2012. On the same criteria appropriated as such, reference is also made to decision no. 94 / R 23 January 2013 the Court of Appeal Cluj

<sup>20</sup> Constitutional Court Decision no. 566 of 27 October 2005, published in the Official Gazette of Romania, Part I, no. 982 of 4 November 2005; Decision no. 1372 of 26 October 2010, published in the Official Gazette of Romania, Part I, no. 801 of 30 November 2010

relations participants trust property, which is absolutely intolerable in them.<sup>21</sup>

Because I have been talking about the fact that the crime of cheating is, in terms substantially the same structure, the only difference being shown, it should be noted that, in terms of criminal procedure, the text makes a difference, which constitutes a genuine difference by introducing the third paragraph of art. 244. According to this text, reconciliation of the parties removes criminal, although criminal proceedings shall be initiated ex officio jurisdiction rules are the same. In this regard, the offense of cheating differs from the new Criminal Code and other offenses against property committed by disregarding confidence.<sup>22</sup>

It should be here reporting everything in terms of criminal procedure, and the provisions of art. 159 par. 3 Criminal Code, according to which reconciliation takes effect only on persons between intervening if it happens to read the document instituting the proceedings, issues that were analyzed in a recent Constitutional Court decision.<sup>23</sup>

## CONCLUSIONS

Obviously cheating that crime can occur in various areas of activity, even in the newer it is assumed that it can intervene more difficult. Appropriate, by way of example, the offense of cheating electronically, known as phishing, a form of criminal activity that consists in obtaining confidential data such as data access for applications like banking, ecommerce applications or credit card information about using manipulation techniques data a person's identity or any institution, claiming but another analysis.

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<sup>21</sup> Constitutional Court Decision no. 215 of 14/04/2005, published in the Official Gazette of Romania, Part I, no. 478 of 07/06/2005; Decision no. 855 of 24/06/2010, published in the Official Gazette of Romania, Part I, no. 541 of 03/08/2010)

<sup>22</sup> G. Antoniu et al., *The Explanation...*, 542

<sup>23</sup> Decision no. 508 of October 7, 2014 regarding the exception of unconstitutionality of art. 159 par. (3) of the Criminal Code, published in the Official Gazette no. 843 of November 19, 2014

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- Constitutional Court Decision no. 566 of 27 October 2005;
- Constitutional Court Decision no. 215 of 14 April 2005;
- Constitutional Court Decision no. 508 of 7 October 2014.

# LIMITS OF PRESUMPTION OF INNOCENCE

Marian ALEXANDRU<sup>1</sup>

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**Abstract:**

*Presumption of innocence refers to persons clearly accused of committing a crime. It starts having effects from the moment the prosecuting bodies are informed until the judge issues the final decision.*

**Key- words:** *presumption of innocence, final decision, Criminal Procedure Code.*

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## I. INTRODUCTION

This work focuses on approaching the presumption of innocence from the point of view of the reformed criminal law, by referring it to the evolution and the development of this law principle and to the causes which justify it on national and international level. Romania needs to update this theme because there are many problems caused by the breach of this presumption of innocence, as we can easily see in the numerous sentences issued by C.E.D.O. for violation of art 6 paragraph 2 of the Convention.

## II. CONTENT

The presumption of innocence appeared for the first time in the Universal Declaration of Human Rights of 1789 as a reaction against the excessive and abusive use of the preventive arrest measure which made torture easy to apply<sup>2</sup>.

The Universal Declaration of Human Rights, adopted and proclaimed during the General Assembly of U.N. by resolution no 217 of December 10<sup>th</sup> 1948, regulates this principle at art 11 paragraph 1,

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<sup>2</sup> C. Cârstea, "Presumption of innocence, Importance and place of this principle given the modernized criminal procedure law", *Judicial Journal of PCA Timișoara* 7(1996): 16.

stating: “everyone charged with a penal offence has the right to be presumed innocent until proved guilty in a public trial where he has had all the guarantees necessary for his defense”.

Internationally, it is also regulated by art 66 of the Rome International Criminal Court Statute<sup>3</sup>.

In Europe, the art 48 of the Charter of Fundamental Rights of European Union, called “Presumption of innocence and the defense rights” stipulates that “the charged person is presumed innocent until proved guilty according to law”

The European Convention of Human Rights<sup>4</sup> contains a regulation identical to the one provided by the European Charter with art 6 which mentions the right to a fair trial and art. 2: “every charged person is presumed innocent until proved guilty according to law”.

In Romania, the Convention and its additional protocols are already part of the internal law and therefore, they enjoy immediate application in law courts.

The Romanian Constitution expressly regulates the presumption of innocence through art 23 paragraph 11: “until the issuance of the judge’s final sentence, the person is considered innocent.”

From the criminal procedure point of view, the presumption of innocence, regulated by art 4 of the new Criminal Procedure Code, states through paragraph 2 that: “After the administration of the entire evidentiary proof, any doubt in favor of convincing the judicial bodies is interpreted in favor of the suspect or the culprit. The principle “in dubio pro reo”<sup>5</sup> is adopted for the first time in the Romanian procedure law,

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<sup>3</sup> Ratified in Romania through law no 111/13.03.2002, published in the Official Gazette no 211/28.03.2002.

<sup>4</sup> The Convention for Defending the Fundamental Rights and Freedoms was signed in Rome on 04.11.1950 and is the reference instrument for defending the human rights within the European Council; it led to creation of the European Court for the Human Rights as compulsory jurisdictional body. Romania ratified the Convention by means of Law no 30/1994, published in the Official Gazette no 135/1994.

<sup>5</sup> „In dubio pro reo” is a Latin expression, used to state the rule according to which in case of doubt, the authorities adopt the solution, the circumstance or the hypothesis criminal.

representing the rule of the favorable double, and being previously applied by the jurisprudence of the law courts.

The presumption of innocence is relatively legal one, with all its judicial features and consequences.

Legal presumptions are law rules which force law courts to draw certain conclusions based on a fact state, except for the case and until the moment where the contrary is proved, being more a judicial guideline rather than an absolute one.

Presumption of innocence is a relative one, as it allows the contrary proof of evidence for the guilt of the suspected or accused person, evidence which can be administrated though legal means and which seeks to protect individual and public interests as well.

Presumption of innocence represents a fundamental right, provided by art 6 of the European Convention, stating the right to a fair trial and offers procedure guarantees for the right, being the expression of the equity concept in the criminal procedure system.

The presumption of innocence appears at art 4 of the New Criminal Procedure Code. This new code stipulates the compulsory character of the beginning of the criminal prosecution previous to all other investigating actions. This new aspect complies with strict observation of the lawfulness of the criminal procedure principle, given the fact that precedent actions in the former system are no longer helpful to this principle, as they allow evidence collection outside the criminal trial.

For the same reason, art 305 paragraph 1 of the New Code provides: “when the informing action complies with the legal circumstances and there is no obstacle for the criminal action exercise, pursuant to art 16 paragraph 1, the criminal prosecuting body rules the beginning of the criminal prosecution based on fact. Thus, the lawmaker establishes the obligation of the criminal prosecution body to begin the criminal prosecution the moment they are informed about the fact”.

Immediately after the informing action comes the order to begin the criminal prosecution focused on the fact.

Art. 305 paragraph 3 of the new Code, requests the presence of the reasonable clues regarding the deed commission by a certain person, clues resulted from the existent data and information.

Once the criminal prosecution is finished, evidence can be collected according to which an accusation is drawn up against a person.

Issuance of an accusation “in personam” has major consequences on the prosecuted person; the accusation must be grounded on several pieces of evidence, administrated through the means provided by law. That’s why the simple beginning of the criminal prosecution based on the fact, is not an accusation brought against her but it represents the procedure condition for the collection of the first pieces of evidence concerning a certain deed.

After the legal usage of some means of evidence, as base for reasonable clues against a person, comes the issuance of an accusation. That is the reason for which art 305 paragraph 3 of the new criminal procedure code states: “when the existent data and evidence contain reasonable clues that a certain person committed the fact for which the prosecution was begun, the prosecutor decides that the criminal prosecution be done “in personam””.

The above mentioned legal provisions guarantee the equity of the criminal prosecution: on one hand, they comply with the request that any investigating action be carried out in a procedure according to art 305 paragraph 1 of the new Criminal Procedure Code, and on the other hand, they are a guarantee meaning that nobody is accused without reasonable clues about the commission of a deed provided by criminal law, pursuant to art 305 paragraph 3 of the new Criminal Procedure Code.

Mentioning a person in the indictment is not enough to turn her into a suspect and neither to consider that the criminal prosecution is focused on her. A suspect is the person who, base on the analyzed evidence, becomes the subject of the criminal prosecution.

Provisions of art 289, of the new Criminal Procedure Code, regulate the content of the criminal complaint and urge to “designate the author”, if he is known.

Therefore, the beginning of the criminal prosecution focused on fact, is compulsory immediately after the complaint is lodged, even if the author is specified.

Taking into account the provisions of art 4 and art 83 of the new Criminal Procedure Code, we consider that the presumption of innocence

acts at the same time with the beginning of the criminal prosecution against the person who becomes suspect.

The presumption of innocence produces effects until the moment the final decree is ruled, pursuant to art 4 paragraph 1 of the new Criminal Procedure Code, meaning that it also is valid during the appeal procedure.

In case of extraordinary appeal procedures, the presumption of innocence appears again the moment the law court appreciates the appeal grounded and, therefore, eliminates the sentence.

For all other situations where the guilt of a person cannot be legally set, by a conviction, the presumption of innocence is still valid and the procedure obstacles have a force similar to those of material nature<sup>6</sup>.

New regulations offer the possibility that the courts decide the abandon the enforcement of the punishment, if the deed exists, it is a crime and has been committed by the defendant pursuant to art 80-82 of the new Criminal Procedure Code or in circumstances provided by art. 83-90 of the new Criminal Procedure Code, when the punishment can be postponed. In both cases, the judge investigation is totally carried out and the courts prove, based on the used evidence, the guilt of the defendant or the presumption of innocence is eliminated.

In cases where the court rules the defendant's acquittal or the cease of the criminal trial, forcing the defendant to pay for the trial costs is not compatible with the presumption of innocence, whereas the defendant being forced to pay the costs promoted by the State when, although acquitted, is forced to remedy the prejudice or if the criminal trial ceased as there is a cause of unpunishment.

The presumption of innocence can lack the object in cases where, during a criminal prosecution, there is an obstacle for the exercise of the criminal action, and thus, the prosecutor can rule the classification of the case.<sup>7</sup> The same situation is not possible if the judge adopted the solution of abandoning the criminal prosecution begun "in personam". Here, the

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<sup>6</sup> *Didu vs România*, CEDO Decision of April 14<sup>th</sup> 2009.

<sup>7</sup> Classification must be total, must concern all accusations for which the criminal prosecution began "in personam" and is ruled by o an order.

presumption of innocence still has object as it is possible to be changed if the order to abandon the criminal prosecution is revoked.

The presumption of innocence is compatible with signing of an agreement for guilt acceptance and also with the trial in case of accusation acceptance<sup>8</sup>.

Taking into consideration all the things above mentioned, we think that making an opinion of guilt during the development of the criminal trial, as the result of using pieces of evidence, apparently unfavored to the defendant, is a mistake as well as starting from the premise of the existence of the defendant's guilt.

The implications of the presumption of innocence lead to certain things regarding the evidence, meaning that the criminal prosecuting bodies have to prove, based on lawful evidence and legal use of it, the guilt expressed against the suspect or defendant.

The presumption of innocence exonerates the suspect or defendant of producing proof of evidence regarding his innocence<sup>9</sup>, as the prosecution has the difficult mission to prove the existence of the crime.

### III. CONCLUSIONS

The presumption of innocence, object of this work, is a complex structure of guarantees, according to which the presumptive beneficiary must be looked and treated as innocent, having the right to remain silent and the right to non-self-incrimination, without clearly expressed obligations provided for this within the criminal trial and with the recognition of the benefit of the reasonable and unbeatable doubt of the investigated person, resulted from the evidence collection activity<sup>10</sup>.

According to the new Criminal Procedure Code, as we already mentioned, the presumption of innocence is regulated by art 4 and is defined as constitutional principle characterized by the defense of subjective rights of the suspect or the defendant, until the ruling of the

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<sup>8</sup> M. Udroi, *Criminal Procedure. General Part* (Bucharest: Universul Juridic, 2014), 16.

<sup>9</sup> N. Volonciu, *Criminal Procedure Code - Comments* (Bucharest: Hamangiu, 2012), 25.

<sup>10</sup> Udroi, *Criminal Procedure. General Part*, 16.

final decree of the judge of the law court, until the person is considered not guilty<sup>11</sup>.

Observing this principle is a guarantee for preventing judicial errors committed towards the suspect or defendant, as the judicial bodies have the obligation to prove the guilt of the investigated person, who became suspect and later defendant.

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<sup>11</sup> M. Alexandru, *Criminal procedure. General Part of the New Criminal procedure Code* (Bucharest: Pro Unversitaria, 2015), 21.

# HOME DETENTION MEASURE IN THE NEW CRIMINAL PROCEDURE CODE. SPECIAL CIRCUMSTANCES FOR ITS ENFORCEMENT

Marian ALEXANDRU <sup>1</sup>

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**Abstract:**

*This preventive measure is new and it was introduced in the Romanian law by the new Criminal Procedure Code. It consists of the obligation imposed on the defendant not to leave the building he is living in, for a certain period of time.*

**Key-words:** *Criminal Procedure Code, obligation, defendant, residence, dwelling.*

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## INTRODUCTION

This work envisages focusing on this freedom privative measure, considered, from its severity point of view, between the judicial control (simple or on bail) and the preventive arrest. Home detention is new and becomes part of Romanian law at the same time as the new Criminal Procedure Code, adopted by law 135/2010.

The Romanian lawmaker drew inspiration from the Italian Criminal Procedure Code<sup>2</sup>. A similar regulation can be found also in the French Criminal Procedure Code but we have to say that, here, the confinement at home or at the address decided by the judge of instruction or the judge for rights and freedoms, is necessarily accompanied by electronic surveillance of the accused person.<sup>3</sup>

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<sup>2</sup>M. Alexandru, *Comparison between preventive measures provided by the old and the new Criminal Procedure Code. State Reform pursuant to the new judicial codes*, (Bucharest: Universul Juridic, 2015), 133.

<sup>3</sup>I. Neagu and M. Damaschin, *Treaty on Criminal Procedure Code. General Part – The effects of the New Criminal Procedure Code* (Bucharest: Universul Juridic, 2014), 621.

According to art 221 paragraph 1 of the New Criminal Procedure Code, the home arrest measure is the obligation imposed on the defendant, for a determined period of time, not to leave the building he is living in without the permission of the judicial body which ruled the adoption of this measure or before which is presented the case in order to be subjected to some restrictions set by him.

Assessment of the circumstances necessary for adoption of such measure is made based on the danger degree of the crime, on the measure purpose, on health, age, family situation or other circumstances concerning the subject of the analysis<sup>4</sup>.

The measure cannot be adopted for the defendant who is reasonably suspected of having committed a crime against a family member and for the defendant who has been definitely sentenced for the crime of escaping some time ago.

The judge for rights and freedoms of the Court which has the competence to judge the case, of first instance or a similar one, based on the jurisdiction where the crime was committed or the Prosecutor's Office address, can rule, at the motivated request of the Prosecutor, the home confinement<sup>5</sup>.

The preliminary chamber judge or the court which judges the case, can decide the home detention at the prosecutor or ex office<sup>6</sup>. During the criminal prosecution, the home detention can last for maximum 30 days and can be extended only in case of necessity, if its motivation is still valid or if there is another one new, each extension cannot exceed 30 days. Maximum length of home arrest, during the criminal prosecution, is 180 days<sup>7</sup>.

The law stipulates the obligation to check, ex office, its lawfulness and motivation, every 30 days, during the preliminary chamber procedure and 60 days, during the trial<sup>8</sup>.

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<sup>4</sup> N. Volonciu, coord., *The New Criminal Procedure Code - annotated. General Part*, (Bucharest: Universul Juridic, 2014), 385.

<sup>5</sup> Art. 291 paragraph 1 of the *Criminal Procedure Code*.

<sup>6</sup> Art. 220 paragraph 1 of the *Criminal Procedure Code*.

<sup>7</sup> Art. 222 paragraphs 1, 2 and 9 of the *Criminal Procedure Code*.

<sup>8</sup> M. Alexandru, *Criminal Procedure. General Part, New Criminal Procedure Code*, (Bucharest: Pro Universitaria, 2015), 227.

The main restriction results from the freedom privative nature or the measure which is the obligation that the defendant shouldn't leave his dwelling without the previous approval of the judicial authority<sup>9</sup>.

The defendant must comply with two compulsory measures:

a) to go before the criminal prosecuting authority, before the judge of preliminary chamber, the judge for rights and freedoms or before the court anytime he is asked to do it. According to art 129 paragraph 4 of law no 254/2004, the criminal prosecuting authority, the judge of preliminary chamber, the judge for rights and freedoms or the judging court informs the surveillance body anytime the defendant is called, mentioning the day, time and place of the meeting. The surveillance body decides on the route and traveling conditions and informs the defendant who signs for confirmation. If the defendant doesn't come before the judicial body, he must inform the surveillance authority at once;

b) not to communicate with the victim or his family members, with other offenders, with witnesses or experts, or other persons according to the judicial authority decision. According to art 132 paragraph 3 of Law no 254/2013, if the defendant is forbidden to make contact to certain persons, the monitoring authority identifies and contacts all the persons who could give important information on a possible non observance of the obligation.

In order to comply with this, it is necessary that the conclusions, ruling the adoption of this preventive measure, should mention the names of the persons who the defendant is not allowed to contact. By simply mentioning that it is forbidden to contact witnesses, experts or other persons, especially during the criminal investigation period, given the secret character of this phase, it is possible that the defendant doesn't know the identity of this category of procedure subjects. It is necessary to mention the names of these persons because the monitoring authority doesn't know them.

The judge for rights and freedoms, the preliminary chamber judge or the judging court can impose on the defendant to wear<sup>10</sup> a tracking

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<sup>9</sup> M. Udriou, coord., *Criminal Procedure Code, Commented articles* (Bucharest: C.H. Beck, 2015), 631.

<sup>10</sup> Alexandru, *Criminal Procedure*, 228.

device during the entire preventive measure that would allow permanent information concerning the presence and the breaching of the obligation.

Other obligations or constraints cannot be imposed on the defendant during this preventive measure, even though they would be not only useful, but even necessary for reaching the purpose it was adopted.

In this way, critics can be brought to the option of the Romanian law maker who, far from the French part, didn't allow the magistrate judge, which rules the house arrest, to be able to impose on the defendant any of the obligations that can be ruled within the judicial control, given the fact that house arrest is a preventive measure more severe than the judicial control.

The judge or the Courtroom ruling the home arrest measure has the obligation to stipulate in the Court Resolution the premises for the enforcement of the measure, together with the obligations to be observed by the defendant, the time of the measure. At the same time the defendant is warned about the effects in the event he breaches in ill-faith a house arrest measure or the obligations resting upon them, or there the Judge for Rights and Liberties, the Preliminary Chamber Judge or the Court, upon justified request by the prosecutor or *ex officio*, may order the replacement of house arrest by pre-trial arrest, under the terms set by the law.

By the Court resolution, the judicial body which ruled the measure has the duty to mention also the authority in charge with the surveillance of the observance of the obligations of the measure. According to art 125 of Law 254/2013, the compliance with the obligations ruled by the judge of the rights and freedoms/the preliminary magistrate or the Courtroom for the defendant, is monitored by the police authority which has jurisdiction on the premises, set in the Court resolution. For the enforcement of this measure no arrest warrant is needed to be issued as the base of this enforcement is the resolution itself ruled by the judge of the rights and freedoms/the preliminary magistrate or the Courtroom.

After receiving the copy of the resolution ruling the measure, the monitoring authority appoints its representatives who leaves at ones for the defendant's place, identifies the persons who are living with him or are being taken care by him, drawing up a minutes, and afterwards

informs the judge of the rights and freedoms/the preliminary magistrate or the Courtroom about the beginning of the surveillance activity.

Together with the defendant, the monitoring authority draws up a program with the home arrest enforcement method, the obligation to inform in case of leaving the premises in emergency cases together with the leaving, travelling or returning conditions to the arrest location, communicated immediately, under signature<sup>11</sup>.

Romanian Police, more exactly, the Department for Criminal Investigations and its territorial structures have new special forces specialized in monitoring, called judicial monitoring offices. According to art 133 of the law 254/2013 for every home arrested person there is a file drawn up by the monitoring authority, containing the defendant's ID.

The Community Public Service has also an important role by refusing to issue ID for the defendant, if they it is lost, stolen or due – together with Border Police Body which has to stop any attempt of him to cross the border of the country.

For a monitored home arrested defendant, the Police have to do the following:

- to pay regular or sudden visits anytime, to check the observance of the measure and of their obligations by the defendant, at the defendant's place or in places set judge of rights and freedoms/the preliminary magistrate or the Court, in order to check the observance of the obligations. The judge of rights and freedoms/the preliminary magistrate or the Court is informed about these sudden visits.

- for the supervision of compliance with a house arrest measure or with the obligations imposed on a defendant during its term, law enforcement bodies may enter the building where the measure is applied, without the permission of the defendant or of the persons living together with them<sup>12</sup>;

- if the measure is not complied with due to *mala fide*, the monitoring authority shall immediately notify the prosecutor, during the criminal investigation, the Preliminary Chamber Judge, in preliminary chamber procedure, or the court, during the trial. In order to draw the

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<sup>11</sup> Udroiui, *Criminal Procedure Code*, 633.

<sup>12</sup> Art. 221 paragraph 10 of the *Criminal Procedure Code*.

notification, the authority appointed in charge of a defendant supervision checks the real situation and hears the defendant, if it possible, or other persons;

- make contact with the local authorities, with other police authorities and public safety, and with any other legal and natural person who could give information about the observance or non observance of the obligations ruled by the judicial authority. If the above mentioned persons acknowledge, in any way, the breaching of the home arrest measure and the obligations of the defendant, they will inform immediately the surveillance body, in order to inform the competent judicial body.

The text regulating the home arrest measure presents 3 different situations where the defendant is allowed to leave the premises:

a. to go before the judicial bodies when he is demanded to do so; The judicial body summons the defendant or sends a warrant. In all circumstances, the summoning authority has to inform the surveillance authority about the movement of the defendant;

b. having the previously granted permission from the judicial institution which had ruled the measure or which is trying the case at that time. This request, drawn up by the defendant in written, must be well-funded; it must be very well grounded and must contain the opportunity of its admission. Such strongly motivated cases for permission to leave the building<sup>13</sup> could be the need to go work, to attend courses or professional training, to buy food and so on, strongly justified, during a determined period of time, if this is necessary to respect some legal rights or interests of the defendant<sup>14</sup>;

c) in emergency cases, for good reasons, a defendant may leave the building without the need to have an approval<sup>15</sup>. The New Code doesn't specify the well grounded reasons and emergency cases, that would justify leaving the premises without a previously approval from the judicial body. Among these reasons we can mention saving his life, or

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<sup>13</sup> N. Iliescu, „*Personal freedom in the Criminal Procedure Code*”, *S.C.J.* 3 (1971): 428.

<sup>14</sup> Art. 221 paragraph 6 of the *Criminal Procedure Code*.

<sup>15</sup> Art. 221 paragraph 7 of the *Criminal Procedure Code*.

another person closed to him, from an imminent danger, his body integrity or health or to save his or somebody else's good or a general interest. Here, the body or authority appointed in charge of his supervision verifies the reality and the reasons. The defendant, on his turn, in this kind of situation, is bound to immediately inform on this the institution, body or authority appointed in charge of their supervision and the judicial bodies having taken the house arrest measure or with which the case is pending. His ill faith in observing his obligations or his desire to commit new crimes lead to the possibility to have a harder measure adopted or even pre trial arrest. The severity of the situation is to be assessed by the authorities, like the judge for rights and freedoms, the judge of preliminary chamber or the judging court.

As the New Code doesn't give the maximum time for the home detention, the Constitutional Court ruled on 17<sup>th</sup> of May 2015, that the home detention measure can violate fundamental rights and freedoms, such as the right to free circulation, to intimate life, to family and private life, the right to education, work and to social protection. Article 222 of the new Criminal Procedure Code is lacking provisions such as maximum time for this measure which means limiting the exercise of the rights and freedoms.

Constitutional Court established that 30 days is the time or the home detention, and it can be extended when this it is considered necessary, meaning that the reasons for the ruling the measure are still valid or new reasons appeared. Each time the extended time will not be longer than 30 days with a total of 180 days during the criminal prosecution. During the trial, the court, ex officio through decree, periodically checks, but no later than 60 days, if the motivation is still valid or whether there are new aspects which can be added to justify the decision for adoption the home arrest measure.

## **CONCLUSIONS**

The measure of home confinement is new and it was introduced by the New Criminal Procedure Coder, adopted by law no 135/2010.

Its severity places it between the judicial control (simple or on bail) and the preventive arrest.

It has its origin in the Italian Criminal Procedure Code and other similar legal systems, such as French Criminal Procedure Code.

Paragraph 1 of art 221 of the new Criminal Procedure Code stipulates that the home detention measure consists of the obligation imposed on the defendant not to leave the building he is living in without the approval of the judiciary authority which adopted it or the permission of the authority who is analyzing the case and to observe some restrictions set by the authority.

The study presents specific aspects appeared the moment of the enforcement of this measure.

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# ETIOLOGICAL DETERMINANTS OF WOMEN CRIMINALITY

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Andreea DRĂGHICI<sup>2</sup>

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**Abstract:**

*Considering the women role and status in the family, the question is what determined her criminalization. In determining the etiology of women criminalization, it must be considered the elements obviously contributing in the acquirement of such conduct, namely: biological and psychological characteristics, gender stereotypes, economical, social, and political conditions and the violence against women<sup>3</sup>; but not least, we must consider other risk factors, such as alcohol or drugs consume.*

**Key-words:** *women criminality, causative factors, etiology, criminological trends.*

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## INTRODUCTION

People, in general, considering their nature, women or man, are subjected to criminality. The question is, and it's not a rhetorical one, what is the factor "motivating" the use of an asocial conduct. But whatever the core of etiological incursion, the criminogenic accents are circumscribed to the extremely complex factors, starting with the aspects related to the social and familial environment, the individual personality and finishing with the situational context.

Statistical approaches considering the feminine criminality phenomenon have swung towards a more grown index comparing to man rate crime<sup>4</sup>, although, in reality, women criminality is less studied and reported.

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<sup>3</sup> A. Bălan, *Criminalitatea feminină* (Bucharest: C.H. Beck, 2008), 21-45.

<sup>4</sup> S. E Robinson, "From victim to offender: Female offenders of child abuse", *European Journal of Criminal Policy and Research* 6 (1998): 59-73.

Considering the women status and role in the family, one question is raising up about what have determined her criminalization. In determining the etiology of women criminalization, it must be considered the elements obviously contributing in the acquirement of such conduct, namely: biological and psychological characteristics, gender stereotypes, economical, social, and political conditions and the violence against women<sup>5</sup>; but not least, we must consider other risk factors, such as alcohol or drugs consume.

Thus, approaching the women criminality causes, it's necessary to understand the complexity of this phenomenon, whose analysis cannot be realised in an uniform manner, but by extrapolating the problem to the whole system of factors and circumstances having an implicit action in this causal chain.

### **CAUSAL FACTORS IN THE FIELD OF WOMEN CRIMINALITY**

Specialised studies<sup>6</sup> have configured the path of women criminality feminine from the perspective of approaching two categories of factors contributing to the occurrence of this type of criminality. We cannot speak about exclusively individual or social factors in determining the criminal conduct, whereas the acquired structures<sup>7</sup>, are finding their answers in the external environment plan, by reacting to the external stimulus.,,The endowment” with criminological tendencies cannot be only biological (frustration, vulnerability, emotional instability, inferiority), but also psychiatric (psychopathy, debility or insanity, personality disorder)

But we must realize that not necessarily a person with such tendencies will have criminal reactions. His manifestation by criminal actions is, without any doubt, equally determined by external factors.

#### *b) Social factors (externals)*

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<sup>5</sup> A. Bălan, *Criminalitatea feminină*, (Bucharest: Publishing House C.H. Beck, 2008), 21-45.

<sup>6</sup> R. M. Stănoiu, *Introducere în criminologie*, (Bucharest: Editura Academiei, 1989), 143.

<sup>7</sup> R. Gassin, *Criminologie*, 2-ième éd, (Paris: Dalloz, 1990), 441. By acquired structures we must understand those criminological trends as personality traits or the agrersivity tendencies that could be geneticaly transmited.

The external environment influence is representing an essential factor for the criminal manifestations of every person, considering that in the social environment the human personality is forming and developing.

Most of the time, the aggressive manifestations are acquired in the family, the relations between family members influencing the developing personality of the child. In many cases the child imitates his parents conduct, but we should not generalize. Equally, the work place or the entourage is representing favourable environments for developing delinquent conduct. Women are suppressing by such tendencies, usually against people belonging to their personal or social environment<sup>8</sup>.

So, there are many risk factors in the feminine delinquency area that we are going to present in this paper.

## **BIOLOGICAL AND PSYCHOLOGICAL CHARACTERISTICS**

Talking about man and women, although the equality between sexes is internationally accepted, our society is inclined to establish a few inequalities, called gender differences. This inclination is the obvious result of recognizing the physical and biological differences between man and women, differences based on sex reasons. These differences appear in the puberty period.

Beyond this morphological and physiological characters, different between man and women, we must name the psychological differences. The woman is sensible, loving, and full of passion, unselfish, building her whole universe around the loved ones, for which is capable to sacrifice herself. Not least, she can become impulsive, lead by the intuition and feelings. She needs protection and stability, being easily influenced. On the contrary, the man is vertical, his feelings are lead by reason, he feels the need to impose himself, to act with authority as a scourge of male domination that must be proved in the society.

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<sup>8</sup>Emilian Stancu and Carmina Aleca, *Elemente de crimmologie generala* (Bucharest: Pro Universitaria, 2014), 174.

## **GENDER STEREOTYPES**

In the economical, social and political life, the man is considered to be the key of success, the women having as principal role of wife, mother and housewife.

The discrimination between man and women persists beyond the legislative regulations at national, international and European level. The differences based on sex criteria mustn't condition the women of the chance of affirm her. Obviously there are a few occupations necessitating force, but it doesn't mean that the women who wants this must be restricted, all the more so as the progress of the teaching area has opened the access to different specialization in different fields. Although, the progresses obtained by mans in a certain field are more valued than the progresses obtained by a women, as a result of the stereotypic thought of the society.

The inequalities between man and women are felt in every domain, even when, being recognized the so-called equality in the professional field, in the couple life the women must fulfil his family duties. On the contrary, considering the equality between man and women in the society and, also, in the family, it ends up no longer be treated as a women. This abnormalities determinates the women either to be subjugated to her biologically characters, or to received the reverse of the medal of her own battle, meaning that she must endure the lack of man consideration. So, the equality doesn't mean identity.

## **THE ECONOMICAL, SOCIAL AND POLITICAL FACTORS**

The economical, social and political conditions are creating discriminations regarding women and their role in the society. We must admit that women are having fewer chances for employment and are poorly paid, that generally the management positions are occupied, that the unemployment phenomenon is affecting more the women, talking about a higher coefficient comparing to the man situation and not least, the fact that politically the women representation, even growing, is still insignificant comparing to man representation.

The unfavourable situation of the women comparing to the man situation not only in the social field, but also at home, is the immediate

consequence and undoubtedly of gender discrimination, beyond the fact that the percentage of women with a certain level of instruction is superior comparing to man situation. Although, they are victims of those inequalities.

## **THE WOMEN AGRESIVITY – ANSWER TO THE MASCULINE VIOLENCE**

The domestic violence problem doesn't be restricted only to the aspects referring the women victim and man aggressor; on the contrary the same interest must be manifested when the man is the abused one. Regarding this aspect, we consider that women are aggressive as a response to the masculine violence and as a self-defence reaction. The personality trait doesn't determine, by itself, violent manifestations, except the pure genetic determinisms<sup>9</sup> or pathological state. So, to understand the violence and its nature, beyond the extrinsic factors of human being we will obviously find the environment impact, in this regard being necessary the study and harmonious correlation of biological, anthropological, sociological, cultural and also political approaches<sup>10</sup>.

## **CONCLUSIONS**

The women criminality issue, although apparently is representing an aspect relatively new discussed in social life, however this type of criminality always existed. Therefore, the so-called emergency of the women criminality is only the result of an explosion of mass-media, as a mark of women emancipation.

Therefore, the phenomenon of women criminality should not be seen in abstract, and it's understanding necessitates also a knowledge of causes, as of its social effects.

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<sup>9</sup> A. Liiceanu, D. Ștefana Saucan and M.I. Micle, *Violența domestică și criminalitatea feminină* (Bucharest: National Institute of Criminology, 2004), 29-30.

<sup>10</sup> Stancu and Aleca, *Elemente de crimmologie generala*, 175-6.

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# NEWS ABOUT ELECTIONS 2016

Florentina-Corina FLOAREA<sup>1</sup>

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**Abstract:**

*In Romania today, the right to vote is universal. Free and fair elections are a prerequisite of democracy. 2016 election brings two important points: the local elections and the parliamentary elections being organized by both new rules, following the amendment of the electoral law last year, rather controversial legislation to the political parties. The legislative elections of 2016 will be different from those of 2012 and 2008, whereas the Committee of the Electoral Code decided to return to vote on the list and waiver of uninominal voting system used in the last two parliamentary elections, change fueled by the PSD and the main opposition Liberal party.*

**Key-words:** *elections, democracy, legislation, political parties, opposition.*

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## INTRODUCTION

The first free elections after the end of a dictatorship is a crucial moment, providing the opportunity of understanding post dictatorial elections objectives and modalities of a political transition. They occurring after less than or greater suppression of democratic elections, and at first resembles a survey. The vote post dictatorial includes a number of components, of which the most important are characteristics of systems partisan atmosphere politico-social pre-election period, the main themes of the campaign, the amount of turnout, explanatory models of the behavior and characteristics of polls and forecasts of election<sup>2</sup>.

After the 1989 Revolution, the new formation of parties systems was preceded by mass movements nature anti totalitarian who had no schedule unified policy and did not manage to form a front very wide, on the one hand due to physical exhaustion and psychological population

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<sup>2</sup> Petre Datculescu and Klaus Liepelt, *Renaissance democracy: Elections in Romania from May 20* (Publishers IRSOP, 1991), 13.

and a sense of fear of new risks, on the other hand, has a tendency to excessive radicalism, so that the 1990 elections, 64 parties received each less than 1% of the valid votes.

The first general elections in Romania were held on May 20, 1990 under Decree-Law no. 92 of 14 March 1990, and the law was to be elected a bicameral parliament consists of two chambers: the House of Representatives and Senate, forming the Constituent Assembly with the aim of adopting the Constitution of Romania.

In 1991 it adopted local government Law no.69 published in the Official Gazette of Romania no. 238 of 28 November 1991 and who remains in effect from 28 November 1991-23 May 2001 when it adopted the Law no. 215, republished in the Official Gazette no. 123 of 20 February 2007, as amended and supplemented.<sup>3</sup>

In the Official Gazette no. 349 of 20 May 2015 was published Law no. 115/2015 for the election of local authorities, local government amending Law no. 215/2001 and amending and supplementing Law no. 393/2004 regarding the status of local elected officials (published in the Official Gazette no. 912 of October 7, 2004, as amended and supplemented).<sup>4</sup>

Local Public Administration Law no. 115/2015 brings a number of changes to art. 3 para. (2) art. 29 para. (1), Art. 55 para. (7) is repealed art. 57 para. (4) art. 69 para. (6) is repealed, art. 88 and 89 para. (1), Art. 89<sup>1</sup>, 89<sup>2</sup>, 89<sup>3</sup> is repealed art. 90, art. 101 par. (1) - (3), art. 102<sup>1</sup> is repealed and art. 108.

Among the changes, the most significant as those referred to in art. 57 para. (4) regarding the dismissal of the Deputy Mayor that can be done only by a resolution adopted by a vote of two thirds of the elected

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<sup>3</sup> The law no. 215/2001, republished in the Official Gazette no. 123 of 20 February 2007, as amended and supplemented.

<sup>4</sup> The law no. 115/2015 for the election of local authorities, amending Law No local government. 215/2001, and amending and supplementing Law no. 393/2004 on the Statute of local elected officials, published in the Official Gazette no. 349 of May 20, 2015.

councilors (compared to the majority of the previous regulation), art. 88 in terms of number of members of each county council that increases by one in the same population reported by the National Statistics Institute on 01 January of the current year, in Art. 89 which stipulates that the competent court is the court and not least in art. 108 which, at para. (1) provides that the president of the county council retains its capacity as county councilor (to regulation where only county council vice retain that status).

Otherwise, the elections in 2016 in addition to these changes, bring a novelty in Romania, namely computerization turnout. This novelty was proposed by the Permanent Electoral Authority and carried out with the support of the Special Telecommunications Service and advantages for all involved in the electoral process, voters and politicians alike.

This novelty was called, system for monitoring the turnout and prevent illegal voting "and presents a number of benefits: improved transparency of the voting process, voting attempts cancellation illegal multiple voting or voting type without the right legal, increasing the speed of the voting process, monitoring time opening and closing of polling stations, real-time monitoring of the turnout at each polling station. Database security to protect personal data will be performed by STS inappropriate access by unauthorized persons.

Another novelty brought by local election law is that presidents of county councils will be elected indirectly, that will be elected by county councilors, as well as vice presidents and deputy by local councils.

Local and county councilors, and mayors will be elected by direct vote of the citizens.

Local and county councils will be chosen based on the poll list, and the mayors by single vote.

Regarding elections, the novelty lies in postal voting law, regulated by Law no. 288/2015 on postal voting, and amending and supplementing Law no. 208/2015 regarding the election of the Senate and Chamber of Deputies, and for the organization and functioning of the Permanent Electoral Authority.<sup>5</sup>

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<sup>5</sup>The law no. 288/2015 on postal voting, and amending and supplementing Law no. 208/2015 regarding the election of the Senate and Chamber of Deputies and the

This novelty was challenged in the Constitutional Court which ruled that the law on postal voting is constitutional. The Constitutional Court decision is final and binding. Thus, all citizens of voting, residing or domiciled abroad can exercise their right to vote by mail, one time, under penalty of criminal law, the parliamentary elections in 2016.

Regarding voter registration and voting by correspondence, provided that the voter residing abroad who wish to exercise their right to vote by mail in the parliamentary elections, is obliged to enroll on the electoral register with the option to vote by correspondence only upon written request, signed and dated, submitted in person or mailed to the diplomatic mission or consular post of the State of domicile or residence, certified by a copy of the document which proves the right of residence issued by foreign authorities applies to Romanian citizens residing abroad.

According to art. 42 para. (2) of Law no. 208/2015, the period of electoral registration in the Register of voters with the option to vote by correspondence in the general elections for the Senate and Chamber of Deputies is starting on April 1 of the year of parliamentary elections take place on time and until the expiry of 48 hours from the start of the election period.

Voters wishing voting by mail will need the following documents:

- an outer envelope provided with security features to ensure its sealing, which will be introduced in the inner envelope and the voter certificate;

- a inner envelope provided with safety features that ensure its seal, which will be introduced voting option or options as appropriate. The inner envelope will contain a sticker with the words „VOTED” provided with safety features established by Government decision. The voter's preference paste the sticker on the ballot by mail;

- voter certificate;

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organization and functioning of the Permanent Electoral Authority, published in the Official Gazette no. 866 of November 19, 2015.

- instructions for exercising the right to vote, indicating the time limit by which the voter must submit mailbox or post office documents referred to in art. 14 para. (5) - sealed outer envelopes - so that they are delivered to the competent electoral office within the period prescribed by law.

Transmission of external envelopes to voters, it is for the "Romanian Post" National Company noting that the transmission be done no later than 30 days before the election date. To ensure delivery envelopes three days before the vote, when they unsealed, they will be sent in good time before the vote.

All these legislative news merely confirm the Romanian Constitution which states on legal essence and genesis of political and legal power, dedicating the art. 2. Sovereignty in meaning: „ (1) National sovereignty resides with the Romanian people, who exercise it through its representative bodies constituted through free, periodic, and by referendum."

The electoral body is the fact that society component (highest) that the entire society manifests original power, granting sovereignty that expresses the exercise of sovereignty of representative bodies, formed as a state based on the principle of separation of powers.

Another important and appropriate role in elections, especially during election campaigns, the media returns.

"Press is a force for contemporary society which finds its legitimacy in civil society. The main function of the press is that through freedom of conscience, freedom of expression and right to information, to participate in the formation and expression of public opinion. „ Press is called the fourth power ", because it has great force and exercise of influence".<sup>6</sup>

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<sup>6</sup> Mihail-Constantin Eremia, *Reflecting the political-legal institutions of society through media* (Bucharest, C.H.Beck, 2007) in Ioan Muraru and Elena-Simina Tanasescu, *Elections and the electoral body* (Bucharest, C.H.Beck, 2007), 40-52.

## CONCLUSION

The year 2016 will be marked by two sets of elections - local, which will be held on the 5th of June, and parliamentary - organized either at the end of November or early December. The land for the election year that has just begun was prepared in 2015 in Parliament by adopting the five electoral laws - Political Parties Act, the law on financing of political parties and campaigns, law local elections, parliamentary elections law and the controversial law postal voting, which will only apply in parliamentary elections. Such is the first year that Romanians from the Diaspora will vote without queuing at polling stations that have proved too few presidential elections in 2014. It will be a difficult year for parties - PNL seems that prepares congress ahead (in 2014 it was established 2017) and PSD is expecting the final decision in the Referendum case to see what happens with the President Liviu Dragnea.

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# CONSIDERATIONS ON THE INDIVIDUAL EMPLOYMENT CONTRACT OF THE PERSON WORKING AS A NANNY

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## **Abstract:**

*According to art. 7 of Law no. 167/2014, exercising the nanny profession can be done in two ways: through completion with a legal person of an individual employment contract or as authorized person, under a service contract concluded with the child's legal representative.*

*With respect to the individual employment contract of the person who is going to carry work as a nanny we consider that it cannot be concluded directly with the child's legal representative, as an employer, but the person will have to conclude under art. 87 paragraph 1 of the Labor Code, a temporary employment contract with a temporary work agent and will be made available to the user, who in such a situation is the child's legal representative. The disposal of art. 99 of the Labor Code regarding the continuation of work by the temporary employee is not applicable to the person performing the nanny activity, as a temporary employee, in the sense that at the mission termination the temporary employee can conclude an individual contract of employment with the user, this thing being impossible.*

**Key-words:** *the profession of nanny, natural authorized person, temporary employment contract.*

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## **INTRODUCTION**

Law no. 167/2014 regarding the profession of nanny<sup>3</sup> regulates according to art. 1 the exercise of this profession "in order to provide specialized services for child care and supervision".

According to art. 7 of the regulation, the exercise of the nanny profession can be done in two ways: by signing an individual labor

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<sup>3</sup> Published in the Official Monitor of Romania, Part I, no. 922 of 16 December 2014.

contract with a legal entity or as natural authorized person, based on a service contract concluded with the child's legal representative.

Thus, under Government Emergency Ordinance no. 44/2008<sup>4</sup>, may perform work as a nanny as natural authorized person<sup>5</sup>, therefore without concluding an individual labor contract, but a civil contract for services, not covered by labor law because, as noted in reference doctrine "juridical relations as a result of rendering work as an authorized person do not fall within the scope of labor law. They are juridical relations having as characteristics: the person rendering the work is not in a legal relationship with an employer, is free to organize work alone; his income depends directly on the profits made and he assigns it alone, not constituting wage"<sup>6</sup>.

Regarding the labor contract of the person who will carry out work as nanny we appreciate that it cannot be concluded directly with the child's legal representative, as an employer, but the person will have to conclude under art. 87 paragraph 1 of the Labor Code, a temporary<sup>7</sup> employment contract with a temporary employment agent and will be available to the user, who in such a situation is the child's legal representative.

From this point of view it can be stated that Law no. 167/2014 contains a limitation of legal<sup>8</sup> capacity, of the natural person to sign an individual labor contract with another physical person, as employer, in order to exercise the profession of nanny.

It is not the only situation, day laborers may not conclude labor contracts with physical persons as employers, because art. 1 paragraph 1

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<sup>4</sup> Published in the Official Monitor of Romania, Part I, no. 382 of 25 April 2008, with the ulterior modifications, including by Law no. 4/2014 and published in the Official Monitor of Romania, Part I, no. 15 of 10 January 2014.

<sup>5</sup> Alexandru Ticlea, *Tratat de dreptul muncii*, edition VIII, revised and supplemented, (Bucharest: Universul Juridic, 2014), 7.

<sup>6</sup> I.T. Stefanescu, *Tratat teoretic si practic de dreptul muncii*, edition III, revised and supplemented (Bucharest: Universul Juridic, 2014), 16.

<sup>7</sup> Regarding the temporary labor contract see: Alexandru Ticlea, "Particularitati ale contractului de munca temporara", *Revista romana de dreptul muncii* 10(2014): 15-22.

<sup>8</sup> Ticlea, *Tratat...*, 404.

letter b of Law no. 52/2011 on occasional activities performed by day laborers<sup>9</sup> concerns only the employment contract concluded with a legal person and "cannot be beneficiary a physical person holder of a contract which employs domestic personnel"<sup>10</sup>.

Another incompatibility concerns the minimum age required by law, which according to art. 5 paragraph 1, letter c is 18 years. In other words, as in other cases determined by the necessity of protecting the person or the defense of the general interests, the minimum age to conclude an individual labor contract cannot be the one set by art. 13 paragraph 1 of the Labor Code, of 16 years, but the one required by the special law that speaks of full legal capacity, so the minimum age of 18.

In art. 6 of the normative document analyzed there are expressly stipulated several incompatibilities which do not allow the exercise of the nanny activity, namely whether the nanny:

a) lives with other people who have suffered a final criminal conviction, except those who committed criminal facts by negligence, according to the affidavit, in the case where the child care takes place at the home/residence of the nanny;

b) is deprived of parental rights by final court decision or have been banned parental rights as complementary punishment;

c) suffers from chronic communicable diseases;

d) family members or others living with her suffer from chronic communicable diseases, in the case where the child care takes place at the home/residence of the nanny;

e) is dependent on psychotropic substances or drugs and/or plants or substances with psychoactive properties; provisions also apply to family members or others who live with her, in the case where the child care takes place at the home/residence of the nanny;

f) the foster parent certificate was withdrawn.

In this sense the provisions of art. 13 letter a of Law no. 167/2014 according to which "the law provisions are completed with the disposals

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<sup>9</sup> Published in the Official Monitor of Romania, Part I, no. 276 of 20 April 2011, with the ulterior modifications and completions.

<sup>10</sup> I.T. Stefanescu, "Contractul individual de munca al zilierilor", *Revista romana de dreptul muncii* 4(2014): 17.

of Law no. 53/2003 - Labor Code republished, with subsequent modifications" applies only if the law concerning the exercise of the nanny profession does not include contrary disposals derogating from the ones of the Labor Code.

Because the law does not distinguish, we appreciate the nanny profession can be exercised not only by women but also by men.

By concluding a labor contract with an authorized employer (legal entity), the person who will practice the nanny profession will act as a temporary employee, and will conclude a labor contract with a temporary work agent, which will be made available for the user during the work mission that can not exceed, in accordance with art. 90 paragraph 2 of the Labor Code, 36 months with all the successive extensions. As mentioned in the doctrine "it is a *pro causa* contract, to achieve a particular task precisely determined or a type of mission."<sup>11</sup>

Government Decision no. 1256 of 21 December 2011 on operating conditions and the procedure for authorizing the temporary labor agent<sup>12</sup>, provides conditions that must be fulfilled cumulatively by the legal entity in order to obtain authorization<sup>13</sup> to function as a temporary work agent.

The temporary employee is according to art. 88 paragraph 2 of the Labor Code, the person who has signed a temporary work contract with a temporary work agent, in order to make him available to a user to work temporarily under the supervision and management of the latter.

The labor contract may be concluded for a definite period respectively for a temporary work mission for a term which shall not be bigger than 24 months, according to art. 90 paragraph 1 of the Labor Code, or indefinitely, where during the period between two missions the temporary employee is available to the temporary work agent.

Art. 20 in the Government Decision no. 1256/2011 provides that in case the temporary labor agent concluded with the temporary employee a labor contract for an indefinite period, in the periods between

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<sup>11</sup> Stefanescu, *Tratat teoretic si practic de dreptul muncii*, 530.

<sup>12</sup> Published in the Official Monitor of Romania, Part I, no. 5 of 4 January 2011.

<sup>13</sup> Dan Top, "Consideratii teoretice privind infiintarea, autorizarea si functionarea societatilor comerciale care urmeaza sa isi desfasoare activitatea ca agenti de munca temporara", *Revista de drept comercial* 2(2006): 19-29.

assignments the employee has access to facilities existing at the temporary labor agent in terms of professional training and legal provisions on child upbringing and care.

For each new mission, the parties shall conclude a temporary labor contract, which will specify all the elements in art. 91 paragraph 2 of the Labor Code.

In these conditions “the work place is not on the premises or other structures (work points etc.) of the employer, but at another person (natural or legal)”<sup>14</sup>.

If the activity is at the residence of the legal representative of the child, the person acting as the nanny cannot have the quality of “household employee”<sup>15</sup>, besides the circumstance that the labor legislation in force does not contain, although it represents "an imperative of certain topicality"<sup>16</sup>, special provisions with respect to such a contract<sup>17</sup>, as we have shown above, it cannot be concluded in consideration to the nanny activity.

The temporary work agent offers the user a temporary employee hired through temporary employment contract, based on a contract for provision (Art. 91) concluded in writing. The provision contract must include:

a) duration of the mission;

This can be set depending on the option of the user, who is the legal representative of the child, the latter being, according to art. 3 of Law no. 167/2014 "the beneficiary of the care and supervision services provided by the nanny" for a period not exceeding 24 months, according to art. 90 paragraph 1 of the Labor Code.

c) specific features of the job, in particular the necessary qualifications, location of the mission and work program;

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<sup>14</sup> Ticlea, “Particularitati ale contractului de munca temporara”, 16.

<sup>15</sup> Ovidiu Tinca, “Comentarii despre contractul individual de munca al angajatului casnic”, *Revista romana de dreptul muncii* 3(2006): 39-47.

<sup>16</sup> Ion-Traian Stefanescu, “Reglementarea legala a muncii personalului casnic – un imperative de actualitate certa”, *Dreptul* 12(2014): 176.

<sup>17</sup> Dan Top, *Tratat de dreptul muncii* (Bucharest: Wolters Kluwer, 2008): 29.

From this point of view we consider that there must be mentioned the attributions provided by art. 8 of Law no. 167/2014, namely: child care and supervision; child feeding; first aid in case of illness or injury of the child; information of the child's legal representative about his evolution and emergency information of the employer on the occurrence of special circumstances concerning the child; escorting the child in recreational, cultural, artistic, sporting and school activities appropriate to his age or supporting him in exercising such activities, and development of educational activities and acquisition of independent living skills.

An important feature is the one laid down in art. 3 of Law no. 167/2014, namely "supervision and child care during the day." These services are defined by law, in art. 4 letter e as "training and educational services that ensure care, upbringing, protection, education and teaching of the child, using various methods and alternative education and assistance of the child."

Exercise of the nanny activity can be done at the home or residence of the child, which under the law (art. 4 paragraph 1 letter c) is "the place where the child's legal representative lives in a stable way, or where the child's legal representative declares the residence" or the nanny's residence or domicile or, by law (art. 4 paragraph 1 letter d), being "the place where she declares the main or secondary residence under the civil Code".

Specification of the work program of the temporary employee work is equally important, and can be a normal schedule, split or individualized<sup>18</sup>.

c) the actual working conditions;

We believe that there may be stipulated clauses that require the user to provide, if it child care takes place at home or residence, food for the nanny during child care.

d) individual protective and work equipment that the temporary employee must use;

e) any other services and facilities in favor of the temporary employee;

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<sup>18</sup> Ticlea, *Tratat...*, 368.

f) the value of the commission that the temporary work agent beneficiates from as well as the remuneration to which the employee is entitled;

g) the terms on which the user can refuse a temporary employee provided by a temporary employment agent;

As mentions discussed above represent minimum requirements of the provision contract content we consider that there can be inserted other clauses such as: mentioning the official qualification title, which in this case may be, according to art. 5 paragraph 2, the certificate obtained in accordance with Government Ordinance no. 129/2000 on adult<sup>19</sup> vocational training or other nanny titles recognized or equivalent in accordance with Law no. 200/2004 on the recognition of diplomas and professional qualifications for regulated professions in Romania<sup>20</sup>; other duties under the contract, as required by art. 6 paragraph 1 letter f; the mention that the nanny monitoring activity is made by the employer in accordance with art. 11 paragraph 1 or the control authorities on the activity of nanny, for example the Department for Child Protection.

Concerning the form of the provision contract it is obvious that it must be written, but not as a requirement *ad validitatem*, as stated in the doctrine "there is no reason to believe that such a contract should dress the written form ... moreover art. 91 of the Labor code does not sanction non-compliance with the written form of the provision contract<sup>21</sup>. So the written form has *ad probationem* value to facilitate the knowledge of rights and obligations of the parties.

The temporary labor contract ceases at the end of the mission for which it was concluded or if the user gives up its services before the end of the mission, in the terms of the provision contract.

During its execution, until the finish of the mission/missions for which it was concluded the temporary labor contract may be terminated

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<sup>19</sup> Published in the Official Monitor of Romania, Part I, no. 430 of 2 September 2000, and republished in the Official Monitor of Romania, Part I, no. 110 of 13 February 2014.

<sup>20</sup> Published in the Official Monitor of Romania, Part I, no. 500 of 3 June 2004, with the subsequent modifications and completions.

<sup>21</sup> Ticlea, *Tratat...*, 368.

by any of the cases stipulated by law for termination of individual employment contracts.

In addition, the loss of nanny quality in terms of art. 9 of Law no. 167/2014, namely the loss of the quality to practice due to: the inability because of health status or of the family members, occurrence of criminal convictions, deprivation of parental rights, psychotropic substances or drug addiction, withdrawal of maternal assistant certificate, which can constitute grounds resulting in termination of the contract.

Cumulus of functions, namely a contract during the day and another at night would not be possible because the provisions of art. 3 of Law no. 167/2014 are categorical, the nanny can carry out activities only during the day.

We appreciate that the disposal of art. 99 of the Labor Code regarding the continuation of work by the temporary employee is not applicable to the person performing the nanny activity, as a temporary employee, in the sense that at the mission termination the temporary employee can conclude an individual contract of employment with the user, this thing being impossible under Law no. 167/2014.

## **CONCLUSIONS**

From the foregoing, it results that an individual may engage the services of a nanny, by signing a service contract (civil) or resorting to a temporary labor agent, without the possibility of concluding a labor contract as an employer, a situation that can be removed, as proposed in the doctrine by the "adoption of a special law having as object the establishment of the domestic personnel<sup>22</sup> work", stipulating, expressly, the regulation of the individual labor contract of the nanny as domestic personnel.

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<sup>22</sup> Stefanescu, "Reglementarea legala a muncii personalului casnic – un imperativ de actualitate certa", 183.

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# IMPRISONMENT AND COMPLEMENTARY PUNISHMENT FOR PURSUING A PROFESSION OR HOLDING A POSITION – CAUSES FOR THE TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT

Carmen NENU<sup>1</sup>  
Carmina POPESCU<sup>2</sup>

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## **Abstract:**

*Termination of the individual employment contract law finds its express regulation in art. 56 of the Labor Code, the legislator considering a limitative number of cases where the individual contract of employment is legally terminated. In the light of the new regulations of the New Penal Code, an analysis from this perspective of the cases of termination the individual employment contract law will be provided following the conviction of the employee executing a custodial sentence or as a result of the prohibition to practice a profession or hold a function as a safety measure or additional penalty.*

**Key-words:** *individual employment contract, punishment, termination of the individual employment contract, Penal Code, employee.*

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## **INTRODUCTION**

Termination of the individual employment contract law finds its express regulation in art. 56 of the Labor Code, a regulatory provision that has suffered successive changes during the 11 years since Law 53/2003 came into force. The legislator considers an exhaustive list of cases where the individual contract of employment is legally terminated, employee or employer will being irrelevant in this respect. Thus, the concrete situations of impossibility of rendering work to the employee following the intervention of legal acts or deeds led to the adoption of

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mandatory legal solutions. Consequently, the employee can no longer perform the obligations arising from the conclusion of the individual employment contract, being in one of the cases expressly provided by the law:

a) on the date of death of the employee or of the employer and in case of dissolution of legal entity employer, the date on which the employer has ceased to exist under the law;

b) on irrevocable court decision declaring death or putting under the ban of the employee or the employer as an individual;

c) on the date of cumulative completion of the standard age conditions and the minimum contribution period for retirement; the communication date of the decision of retirement for disability pension, partial early retirement pension, early retirement pension, old age pension with reduced standard retirement age;

d) following the finding of nullity of the individual labor contract, the date on which the invalidity has been established by agreement or by final judgment;

e) as a result of the request for reinstatement to the position occupied by the employee of a person dismissed unlawfully or for the wrong reasons, starting with the date of the reintegration final judgment;

f) as a result of a sentence of imprisonment, from the date of the final judgment;

g) the date of withdrawal by the authorities of the permits, authorizations or certificates required by the profession;

h) as a result of the prohibition to practice a profession or hold a position as a safety measure or complementary punishment, from the date of the final court decision which ordered the ban;

i) the expiry of the individual fixed-term employment contract;

j) following the withdrawal of parental consent or legal representatives in the case of employees aged 15 to 16 years.

In such situations, a case occurs expressly established by the laws and which makes producing further effects of the contract definitively impossible<sup>3</sup>. Therefore we can say that the termination of the individual

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<sup>3</sup> C. Nenu, *Dreptul muncii* (Craiova: Sitech, 2014), 20.

employment contract materializes through a dismantling of labor relations that occurs in the power and effect of law<sup>4</sup>.

In the light of the new regulations of the New Penal Code, an analysis from this perspective of the cases of termination of the individual employment contract law will be provided following the conviction of the employee executing a custodial sentence<sup>5</sup> or as a result of the prohibition to practice a profession or hold a function as a safety measure or additional penalty<sup>6</sup>.

### **TERMINATION OF THE INDIVIDUAL EMPLOYMENT RELATIONSHIP, FOLLOWING THE CONVICTION OF THE EMPLOYEE EXECUTING A CUSTODIAL SENTENCE, FROM THE DATE OF THE FINAL JUDGMENT**

In accordance with art. 56 p. (1) f) of the Labor Code the individual labor contract shall automatically be terminated if the employee was sentenced to execution of a custodial sentence, termination that occurs beyond the control of the contracting parties, from the date on which the judgment of conviction became final, becoming enforceable.

The essence of the individual employment contract is work performed by the employee, for which, by employee condemnation, the subject of the contract itself becomes impossible. As such, consequently, the contract naturally ceases to have effect. The legislator situation referred only to executing a custodial sentence, solution generated strictly by the objective impossibility of the employee to fulfill an obligation under the contract, which leads us to launch related criticism.

*Per a contrario*, the interpretation of the actual legal text of art. 56 lit. f) of the Labor Code, termination of the individual employment contract does not work if the employee concerned has been sentenced to imprisonment, but the execution was suspended.

In present, Penal legislation no longer enters the institution of suspended sentence, the latter being replaced by suspended sentence

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<sup>4</sup> See in this regard, Ion-Traian Stefanescu, *Tratat de dreptul muncii* (Bucharest: Wolters Kluwer, 2007), 482.

<sup>5</sup> Art. 56 f) of the Labour Code.

<sup>6</sup> Art. 56 h) of the Labour Code.

under supervision when the punishment imposed, including offenses, is imprisonment of up to three years<sup>7</sup>. As such, in this case, there will be no termination of the individual employment contract. Another stipulation of the new Penal Code is conditional sentence, in which case a period of supervision is established, of 2 years from the date of the final judgment ordering the conditional sentence, the respective employee being interdicted to hold the position, profession or activity that has been used for committing the offense. We believe, in this respect, that such a situation requires special regulations in labor law, causing more than a suspension of the individual employment contract during the period of supervision.

Given these brief considerations, we can say that the regulatory approach today is incomplete, because the laws are so established that the individual employment contract terminates only in the case of sentencing to imprisonment, therefore - execution of sentence in detention<sup>8</sup>.

**TERMINATION OF THE EXISTING INDIVIDUAL EMPLOYMENT CONTRACT AS A RESULT OF THE PROHIBITION TO PRACTICE A PROFESSION OR HOLD A POSITION, AS A SAFETY OR ADDITIONAL PENALTY, FROM THE DATE OF THE FINAL COURT DECISION WHICH ORDERED THE BAN**

According to art. 56 h) of the Labor Code, the individual employment contract shall automatically be terminated if the employee is convicted by a final court decision with the additional punishment of prohibition of the right to occupy a position. It also applies when one was banned to occupy a position or pursue a profession, as a safety measure, in which case the employer can only find termination of the existing contract.

If the employee can no longer exercise a profession or hold a particular position, the subject of the individual employment contract no

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<sup>7</sup> Art. 91 para 1 New Penal Code.

<sup>8</sup> For a detailed analysis of the matters of custodial penalties and their enforcement regime see E. Stancu and C. Aleca, *Elemente de criminologie generală* (Bucharest: ProUniversitaria, 2014), 215-217.

longer meets the condition of legality, and then the contract will be legally terminated, regardless of the will of the contracting parties<sup>9</sup>.

A special discussion is that of the security measures regime or of additional penalties as it is established by the provisions of the new Penal Code<sup>10</sup>, in this respect national criminal law bringing some new ideas. In the category of sentences, the legislature regulates a triple classification of penalties or punishments, that is, main punishments, additional punishments and complementary punishments. Art. 66 of the new Penal Code provides that the additional punishment of prohibition of the exercise of rights is the deprivation of a period of one to five years from one or more of the rights expressly and exhaustively set out in the text of the law, including the right to hold a position involving the exercise of state authority, the right to occupy a leading position within a legal person of public law, namely the right to hold office, to pursue the profession or craft or to engage in the activity that was used for committing the offense<sup>11</sup>.

As the new Penal Code stated in art. 68, the execution of the complementary penalty of interdicting the exercising of certain rights starts from the final judgment of conviction to penalty fine, from the final judgment of conviction ordering suspended sentence under probation, after imprisonment after pardon or amnesty of the penalty, after expiry of the limitation of the sentence or after expiry of the conditional release supervision. Beyond the penal provisions, art. 56. h) of the Labor Code expressly set mandatory termination of the individual employment

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<sup>9</sup> C. Nenu, *Dreptul muncii* (Craiova: Sitech, 2014), 22.

<sup>10</sup> Published in the Official Gazette of Romania, Part I, no. 510 of 24.07.2009, as amended by Law 187/2012 for the implementation of Law no. 286/2009 on the Penal Code, Official Gazette no. 757/2012, Law 27/2012 amending and supplementing the Penal Code of Romania and Law 286/2009 on the Penal Code, Official Gazette no. 180/2012, Law 63/2012 amending and supplementing the Penal Code of Romania and Law 286/2009 on the Penal Code, the Official Gazette no. 258/2012.

<sup>11</sup> Art. 66 letters b) and g) of the new Penal Code. In this regard, see for extensive analysis of the complementary penalty of prohibition of certain rights in the settlement of the New Penal Code, Stancu and Aleca, *Elemente de criminologie generală*, (Bucharest: ProUniversitaria, 2014), 224 ff .

contract from the date of the final judgment imposing the prohibition that was ordered as an additional penalty.

Punishment complementary to banning the exercise of certain rights may be ordered only in addition to the main punishment consisting of imprisonment or a fine, and only if the court finds that, in the nature and gravity of the offense, the circumstances of the case and the person of the offender, the application of punishing is shown to be necessary<sup>12</sup>. Penalty of banning the exercise of a position or profession is mandatory where the law requires punishment for the offense. It is not important the execution of the main penalty, the employment contract being legally terminated from the date of the final court decision which ordered the ban.

According to art. 108 letter c) the new Penal Code, one of the safety measures is the prohibition of holding a position or exercise of a profession. Unlike the complementary punishment applicability regime, safety measures have a character which is independent on main punishments<sup>13</sup>, they can be imposed even if the perpetrator employee was not applied any penalty. Thus, when an offense was committed according to criminal law, the employment security measure banning holding a position or exercising of a profession will have to exist without an explanatory cause<sup>14</sup>. In other words, the law does not require that the deed be attributable to the employee, which means that the security measure can be ordered where there is a cause of non - imputability<sup>15</sup>.

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<sup>12</sup> Art. 67 New Penal Code.

<sup>13</sup> For discussion, see I. Pascu and P. Buneci, *Noul Cod penal, Partea generală și Codul penal, Partea generală în vigoare*, (Bucharest: Universul Juridic, 2010), 146.

<sup>14</sup> According to art. 107 of The New Penal Code, the safety measures are taken against the person who committed an offense under the criminal law, unjustifiably. The current criminal law is supporting the following causes: self defense, state of necessity, exercising of a right or performance of an obligation, the injured person's consent. See I. Lascu, "Cauzele justificative și cauzele de neimputabilitate în Noul Cod penal", *Revista de Drept penal* 3 (2011), 71-92; Pascu and Buneci, *Noul Cod penal*, 31-34. The current penal legislation supporting causes are: self defense, state of necessity, in exercise of a right or performance of an obligation, the injured person's consent.

<sup>15</sup> I. Ristea, *Drept penal. Partea generală* (Bucharest: Universul Juridic, 2011), 353; Pascu and Buneci, *Noul Cod penal, Partea generală și Codul penal, Partea generală în vigoare*, 146.

Reinterpreting, although some act committed by the employee is not imputed to him, due to the fact that it was committed in certain situations or circumstances<sup>16</sup>, the security measure that bans holding a position or exercising a profession can be disposed. The justification taken into account by the legislature in this respect is that the security measure is imposed in order to consider the idea of rehabilitation and re-socialization of the offending individual, including intervention ante-delictum in case of occurrence of conditions or dangerous situations, not considering the sanction of employees, as in the case of complementary punishment that is coercive and educational.

Moreover, prohibition of exercising certain positions or professions as a safety measure occurs when the criminal act committed by the employee is determined by the professional mismatch of the employee to the place of work, or when the act was committed due to inability, lack of training, or other causes that make them unfit for occupation of certain positions, for exercising a profession or trade or for the pursuit of other activities<sup>17</sup>.

The safety measure may be revoked upon request if at least one year passed from then, and the grounds underlying it have ceased<sup>18</sup>.

The prohibition ordered by regulating art. 56 letter h) of the Labor Code is not a general one, since this would produce a serious violation of the constitutional right to work, so it does not refer to the exercise of any profession or position, but merely to those of the existence of a link between the work performed by that employee and the offense committed by them *Per a contrario*, the individual employment contract will not terminate by operation of law if an employee is prohibited from exercising functions other than one they have.

At the same time, in view of the special nature of the prohibition of the exercise of a profession or function, being closely related to the type

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<sup>16</sup> The concept of the New Penal Code non-imputable causes: physical constraint, the non-imputable excess, intoxication, error and fortuitous event, See Pascu and Buneci, *Noul Cod penal*, 146.

<sup>17</sup> Art. 111 paragraph 1 of the New Penal Code.

<sup>18</sup> Art. 111 paragraph 2 of the New Penal Code.

of work performed by the employee, it is possible for the employee to benefit from being legally provided by the employer of another job or position, after termination of the individual employment contract, which means that the respective employee can perform another function or profession than that for which such interdiction was disposed as an additional penalty or as a safety measure.

In any case, however, regardless of the title of that prohibition, the essential condition required by the legislature is that function or profession held by the sentenced employee be prohibited by final court decision. Thus, the court is the one that has the imperative title of termination of the individual employment contract, there is no free will in this respect from the employer, as the judgment is enforceable. The employer is able only to declare the termination as a result of the measure by which the court ordered the ban on exercising a function or profession as a complementary punishment or as a safety measure<sup>19</sup>.

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<sup>19</sup> Although the new criminal provisions do not provide anything about taking provisional safety measures, yet they may be provisionally disposed during both prosecution and judgment. See M. A. Hotca, *Noul Cod penal și Codul penal anterior. Aspecte diferențiale și situații tranzitorii*, (Bucharest: Hamangiu, 2009), 121; Pascu and Buneci, *Noul Cod penal, Partea generală și Codul penal, Partea generală în vigoare*, 153.

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# BRIEF COMMENTS ON THE MAIN LEGAL ACTS REGULATING PERFORMANCE OF THE INDIVIDUAL LABOR CONTRACT

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**Abstract:**

*By law, the employer has authority in relation to their employee as the main feature of their rights. The employer authority is materialized in various legal instruments, under which the organization and operation of the entity is regulated, order and discipline within the organization is established, without which a group of employees could not to become a whole, where the personal interests of each of them would intersect with the general interest of the employers and the team that they coordinate.*

**Key- words:** *employer, employee, job description, Labor Code, work, organization.*

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## INTRODUCTION

By law, the employer has authority in relation to their employee as the main feature of their rights. However, authority has various manifestations of its rights. The employer, depending on the nature of the activities taking place within the company, the variety of employee occupations, must use different legal forms to materialize the right to organize the work of the employee. Of these, particular attention must be paid to job descriptions and internal regulations, required documents mandatory for an individual employment contract.

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## **JOB DESCRIPTION**

The employer becomes a legal entity as a rule. Under Art. 187 of the Civil Code, any legal entity must have an independent organization and its own patrimony, to achieve a certain moral licit aim and in agreement with the general interest. The first requirement imposed by law materializes in a document which establishes the organization and functioning of the legal person on compartments, as well as the main tasks and responsibilities of the component structures. In labor law, provisions governing the functional components are typically regulations on organization and functioning of the legal person. These documents emanating exclusively from those entitled to set up a legal entity express mainly the right to organize an activity belonging to the employer and establish the functional hierarchy within the legal person, specifying duties of management positions, and of the divisions which they lead, establishing positions in the hierarchy interposed between top management and each employee. Rules of organization and operation are prepared on the basis of an organizational structure, known as establishment, schematically comprising the functional hierarchy of departments and senior management, to the highest level.

According to duties of compartments properly defined in the rules of organization and operation, management decides under organizational prerogatives, the number of jobs allocated to fulfill those duties, vacancy requirements and main tasks and responsibilities thereof. For the employer, the job is the main entity that allows better organization of an entity and establishment of the duties and responsibilities of its employees. For the employee, the job is the sum of the activities it has to fulfill and the conditions for achieving them.

The job description is a major tool that materializes the authority of the employer in relation to each of their employees. In its content one must specify all the duties and responsibilities incumbent to the job holder, working conditions, performance standards, the rewarding method and employee personal characteristics necessary to fulfill the job requirements. Any job description has a degree of generalization due to the fact that it is a document prepared for any possible candidate. It is undeniable that each employee occupying a certain position has their

own way to perform the job, the performed work being intrinsic to each employee personality, but this is not subject to the job description, which must retain the impersonal nature.

The importance of the job description, as a tool which materializes employer authority, derives from the analysis of the legal provisions referring to this document, although there is no definition of that concept or a certain minimum content requirement, in terms of labor legislation. Normative provisions contained in the Labor Code which refer to the job description are:

- Art. 17 para. (2) d) and f) according to which the employer is required to inform the person selected for employment or, where applicable, the employee about the job duties or job risks;

- Art. 39 para. (2) a) according to which the employee is required to achieve the work quotas or, where appropriate, to fulfill the tasks assigned by the job description;

- Art. 40 para. (1) b) that the employer has the right to establish adequate duties of each employee under the law and / or under the applicable collective labor contract signed at national level by industry or group of units.

References to job descriptions can be found in other normative documents, among which:

- Art. 13 para. (1) d) of the law of safety and health in work no.319/2006, according to which, in order to ensure the health and safety conditions and prevent work accidents and occupational diseases, employers are required to establish for workers, by the job description, duties and responsibilities of their respective security and health, according to positions held;

- Section. F in the framework model of the individual labor contract approved by order of the Minister of Labor no. 64/2003, as amended and supplemented<sup>3</sup> states that the job description is provided in the annex to the individual employment contract.

The question is whether the job description should be made in writing as a condition of validity or not. The answer can only be positive, because the job description is an annex to the individual employment

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<sup>3</sup> Official Gazette no. 139, 4 March 2003.

contract, whose written form is a requirement of validity. It is recommended, in order to avoid conflicts during the progress of the individual employment contract, that the job description be a document as comprehensive as possible, to be brought to the employee both when concluding individual employment contract and during its execution, with every change in its contents.

In light of the above, the job description is a document required and necessary, annex to the individual employment contract, which establishes the basic coordinates of the position, both in terms of control of the employee by the employer, and in terms of the correct assessment of employee duties correlative to how they are fulfilled.

## **INTERNAL RULES AND REGULATIONS**

Provisions relating to internal rules<sup>4</sup> can be found throughout the Labor Code, but its regulation as a legal entity is found in Title XI (legal liability), Chapter I (internal rules) without it receiving a legal definition. The source is art. 241-246 of the Labor Code. The analysis of these legal provisions shows that internal regulations is a document emanating from the employer, primarily aimed at establishing a climate of discipline at entity level by establishing the specific rights and obligations of the employer, on the one hand, and employees, on the other hand, and by establishing uniform rules about the conduct that employees must have in relation to the employer, irrespective of the position they occupy. The doctrine<sup>5</sup> recognizes the quality of internal regulations as a specific legal source of labor law, which must be correlated with the content of the

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<sup>4</sup> The term rules of procedure used by Law no. 1/1970 on labor discipline in state socialist units, was replaced by the internal regulation. See Raluca Dimitriu, „Regulamentul intern”, *Raporturi de muncă* 6 (2004): 40; Dan Țop and Lavinia Savu, „Considerații privind regulamentul intern”, *Revista romana de dreptul muncii* 4 (2003): 58-59; A.G. Uluitu, „Contractul colectiv unic la nivel național pe anii 2007-2010 și Regulamentul intern”, *Revista romana de dreptul muncii* 1 (2007): 48-49.

<sup>5</sup> Alexandru Athanasie and Luminița Dima, *Dreptul muncii*, (Bucharest: CH. Beck, 2005), 12-13; Alexandru Țiclea, *Tratat de dreptul muncii* (Bucharest: CH Beck, 2013), 40-41; Ion-Traian Ștefănescu, *Tratat de dreptul muncii* (Bucharest: Universul Juridic, 2012), 44-47.

collective labor contract<sup>6</sup> if there is such an agreement applicable to that unit.

We will further analyze briefly the most important mandatory elements of the internal rules, as set out in the Labor Code.

## **RULES FOR PROTECTION, HYGIENE AND SAFETY AT WORK WITHIN THE UNIT**

Considering the provisions of Law no. 319/2006 on safety and health at the workplace, the employer has a number of obligations whose fulfillment aims to promote improvements in the safety and health of workers, mainly consisting in establishing general principles concerning the prevention of occupational risks, the elimination of risk factors and injury, consultation, balanced participation and training of workers in this regard.

Legislation on safety and health at work of employees has many references to the rules and regulations. The rules for the application<sup>7</sup> of Law no. 319/2006 established that a number of rules for safety and health at work must be provided in the internal rules or organization and operation regulations or in the applicable collective agreement. Under this law the concept of office duties is defined (art. 2 pt. 15), as professional tasks set out in the individual employment contract, rules or regulations of organization and functioning, job description, written decisions, the written or verbal provisions of the direct manager or superiors thereof. The content of this definition includes all legal instruments by which the employers advance their authority in relation to their employees.

### **A. Rules on eliminating discrimination and all forms of violation of dignity**

Discrimination of employees is considered a fundamental principle of labor law, closely linked with the principle of social protection of employees, which has its origins in the country's fundamental law. Discrimination in labor relations involves differentiating or different

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<sup>6</sup> See for details Ion-Traian Ștefănescu, „Conținutul contractului colectiv de muncă”, *Revista romana de dreptul muncii* 4 (2004): 13-18.

<sup>7</sup> Approved by H.G. no. 1425/2006, Official Gazette no 882, 30 October 2006.

treatment of two people or two situations where there is no relevant distinction or equal treatment to different situations. The normative acts which should be the basis for determining the content of these rules and internal regulations are O.G. no. 137/2000 on preventing and sanctioning all forms of discrimination, republished<sup>8</sup>, and Law no. 202/2002 on equal opportunities and equal treatment between women and men, republished<sup>9</sup>. The rules laid down in its internal rules must be clear and adapted to the specific activity of the entity, identifying situations in which discrimination may arise directly or indirectly. Thus, employees must know both legal concepts of discrimination and their duties within the organization to prevent or combat any form of discrimination or infringement of the principle of dignity at work.

### **B. The rights and obligations of the employer and employees**

Besides the rights and obligations set forth in art. 39-40 of the Labor Code, there are other rights or obligations arising from the positions of the two contracting parties. The rights and obligations stipulated by the Labor Code are general, the employer has the obligation to determine concretely how they apply in practice (e.g., the employer is obliged to keep records of work performed). The internal regulations provide the concrete way to highlight the work time by presence registry, through timesheets or by electronic cards.

### **C. The procedure of handling requests or complaints of individual employees**

The employers shall establish a procedure for handling requests and complaints from employees, to be communicated to them, so they can use them in given situations. Thus, deadlines are set; forms are used, as well as the persons responsible for settling employees' claims.

### **D. Concrete rules on labor discipline in the unit**

Work order and discipline is a must for any work process, whether it is a collective or individual process, because it conditions the normal course of business in the unit. The provisions included in its internal rules are mandatory for all employees, the employer making all necessary efforts to bring it to the staff.

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<sup>8</sup> Official Gazette no. 166, 7 March 2014.

<sup>9</sup> Official Gazette no 326, 5 June 2013.

### **E. Disciplinary violations and penalties**

Due to the fact that in the Labor Code there is no detail on misbehavior, only a definition of it, given in general terms, the employer must individualize the actions or inactions of their employees that may constitute misbehavior. With regard to disciplinary sanctions, they are provided by law and according to the principle of legality of their application, the internal rules may be provided for other sanctions than those established by the Labor Code, namely by certain professional status. It should also be noted that neither establishing a correlation between a certain disciplinary deviation and sanction applicable cannot be regarded as lawful, in the context of disciplinary liability<sup>10</sup> arises depending on certain conditions, which cannot be predetermined.

### **F. Rules relating to disciplinary proceedings**

The Labor Code provides that no disciplinary sanction, except the written notice, can be applied without a disciplinary investigation. Consequently, the internal regulations must provide both the concrete way of implementing written warnings (persons empowered, formalities) and the disciplinary procedure including investigation preliminary to the application of disciplinary sanction (which is the commission, how they work in this committee, what measures may be taken during the disciplinary investigation etc.).

### **G. Methods of implementing of other specific legal or contractual provisions**

The individual employment relationship is born, develops and ends under the law and the individual employment contract. There are times when the provisions contained in such acts are contradictory or just different. The internal rules stipulate specific rules for applying legal or contractual provisions which will complete the legal general provisions, some specific, applicable within that entity.

### **H. The criteria and procedures for evaluating employees professionally**

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<sup>10</sup> See in this respect Mona-Lisa Belu-Magdo, „Răspunderea disciplinară în sistemul general al legislației muncii”, *Revista română de dreptul muncii* 1 (2005): 58-66; Țiclea, *Tratat...*, 633-674; Ștefănescu, *Tratat...*, 450-480.

Consistent with the principled character of art. 17 and 40 of the Labor Code, Law no. 40/2011 amending and supplementing Law no. 53/2003 - Labor Code<sup>11</sup> has introduced a new concept, namely personnel evaluation criteria. These should be reflected in the content of the individual employment contract, but also in the internal rules which regulate procedures to be followed to achieve professional evaluation of employees. Without these procedures, the employer is unable to achieve the objective fair and lawful professional evaluation of staff, being unable to dismiss employees for professional unsuitability to the workplace.

## **THE ROLE AND IMPORTANCE OF JOB DESCRIPTIONS AND INTERNAL REGULATIONS**

The importance of internal regulations as a tool to materialize the employer's authority in relation to its employees, however, is much diminished in practice. Therefore, the vast majority of employers, with a small number of employees, only establish a formal role for internal regulations and not an essential one, necessary for carrying on an activity in order and discipline within the organization. The requirements are mandatory for domestic employees, non-compliance constitutes misbehavior. The internal regulations allow the employers to protect their rights to control and sanction, testing decisions applying disciplinary sanctions.

In practice, rules are presented, most often as an annex to the collective agreement. Considering this last statement, in reality, rules shall be made in accordance with art. 241 of the Labor Code by the employer in consultation with trade union or employee representatives, as appropriate. However, the employer has the possibility to introduce in negotiating collective agreements the internal rules, without this negotiation being a claim of employees.

## **CONCLUSIONS**

Considering the above, it appears that the employer authority is materialized in various legal instruments, under which the organization

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<sup>11</sup> Official Gazette no 225, 31 March 2011.

and operation of the entity is regulated, order and discipline within the organization is established, without which a group of employees could not to become a whole, where the personal interests of each of them would intersect with the general interest of the employers and the team that they coordinate.

Action is therefore required that both job descriptions and internal rules to benefit from a more comprehensive statutory regulation, not leaving up to the employer the contents of these tools particularly important in executing an individual employment contract, because they ensure enforcement of rights and contractual obligations assumed by both the employer and the employee.

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- Law no. 202/2002 on equal opportunities and equal treatment between women and men, republished, Official Gazette no 326, 5 June 2013.
- O.G. no. 137/2000 on preventing and sanctioning all forms of discrimination, republished, Official Gazette no. 166, 7 March 2014.

# RIGHTS AND DUTIES OF THE PARTIES IN THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE VIEW BETWEEN ROMANIAN LAW AND EASTERN EUROPEAN STATES' LEGISLATION

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## **Abstract:**

*The contract of employment, once concluded, gives birth to a combination of diverse corresponding duties and obligations. While Labour Code defines the general rights and duties of the employer and the employee, other rights and obligations of the parties are specified in different specialized acts and regulations (e.g. the laws concerning workers' safety and security). The issue of the duties of the two parts under the employment relationship is more complex because they consist of many component parts. The fulfillment of each obligation presupposes the fulfillment of all its component elements in their diversity. There are many cases in which the Romanian legislation, unlike other labour legislations from Eastern European countries, gives a much generalized definition of a certain duty or right, but in order to know what was intended to be stipulated, we need to interpret the provisions of the law. The more generalized the manner in which a duty or right is formulated the more diverse are its concrete manifestations.*

**Key- words:** *employee, employer, contract, Labour Code, collective bargaining, work.*

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## **INTRODUCTION**

Individual employment contract is binding between its two parts - employer and employee, in the name of the compulsory contract principle according to which the legal agreements have made the laws of

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the contracting parties<sup>3</sup>. Under this principle, any party that holds the rights acquired by contract is entitled to claim the other party to satisfy these rights.

The execution of the individual employment contract involves carrying out in successive time the mutual obligations of the parties, of which are fundamental work performance and salary payment. Consequently, employee's rights are born, as a rule, on "a pro rata basis" (as the labour supply).

In general, the rights and obligations included in the individual employment contract shall be governed by the Labour Code. Also, other rights and obligations of the employment relationship between employer and employee are determined by negotiations under collective agreements and individual contracts of employment, or are under internal rules.

For different categories of personnel (judges, teachers, customs staff, staff of national energy system, etc.), rights and obligations of the parties are provided by professional or disciplinary statutes.

Employees can not waive their rights recognized by law. Any transaction that seeks waiver of employees' rights recognized by law or limiting such rights is invalid<sup>4</sup>.

## **I. OBLIGATIONS AND RIGHTS OF THE EMPLOYEE**

According to the Romanian Labour Code, the employee has the following main rights<sup>5</sup>: a) the right to remuneration for work, b) the right to daily and weekly rest, c) the right to annual leave, d) the right to equal opportunity and treatment; e) the right to dignity at work, f) the right to safety and health; g) the right of access to training, h) the right to information and consultation; i) the right to take part in determining and improving working conditions and working environment, j) the right to protection in case of dismissal, k) the right to bargain collectively and individually, l) the right to participate in collective action, m) the right to form or join unions.

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<sup>3</sup> Article 1270 of the Romanian New Civil Code.

<sup>4</sup> Article 38 of the Romanian Labour Code.

<sup>5</sup> Article 39 para. 1 of the Romanian Labour Code.

In comparison with the Romanian legislation, the Bulgarian Labour Law, in art. 124, request the employer “to provide conditions to the employee so he can perform his work and pay him for work done”<sup>6</sup> and also stipulates that other more specific rights of the employee are: payment according to the duration and results of the work performed; entitlement to statutory fixed working time, rest and leave; entitlement to safe and healthy working conditions; the opportunity to maintain and improve professional training.

Employee has the following main obligations in the Romanian legislation<sup>7</sup>: a) the obligation to perform work share or, where appropriate, to meet his / her duties according to job description, b) the obligation to observe labour discipline, c) the obligation to observe the provisions of the internal rules, applicable collective contract and the individual employment contract, d) the obligation of fidelity to the employer in carrying out duties<sup>8</sup>; e) the obligation to comply with measures of health and safety in unity, f) the obligation to observe the secrecy of service.

According to article 39 par. 2 let. b) of Labour Code, the employee has, among other obligations, the obligation to respect work discipline. The obligation stipulated by law operates at somebody’s charge only on the basis of a individual labour contract.

Work discipline has two forms: technological and organizational discipline. Technological discipline implies the fair application of all knowledge about means and methods of effectuation the operations necessary for realizing products, works or services, as well as the use, in security conditions, of tools, instalations, machines and work equipments. Organizational discipline is ensured through the agency of

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<sup>6</sup> W. Gary Vause and Kalina Sarmova, „The Development of Bulgaria’s Labor Law”, in W. Gary Vause, Den Bosch, *Business Law Guide: Bulgaria. With English Translation and Analysis of the New Labor Law* (The Netherlands: BookWorld Publications, 1997), 42; Csilla Kollonay Lehoczky, *Labour Law and Social Security* (Budapest: Central European University, 1998), 61.

<sup>7</sup> Article 39 para. 2 of the Romanian Labour Code.

<sup>8</sup> For details, see Cristina Popa Nistorescu, „Cadrul juridic al responsabilității sociale a întreprinderii în România”, in *Responsabilitatea socială a întreprinderii*, coord. Adriana Șchiopoiu Burlea (Craiova: Universitaria, 2007), 97.

“respect, by all employees, irrespective of their hierarchical level, of all their obligations, as well as the established work relations”<sup>9</sup>. In addition to the basic obligation to respect work discipline, article 22 of Law no. 319/2006 concerning safety and security at workplace stipulates that each worker must perform his activity in accordance with his training and experience, as well as with the instructions given by his employer, in order that his person or other person’s security should not be put into danger during work process. More specific are the dispositions of art. 126 of the Bulgarian Labour Code which states that the employee has to appear at work in a condition permitting the work performing accordingly and take care of the property entrusted to him or her in course of performing the job duties. Having in view that neither the Romanian Labour Code nor Law no. 319/2006 does not expressly ban for the employee to work drunk or consuming alcoholic beverages during working hours, „de lege ferenda” we consider that art. 22 of Law no. 319/2006 should be amended as follows: „Every worker must come to work in a state allowing it to perform his activity in accordance with his training and experience and with employer’s instructions, so that do not expose to risk of injury or occupational disease both themselves and others who may be affected by his acts or omissions during work”.

Art. 39 para. 2 of the Labour Code lists among the duties of the employee, besides the obligation to respect the safety and occupational health measures, the obligation to fulfill the tasks assigned by the job description list, the obligation to observe work discipline, obligation to respect the provisions of the internal regulations, of the applicable collective labour contract, as well as of the individual employment contract.

Another important obligation of the employee is to be in alert or to communicate immediately to the employer and/or designated workers any work situation they have reasonable grounds for considering a danger to the safety and health of workers, and any deficiency in the protection systems provided by art. 23 lit. d of Law no. 319/2006, its

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<sup>9</sup> Alexandra Sandu, *Managementul resurselor umane* (Craiova: Universitaria, 2005), 130.

observance being crucial both for their safety and for the safety of other employees.

Under Romanian Labour Code, the laws regulating social protection, safety and security at work relate specifically to employees with employment contracts. The obligation to conclude individual employment contract in writing form, as a prerequisite for the valid conclusion of the contract, is incumbent to the employer. Failure to reach agreement in writing has also the most serious consequences for the employee which can be sanctioned and is deprived of any social security benefits. Thus if an employee is injured at work, social guarantees may apply only if the employee has a contract. This is the case of Latvia <sup>10</sup>.

In different labour legislations from Eastern European countries there are differences between the conditions in which a right can be acquired / exercised or in which an obligation must be fulfilled. For example, according to art. 155(1) of the Bulgarian Labour Code, worker's basic right to paid annual leave vests after eight months of service regardless whether that period of time is work performed at the same employer or different employers or if the work was "interrupted"<sup>11</sup>. Romanian Labour Code stipulates that "the effective period of annual leave is determined by the applicable collective labour contract, is stipulated in the individual labour contract and is granted in proportion to the activity performed in a calendar year" (art. 140 par. 2) but makes no specification regarding the minimum period of employment after which the employee is entitled to request annual paid leave.

In the Romanian law, the foundation of employee's right to equal pay for equal work is found in art. 159 par. 3 of the Labour Code. The right to equal pay benefits to all who have an individual contract of employment or legal relationship. The significance of this principle is that when two or more persons are in an identical situation, their salaries

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<sup>10</sup> Charles Woolfson, „Labour Standards and Migration in the New Europe: Post-Communist Legacies and Perspectives”, *European Journal of Industrial Relations*, vol. 13, no. 2 (2007), 203.

<sup>11</sup> W. Gary Vause and Kalina Sarmova, „The Development of Bulgaria's Labor Law”, 34; Csilla Kollonay Lehoczky, *Labour Law and Social Security*, 55.

cannot be different. This does not mean that the principle of equal pay is an obstacle to the employer's power of wage individualization which is justified if the difference between salaries is based on objective reason<sup>12</sup>. For each employee, the salary amount is determined according to his qualifications, the importance and complexity of its performance, professional training and competence. The fundamental criterion to be taken into account in determining wages remains professional capacity; however, the employer cannot introduce its own arbitrary criteria, essentially different from the common ones. It is true that in order not to violate this principle can be applied a wage system according to which the size of the basic salary is determined only by the complexity of the job, regardless of differences in performance of those occupying positions of equal value. At the same time, the employer has the possibility, depending on the results of professional performances of employees in the previous period, to reward the most deserving employees by giving them merit salaries, bonuses or other forms of awards<sup>13</sup>.

Employee's obligation to respect the term of notice is valid as long as the employer meets its contractual duties. Otherwise, the employee may resign without notice<sup>14</sup>. The specialty literature admits the possibility of the employee to resign without notice period „only if the employer does not fulfill those obligations which are reciprocal and interdependent with the obligation of the employee to perform the work, that it is the employer's obligation to pay salary and to provide working

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<sup>12</sup> See Roxana -Cristina Radu and Cezar Avram, "The Principle of «Equal Pay for Equal Work» in Community Norms and Romanian Legislation", *Revista de Științe politice/ Revue de Sciences Politiques* 20 (2008), 90-98.

<sup>13</sup> Mioara Neamțu, *Evaluarea performanțelor profesionale - componentă a managementului resurselor umane* (Craiova: Universitaria, 2007), 81.

<sup>14</sup> If the employer does not fulfill his contractual obligations, the employee may not oppose the exception of „non adimpleti contractus” as in civil contracts. He is forced to work further with the possibility to sue the employer or to resign. Based on art. 79 para. 8 of the Labor Code, the employee has, in this case, the opportunity to resign without notice.

conditions”<sup>15</sup>. Another opinion is that this option remains „not only for breach by the employer of obligations under individual employment contract, but also of the obligations under the collective agreement or by law”<sup>16</sup>. In light of these considerations, we believe that breach by the employer of its obligation to ensure employees all rights under the law, the collective agreement applicable to the unity’s level and the individual employment contracts, including employee’s right to dignity at work<sup>17</sup>, give him the right to resign without notice<sup>18</sup>.

Because of the fact that the individual employment contract is a mutual binding contract, we can say that employee’s obligations may be seen as expectations to which the employer is entitled. The fulfillment of each obligation presupposes the fulfillment of all its component elements in their diversity. There are many cases in which the Romanian legislation, unlike other labour legislations from Eastern European countries, gives a much generalized definition of a certain duty or right, but in order to know what was intended to be stipulated, we need to interpret the provisions of the law. The more generalized the manner in which a duty or right is formulated the more diverse are its concrete manifestations.

## **II. RIGHTS AND OBLIGATIONS OF THE EMPLOYER**

Regarding employer’s rights, they give expression to its powers: directing, control and disciplinary power. According to the Romanian law, the employer has the following main rights <sup>19</sup>: a) to establish the organization and operation of the enterprise, b) to set tasks for each employee under the law and / or conditions of the applicable collective agreement concluded at national level, branch of activity or group of units, c) give instructions compulsory for the employee, subject to their legality; d) to exercise control over the tasks of service, e) to find

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<sup>15</sup> Alexandru Athanasiu and Luminița Dima, ”Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii”, *Pandectele române* 6 (2003), 214.

<sup>16</sup> Raluca Dimitriu, ”Reglementarea demisiei în noul Cod al muncii”, *Raporturi de muncă* 2 (2004), 30.

<sup>17</sup> According to Article 39 para. 1 and Article 40 para. 2 of the Romanian Labour Code.

<sup>18</sup> Dimitriu, ”Reglementarea demisiei în noul Cod al muncii”, 30.

<sup>19</sup> Article 40 para. 1 of the Romanian Labour Code.

committing of disciplinary violations and impose sanctions under the law, applicable collective agreement and internal regulations. The Labour Code expressly and limitedly stipulates the sanctions which can be applied by the employer to the employee that committed misconduct. Because of the fact that, being inexhaustible, misconducts cannot be enumerated, the Romanian legislator could not have stipulated for which misconduct one or other sanction would be applied. As a result, the employers is the only one that establishes the applicable sanction, taking into consideration a series of general criteria such as<sup>20</sup>: the circumstances in which was committed the fact; employee's guilt; the previous behaviour of the employee etc.

Romanian employers have the following main obligations<sup>21</sup>: a) to inform employees on working conditions and elements regarding the conduct of labour relations, b) to provide permanent technical and organizational conditions envisaged to develop labour standards and conditions of employment, c) to give to the employees all rights granted by the law, applicable collective agreement and individual employment contract, d) to communicate regularly to the employed the economic and financial situation of the enterprise, except sensitive or secret information which the disclosure is likely to damage enterprise's activity; e) to consult with the union or, where appropriate, with employees' representatives on decisions likely to affect substantially their rights and interests, f) to pay all contributions and taxes in its task and to retain and transfer contributions and taxes payable by employees, g) to establish the register of records and make records of employees under law provisions; h) to issue, upon request, all documents certifying the applicant's employee status, i) to ensure the confidentiality of employees' personal data.

Of these obligations, a special meaning, as an expression of social dialogue, has the employer's obligation to consult with trade unions or,

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<sup>20</sup> Article 266 of the Romanian Labour Code.

<sup>21</sup> Article 40 para. 2 of the Romanian Labour Code.

where appropriate, employees' representatives, on decisions likely to affect substantially their rights and interests<sup>22</sup>.

Regarding employer's obligation to communicate periodically to his employees enterprise's economic and financial situation, the art. 40 par. 2 point d) of the Romanian Labour Code has raised many discussions and critics<sup>23</sup>. The Constitutional Court rejected the criticism, noting that these provisions do not oblige employers to communicate information of professional secrecy or confidentiality character, which are likely to damage enterprise's activity. This obligation targets general data concerning economic and financial situation of the enterprise, which shall be released also with the balance sheet that is regularly published in Romania's Official Monitor, just to ensure compliance with market economy principles and requirements of fair competition.

Romanian labour legislation stipulates employers' obligation of ensuring participation in professional training programs for all employees at least once in two years (if they have minimum 21 employees) or at least once in three years (if they have 21 employees at the most). Moreover, the employer juridical person which have more than 20 employees has to elaborate and apply once a year plans of professional forming, after the consultation of union trade or employers' representatives<sup>24</sup>. In accordance with the stipulation of Labour Code, expenses involved by the participation at professional training programs are paid by the employer. Moreover, if participation in courses or programs of professional forming implies integral drawing out of

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<sup>22</sup> Marius Ezer, „Informarea și consultarea salariaților”, *Revista Română de Dreptul Muncii* 5 (2007), 90-92.

<sup>23</sup> Article 21 letter a) of the Revised European Social Charter (adopted in Strasbourg on 3 May 1996 and ratified by Romania through Law no. 74/1999) stipulates, for workers or their representatives, the right „to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the company employing them, being understood that the disclosure of certain information which may affect businesses may be refused or it may request that they be confidential”. According to article 11 para. 2 of the Constitution, „Treaties ratified by Parliament, according to the law, are part of national law”, which means that the text of art. 40 para. 2 letter d) of the Labour Code are completed with the mandatory provisions of Article 21 lit. a) of the Revised European Social Charter.

<sup>24</sup> Roxana Cristina Radu, *Dreptul muncii* (București: C.H. Beck, 2008), 180.

activity, the individual labour contract of the respective employee is suspended but he receives an allocation paid by the employer, the quantum of this allocation being stipulated in the collective or individual contract of labour, as the case may be<sup>25</sup>. Problem remains because of the fact that Romanian legislation does not provide any penalty for an employer who does not fulfill this obligation.

The employer is obliged to provide in the internal regulations of the unit disciplinary sanctions as provided by law for employees who violate personal dignity of other employees by creating degrading, intimidating, hostile, humiliating or offensive environments through actions of discrimination, as defined in art. 4 letter a) -e) and art. 11 of Law no. 202/2002 on the equal treatment between women and men. Undoubtedly, the establishment of such obligations on employers represents a great progress for Romanian labour law<sup>26</sup>. It is certain that it was "legal conditions" which do not allow the employer to apply to those who committed an act which violates the principle of equal treatment between men and women other sanction than those of art. 248 par. (1) of the Labour Code or of the special law applicable. "De lege ferenda" we consider it necessary to regulate a specific disciplinary sanction for those who commit an act which violates the principle of equal treatment and dignity at work, sanction involving the definitive modification of the workplace, and in case of committing such acts repeatedly, if not met the conditions of existence of an offense, the employer may apply the sanction of disciplinary dismissal.

### **III. COLLECTIVE RIGHTS**

Knowledge of employees' rights to collective action has both theoretical and practical importance because only by doing so can promote their interests by the professional, economic, social (collective bargaining) or may obtain greater rights in addition to those covered by

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<sup>25</sup> Roxana Cristina Radu, *Dreptul muncii – Aspecte teoretice și practice* (Craiova: Aius, 2015), 235-6.

<sup>26</sup> Nicolae Voiculescu, „Unele aprecieri asupra Legii nr. 202/2002 privind egalitatea de șanse între femei și bărbați și armonizarea ei cu directivele comunitare în materie”, *Revista Română de Dreptul Muncii* 2 (2002), 18.

labour laws (by conclusion of collective agreement) and can defend their rights violated (by the onset and resolution of labour disputes - the interests or rights).

Priority enjoyed by the Romanian law of collective bargaining in labour legislation, by law, the employment relationship with other specific sources of labour law is fully consistent with international rules<sup>27</sup>. The European Union norms confer an important position to collective bargaining<sup>28</sup>. According to Art. III - 104 section 4, a Member State may entrust the social partners, at their joint request, the implementation of European framework laws adopted in areas where the EU supports and supplements Member States to achieve social objectives. Therefore, any area or specific issue of employment - except those excluded under art. III - 104 section 6, of Union competence (compensation, right of association, right to strike, the right to impose lock-outs) - subject to law - European framework can govern by means of specific national social dialogue, particularly by collective bargaining agreements by social partners at their joint request<sup>29</sup>.

The collective bargaining agreement underpins relations established between employers and employees covered by this contract are both rights and obligations of both parties. Also in the collective agreement are provided possible solutions to resolve any misunderstandings between employees and employers. For example, pursuant to the stipulations of article 39 par. 1 of Law no. 202/2002 concerning the equality of chances for men and women, when the employees consider themselves sexually discriminated, they have the right to submit petitions to the employer or against him, if he is directly

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<sup>27</sup> The International Labor Organization has adopted various regulations that relate directly or indirectly to collective bargaining or its related topics: Recommendation no. 91 (1951) concerning collective agreements; Convention no. 87 (1948) on freedom of association and protection of the right of association in trade unions; Convention no. 98 (1949) concerning the right to organize and bargain collectively; Recommendation no. 163 (1981) on collective bargaining, etc.

<sup>28</sup> According to art. 137 pt. 4 of the Treaty establishing the European Community, consolidated.

<sup>29</sup> Obviously, any Member State may accept that the regulation of certain aspects of employment relationships to be made by the social partners.

involved, and ask for the support of the trade union or the employees' representatives for solving the work situation. Unlike other state laws providing in detail the mediation procedure at the employer/unit level<sup>30</sup>, Romanian Labour Code does not regulate the procedure of solving employees' individual petitions at employer's level. Because of the fact that this aspect is not regulated by law, it should be included as a distinctive issue in the content of collective labour contracts concluded at the unity level or internal regulations. Thus, in order to create and maintain a working environment meant to encourage the respect of each persons's dignity, through the agency of collective labour contract concluded at unity level, there shall be established procedures of amiably solving the individual complaints of the employees, inclusively the ones concerning cases of moral or sexual harassment.

The collective bargaining agreement is leading to harmonize the interests of employers, employees and the general interest of society. Analyzing Law no. 53/2003 - Labour Code<sup>31</sup> and labour law as a whole, unquestionably stands out that, in all respects, including in terms of content regulation, collective bargaining plays a preeminent role. After the emergence of Law no. 62/2011 on social dialogue the interests of

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<sup>30</sup> For example, Article L1152-6 of the French Civil Code provides: "Une procédure de médiation peut être mise en oeuvre par toute personne de l'entreprise s'estimant victime de harcèlement moral ou par la personne mise en cause. Le choix du médiateur fait l'objet d'un accord entre les parties. Le médiateur s'informe de l'état des relations entre les parties. Il tente de les concilier et leur soumet des propositions qu'il consigne par écrit en vue de mettre fin au harcèlement. Lorsque la conciliation échoue, le médiateur informe les parties des éventuelles sanctions encourues et des garanties procédurales prévues en faveur de la victime" („A mediation process can be implemented by any person in the enterprise who feel affected by bullying or by the person questioned. The choice of mediator is the subject of an agreement between the parties. The mediator asked about the state of relations between the parties. It attempts to reconcile them and submit their proposals set it in writing to stop the harassment. Where conciliation fails, the mediator informs the parties of any penalties incurred and procedural guarantees stipulated by law in favor of the victim").

<sup>31</sup> Published in Romania's „Official Gazette”, Part I, no. 72 of 5 February 2003, amended by Law no. 480/2003, published in the „Official Gazette”, Part I, No. 814 of 18 November 2004 and by Law No. 913/2003, published in the „Official Gazette”, Part I, no. 913 of 19 December 2003.

employees have been severely affected by eliminating the possibility of negotiating and concluding a collective agreement at national level. As for contracts negotiated at the level of sectors, the collective labour contract will be registered at that level only if the number of employees in establishments-members of the signatory employers organizations is greater than half of the total number of employees in the business sector. If this condition is met, the application of collective labour contract registered at the level of a sector will be extended to all establishments in that sector by the order of the Minister of Labour, Family and Social Protection, with the approval of the National Tripartite Council, based on the request of the signatories of collective labour agreement at sectorial level<sup>32</sup>. Otherwise, the contract will be registered as a contract of group of units. A similar situation is registered in Hungary, where the revised Labour Code stipulates that the ministry of labour can extend branch agreements to the entire industry or sector in response to a joint request by the contracting parties but only if the parties are „representative in the industry concerned”<sup>33</sup>. These conditions lead to a continuous deterioration of industry agreements which are fewer and weak, providing only minimum standards for pay, leaves and work conditions, usually just above those provided for by law.

## CONCLUSION

Although legislation plays an important role for the protection of employees' rights, it is clear that in the case of Romania, the legislation is either insufficient or has many gaps that may give rise to various interpretations, depending on the circumstances. The issue of workers' rights infringement becomes even more complicated when is the result of repeated abusive practices of the employers that can take different forms and types of manifestation. Without claiming to have exhausted all

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<sup>32</sup> Article 143 para. 5 of Law no. 62/2011 on social dialogue.

<sup>33</sup> Csilla Kollonay Lehoczky and M. Ladó, "Hungary", In *New Patterns of Collective Labour Law in Central Europe: Czech and Slovak Republics, Hungary, Poland*, eds. U. Carabelli and S. Sciara (Millan: Giuffré Editore, 1996), 136; Anna Pollert, "Ten Years of Post-Communist Central Eastern Europe: Labour's Tenuous Foothold in the Regulation of the Employment Relationship", *Economic and Industrial Democracy*, vol. 21, nr. 2 (2000), 192.

aspects regarding the rights and obligations of the individual employment contract's parties, we mention that we wanted to illustrate this article only with the most significant examples of legislative provisions that are problematic in practice and that this action is intended to be only the first step in a series of future studies.

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# DAMAGE RECOVERY BY USING CASH FORMED GUARANTEE

Marioara ȚICHINDELEAN<sup>1</sup>

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## **Abstract:**

*According to Art. 254, Align. 1, Labor Code, the employees answer with their patrimony by respecting the norms and principles of the civil contract liability, for the material damages they induce to the employer by their own fold or their work related. Damage recovery by using cash formed guarantee has certain characteristics, like: cash formed guarantee can be used for covering inventory damages caused by the inventory-keeper and not for covering other debts he has towards the company; cash formed guarantee cannot be used by another creditor company; regardless the amount of money owed by the inventory-keeper, the company cannot proceed for recovering its claim by using the cash formed guarantee if it does not own an indefeasible enforceable title in this sense; if the inventory-keeper causes a damage at his work-place and this damage is not fully covered within a month from the date the company obtained an indefeasible enforceable title, the company can proceed for recovering its damage by using the cash guarantee formed in its favor.*

**Key-words:** *cash guarantee, inventory-keeper, patrimonial liability, claim, creditor.*

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## **INTRODUCTION**

Law No. 22/18 November 1989 regarding the employment of inventory-keepers, guarantee formation and responsibility of keeping the

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company's, public authorities' or institutions' goods<sup>2</sup> represents in same time a special law which derogates from the common law provisions, from the labor law, respectively, and from the common law of keeping by its regulation content.

Law no. 22/1969, as a special law, regulates the patrimonial liability of the inventory-keepers and represents a particular application within the legal individual labor relation of the employees' patrimonial liability as stated in Art. 254, Align. 1 from Labor Law; inventory-keepers are liable for the employer's material damages caused by their fault or are related with their work, in accordance with the norms and principles of civil contract liabilities.

To emphasize the particularities of the damage recovery by using cash formed guarantee procedure, it is imperative to present the characteristics of the patrimonial liability of the employees relative to the employer (as regulated by the Labor Law), characteristics which differentiate this procedure from other forms of legal liability:

- a. it involves the existence of the individual labor contract; thus the employees' patrimonial liability is a contractual liability;
- b. it has an individual character; the employee is liable for the employer's material damages caused by his fault or are related with his work. Within the legal labor relationship, the employee's patrimonial liability excludes, basically, solidarity because of the following: when the damage has been caused by several employees, the part of every single employee is determined relative to his individual contribution in causing it (Labor Law, Art.255, Align.1)<sup>3</sup> in opposition with the legal civil relation (Civil Law, Art.1370) which states that in case of impossibility of individualizing the author of the illicit doing, the liability is solidary because the damage was caused by the simultaneous or successive action of several persons and no cause was determined and, case wise, no single persons could have been identified for causing the action;

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<sup>2</sup>Published in the Romanian Official Monitor, Part I, No. 757 from 12.11.2012.

<sup>3</sup>Daniela Moțiu, *Dreptul individual al muncii*, 2<sup>nd</sup> Edition (Bucharest: C.H.Beck, 2012), 340.

- c. It is regulated by imperative legal norms<sup>4</sup>, thus, changing these conditions against the employee by using a convention is not admissible;
- d. Being contractual, the patrimonial liability presumes both effective damage (*damnum emergens*) and not achieved benefit (*lucrum cessans*).
- e. The guilt presumption is not applicable<sup>5</sup>, while within the civil liability, the same presumption is possible having noticeable effects<sup>6</sup>;
- f. Determining the patrimonial liability is done either by the parts' agreement or by the law court;
- g. The recovery of the damage caused by the employer is usually<sup>7</sup> done by using monetary equivalent, in opposition with the common law, civil law which states that the damage is recovered in-kind and, if this type of recovery is not possible, monetary equivalent is used;
- h. The normal job risk represents an additional clause of non-liability besides those regulated by the civil law;
- i. The enforcement procedure assumes two phases, as following:
  - detain from salary rights of the specific person for a three-year period of the individual labor contract;
  - enforcement in accordance with the Civil Processual Code if the damage was not recovered through the amounts of money retained from the salary rights within a 3-year period or the employee has ended his individual labor contract.

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<sup>4</sup>Alexandru Țiclea, *Contractul individual de muncă* (Bucharest: Lumina Lex, 2003), 295.

<sup>5</sup> With the exception of the inventory-keeper's guilt presumption under the hypothesis of quantitative lacks in keeping.

<sup>6</sup> Ion-Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii* (Bucharest: Universul Juridic, 2010), 748.

<sup>7</sup> Ștefănescu, *Tratat...*, 748.

## CASH GUARANTEES

The inventory-keeper is obliged to set up a cash guarantee. Setting up a cash guarantee is made by signing a written contract<sup>8</sup>.

Inventory-keeper (as stated by Law No.22/1969, Art. 1, Align. 1) is that company's employee which has as main work responsibilities the reception, keeping and disposing of goods which the company is keeping, using or owning, either permanent or temporary.

The ministries and the other central organs establish the functions which when occupied by an employee confer him the inventory-keeper quality.

According to the mentioned law (Law No.22/1969), material goods, monetary means and any other values are considered goods.

The cash guarantee will be of minimum a monthly salary and of maximum three monthly salaries of the inventory-keeper, but will not exceed the value of the assigned inventory goods.

For the inventory-keepers paid on percentage-share basis, the minimal amount of the cash guarantee will be the equivalent of one average monthly earning, while the maximum amount will equal three average monthly earnings.

The cash guarantee will be retained in monthly rates of 1/10 of the monthly salary or, case-wise, of the average monthly earnings. If, due to other retentions, the rates from the guarantee account cannot be retained, the inventory-keeper is obliged to deposit them.<sup>9</sup>

For temporary employees, other than those regulated by Law No.22/1969, Art.10, last Align., as well as for seasonal employees, higher rates can be settled or even obliged for depositing the entire cash guarantee when they receive the goods for keeping.

The ministries and other central organs establish, in accordance with the complexity of the keeping, nature and value of the goods, the guarantee amount in cash within the limits regulated by Art. 12, as well as the rates contained by Art. 13, Align. 12, Law No.22/1969.<sup>10</sup> The

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<sup>8</sup> Art.11, Align.1 from Law no.22/1969.

<sup>9</sup> Art. 13, Align.1 from Law No. 22/1969.

<sup>10</sup> Art. 12 – Cash guarantee will be of minimum one monthly salary and of maximum three monthly salaries of the inventory-keeper; the cash guarantee cannot exceed the

ministers and other central organs can settle, when justified, cash guarantees under the minimal value stipulated by Art. 12 or even guarantee exemption.

The companies, public institutions and authorities will deposit the cash guarantee at CEC Bank or other banks in a special account of the company, public institution and authority. The deposited cash guarantee at CEC Bank or other banks are written in a consignment book on the inventory keeper's name. This consignment book is kept in the pay-office of the company, public institution and authority in which favor the cash guarantee was established.

The guarantee depository fixes a yearly interest rate for the deposited guarantee which cannot be lower than the interest rate of the on year time-loans.

### **PARTICULARITIES OF THE PROCEDURE FOR RECOVERING THE PATRIMONIAL DAMAGE OF THE EMPLOYER BY USING THE CASH GUARANTEE**

1). The infringement of the legal regulations regarding the keeping of the goods incurs, case-wise, material, disciplinary, administrative, penal or civil responsibility.

Law No.22/1969 and Labor Code regulates the material responsibility of the inventory-keeper for the damages caused within keeping through actions which are not crimes.

The provisions of Law No.22/1969 regarding the material responsibility should be corroborated with the new regulations of the Labor Code regarding the patrimonial responsibility; this does not imply the loss of the specific character of this law's norms.

2). According to Art. 25 from the Law No. 22/1969, the inventory-keeper has full responsibility towards the employer for the damages he

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goods' value. For the inventory-keepers paid on percentage-share basis, the minimal amount of the cash guarantee will be the equivalent of one average monthly earning, while the maximum amount will equal three average monthly earnings.

Art. 13 - The cash guarantee will be retained in monthly rates of 1/10 of the monthly salary or, case-wise, of the average monthly earnings. If, due to other retentions, the rates from the guarantee account cannot be retained, the inventory-keeper is obliged to deposit them.

has caused during his keeping; the law-maker has regulated a special situation which can encounter in inventory-keeping, as presented below: receiving goods with a lower quality than contained in the goods' documents or apparent flaws without drafting out legal documents with the findings as well as not appealing for specialized, technical assistance when the goods were received (although that was necessary).

By the Decision No. 257 from 24 February 2009 regarding the non-constitutional exception of the directives of Art. 25, Law No. 22/1969 regarding the employment of inventory-keepers, guarantee formation and responsibility for keeping the goods of companies, public institutions and authorities<sup>11</sup>, the Constitutional Court has rejected the non-constitutional exception of the Art. 25, Law No.22/1969 directives' by considering that the criticized law dispositions are precisely and clearly written for making the protection instituted by the invoked constitutional texts effective and for the allowance of situation adjustment of the interested parties. The Constitutional Court has considered that the content of these dispositions do not contain inadequate formulations which could generate problems and difficulties in applying them. In this sense of interpretation, the European Court for Human Rights has admitted that, because of the general character of the laws and with the purpose of avoiding excessive rigidity, their elaboration cannot have absolute precision (Cantoni Cause against France, 1996). Thus, it is the judges' duty to decide regarding the interpretation and application of some legal norms.

3). The cash guarantee can be used only for covering those damages caused by the inventory-keeper and not for other debts he has towards the company. In this sense, we exemplify: if the inventory-keeper cashed in amounts of money that were not legally his (fees, prizes or other incentives, etc.) or has not justified the earnest money for some compensation, etc., those debts cannot be retained from the cash-guarantee, but only from his salary<sup>12</sup>.

4). The cash guarantee cannot be targeted any other creditor, indifferently the nature of the sums of money owed by the inventory-

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<sup>11</sup> Published in the Romanian Official Monitory, Part I, No. 173 from 19 march 2009.

<sup>12</sup> C. Jornescu, *Gestionarea bunurilor* (Bucharest: Lumina, 1990), 131.

keeper (real-estate buying rates ore mobile goods, rents, etc.) or natural person even if the sums are aliment sums.

5). If the inventory-keeper has caused a keeping damage at his workplace and this damage has not been integrally recovered within in month from the obtaining of the definitive enforceable title, the organization will recover its damage from the cash-guarantee established in its favor (Art.16, Align.3, Law No.22/1969). Through the disposition of Art.23, Law No 22/1969 stipulates that, when finding a keeping damage, the person responsible for the damage can take a written engagement for recovering the damage, document which constitutes an enforceable title.

By comparing the legal norms of Law No.22/1969 with those of Art.169, Align. 2 and Art.258, Align.1, Labor Code, aspects of disaccord within the regulations of patrimonial liability specific for the individual labor contract can be identified which involves clarifications which have consequences in both substantial, and processual right, as follows:

a) According to Law No.22/1969, an enforceable title represents a paying engagement, institution which is not currently regulated by the labor code. As such, calling the law-makers orientation of considering the employee's patrimonial responsibility for the material damages caused by his fault or his work related on the employer's behalf, as being based on norms and principles of the civil contractual responsibility, the fair questions arises if the paying engagement can or cannot be considered an enforceable title.

Although the norm of Art. 169, Align.2, Labor Code which stipulates that the retentions *with the title of damage caused on the employer's behalf* will be applied only if the employee's debt is due, liquid and exigible and was found as such thorough a definitive and irrevocable court decision, we consider that for the patrimonial liability of the inventory keeper employees (their status is regulated by the Law No. 22/1969) this law's regulations are applicable regarding the specific method of recovering the damage caused by the employers on the organization's patrimony behalf, for the following aspects:

- Provision of Art.169, Align.2, Labor Code refers to salary retentions;

- The damages generated within the employer's patrimony can have causes different from those which result from the reception, keeping and disposing of goods, goods which are in the permanent or temporary administration, usage and owning of the inventory-keepers;

- The law-makers acknowledges the possibility<sup>13</sup> and not the obligation of the inventory-keeper to take a written engagement for recovering the caused damage when the damage was found;

- The payment engagement represents *ope legis* an enforceable title.

As a matter of fact, before the upper mentioned legal provision, Art.169, Align. 2 from the Labor Code through the Decision No.24/22 January 2003 regarding the non-constitutional notice of the dispositions of Art.40, Align, (2), Lett.d), Art. 52, Align. (1), Lett. c), Art. 53, Align. (1), Art. 69, 70, 71, 129, 164 and 223 from the Labor Code<sup>14</sup>, the Constitutional Court has rejected the non-constitutional exception as being not founded and has stated that "the interdiction of salary retention with damage title, without the debt being due, liquid, and exigible, found as such through a definitive and irrevocable court decision", regulated by Art. 164, Align. 2, Labor Code, is meant to eliminate the arbitrary from the previous regulations by which the organization's administration established the existence of the damage, its spread, took actions for recovering the damage through imputation decision and proceeded rapidly in salary retention. Reductively, the employee addressed himself to the judicature organs for defending his legitimate salary rights by respecting the conditions of the constitutional state, his salary value settled by Art. 1, Line 4 from the Constitution; patrimonial responsibility for damage will be decided by the law courts which according to Art.123, Align.1 from the Constitution carry out justice on the law's behalf. The same constitutional principle further imposes that every enforcement should be based on an enforceable title. Such a title does not injure the contractual freedom because the contractual parties can agree regarding the methods of enforcement or quittance of their common obligations. Moreover, the employee's right is not fringed for his willed agreement

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<sup>13</sup> Art.32, Align.1 from Law No.22/1969.

<sup>14</sup> Published in the Romanian Official Monitory, Part I, No.72 from 5 February 2003.

for the recovery of the eventual damages caused by him, without waiting for a court decision in this sense. The hypothesis regulated by Align. 2 of the criticized legal dispositions refer only to the situations in which the employee does not willingly cover the damage he caused to the employer. By analyzing the Constitutional Court's decision within the specific literature<sup>15</sup>, it is considered that this authority's position is a correct one and beneficial to every employer because the parts' agreement regarding the covering of the caused damage by one of them in the benefit of the other implies the acknowledgement (extralegal) of the employer or the employee of creating a damage in the other part's patrimony.

Hence, in this legal context, we consider that the judicial principle *specialia generalibus derogant* is operating which implies the fact that the special norm is the one which derogates from the general norm and that the special norm is strictly interpreted according to a specific case. Moreover, a general norm cannot eliminate from application a special norm. Because the general norm represents the common law situation and the special norm the exception, two rules must be respected:

- special norm derogates from general norm - *specialia generalibus derogant*;
- general norm does not derogate from special norm - *generalia specialibus non derogant*.

Being a derogation from the general norm, it results that the special norm is applicable in every case which is under its incidence, hence the special norm is applicable foreground the general norm even if the special norm is older than the general norm.

The High Court of Cassation and Justice of Romania, in its Decision No. 33 from 9 June 2008<sup>16</sup> has settled that in accordance with the *specialia generalibus derogant* principle, the concurrence between the special law and the general law is solved in the special law's favor, although this fact is not express included in the special law. Moreover, the same court has considered that if discordances between the special

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<sup>15</sup> H. Sasu, *Codul muncii republicat. Modificările aduse prin Legea nr.40/2011.Comentarii și soluții* (Bucharest: C.H. Beck, 2011).

<sup>16</sup> Published in the Romanian Official Monitory, Part I, No. 108 from 23 February 2009.

law and the European Convention for Human Rights are noticed, the last one is prior.

Hence, the payment engagement regulated by a special law, Law No.22/1969 represents a method for recovering the damage caused in the employer's patrimony which derogates from the Labor Code's provisions only when the patrimonial liability of the inventory-keeper employee is involved.

b) The law-maker sets a period of time within which the inventory-keeper employee is offered the possibility of willingly covering the damage he caused in the employer's patrimony, a month from obtaining the enforceable title, respectively; it is an application of the principle established in Art. 633, Align.1 of the Civil Processual Code which regulates that the obligation fixed by a court decision or by another enforceable title is willingly accomplished.

Enforcing the payment engagement which has an enforceable title value will be done after the ending of the one-month period from the enforceable title obtaining. The title can be definitive if not contested or, if contested,<sup>17</sup> the one-month period begins from the date the final court decision has been taken.

Another argument in support of the enforceable title character of the payment commitment regulated by the Law No.22 / 1969 derives from the provision contained in Art.632, Align. 2 of the Civil Processual Code which establishes that any enforceable decisions, final decisions and any other decisions or documents that by law can be enforced, are enforceable titles. Therefore, the payment commitment, as an *ope legis enforcement*, remains a legal institution specific for the liability of the inventory-keeper.

c) the particularity of the enforcement of the payment commitment, enforceable title, is to cover the damage caused by the inventory-keeper to the patrimony from the cash warranty created in his own favor. As such, the first step in the procedure for enforcement of the inventory-

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<sup>17</sup> The appeal against the payment engagement by taking in consideration its enforcement value, represents a real appeal against enforcement. According to Art. 3, Align.4 from the Law No.22/1969, the competent justice organ can postpone the engagement enforcement.

keeper is to withhold of cash warranty of the inventory-keeper until the equivalent value of the damage will be reached.

The second stage provided by the special law for enforcement of the inventory-keeper is set out in Article 33 of Law no.22/1969 which states that in order to compensate for the damages caused in the organization, which cannot be covered by the cash guarantee, measures will be taken in order to ensure and follow up on any assets owned by the inventory-keeper and by those responsible according to the law, the measures for insurance being accepted by the competent jurisdiction body to resolve the dispute.

Under this legal provision, the organization has two possibilities, namely:

**A.** to suffice from the additional guarantee according to Art. 10, Align. 2 of Law No.22 / 1969 consisting of:

- a. impairment of real estate or mobile goods, property of the inventory-keeper or third parties in order to guarantee against the employer, to cover the damages that would be caused by the inventory-keeper;
- b. obligations of third parties on the employer to cover the damages that would be caused by the inventory-keeper, either entirely or for a specific amount.

**B.** Enforcement under the provisions of Civil Processual Code.

**6).** The material responsibility of the employees represents the type of legal responsibility that has a reparatory character.<sup>18</sup>

Given the reparatory character of the inventory-keepers patrimonial liability, examining the possibility of applying the provision of Art.254, Align. 3 and Align. 4 of the Labor Code on the patrimonial liability of inventory-keepers show a real interest. In the text mentioned above it is established that if the employer finds that its employee caused a loss of fault in connection with his work, the employer may require the employee a finding document for the identification and assessment of the damage, the recovery of the equivalent value being made, through bilateral agreement, in a period which shall not be less than 30 days from

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<sup>18</sup> Claudia-Ana Moarcăș-Costea, *Drept individual al muncii. Terminologie și practică judiciară* (Bucharest: C.H.Beck, 2011), 146.

the date of communication. In such a situation, we consider that the employer may opt to cover the damage in the situation that these could not have been covered by the amount of security provided in cash to recovery of difference under the agreement given by the inventory-keeper through the finding document if the equivalent value of the damage is higher than the equivalent of five minimum gross salaries. The use of the finding document and assessment of the damage, as an amicable way of damage recovery caused by the employee represents a faculty regulated by law in favor of the employer, thus it is the employer who chooses.<sup>19</sup>.

7). According to art. 16 of Law No.22/1969 the cash guarantee and the interest may be claimed by the inventory – keeper, owner of the consignment book at the termination of his employment contract or when switching to a position which does not require guarantee, when the employee did not cause any damage or if the damage was fully covered.

In the first case, that of the termination of the individual labor contract, in order for the cash guarantee to be claimed, the following requirements have to be met:

- the inventory- keeper should not have caused any damage in the patrimony of the organization;
- the organization is obliged to issue the inventory-keeper, within 10 days, the consignment book together with a communication to C.E.C Bank in which to be shown that the owner is entitled to claim his guarantee.

In the practice of courts, violations of the legal provisions were identified when it comes to the following:

- the quantum of established guarantee;
- failure to submit to C.E.C Bank the established guarantee;
- refuses the release of guarantee motivated by the possibility of finding, in the future, damages caused in the patrimony of the organization, even if the employee was released of performing inventory, with no damages found and the inventory was already given to the persons designated by management of the unit for this task.

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<sup>19</sup> M. Gheorghe, *Dreptul individual al muncii. Curs universitar* (Bucharest: Universul Juridic, Bucharest, 2015), 455.

In the situation of transfer of the inventory-keeper on another position that also requires guarantee, the consignment book where the deposited amounts have been recorded as guarantee will be moved to the new job, and, where appropriate, legal action will be taken according to art. 20 of Law no.22/1969 which states that the guarantees will be recalculated periodically according to changes in the wage of the employee and the specifics and the value of assets managed by employee, proceeding for an appropriate adjustment to the guarantee contract, if needed, through the completion of the cash guarantee or cash issue if the guarantee on deposit value is greater than the recalculated guarantee.

## CONCLUSIONS

As a final conclusion, we consider that Law no.22 /1969 is a special law that, through its provisions derogates from the provisions of the Labor Code in respect with the means to recover the damage caused to the patrimony of the employer by the inventory-keeper employees.

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# THE DISCIPLINARY SANCTIONS APPLICABLE TO MILITARY PERSONNEL FOR BREACH OF MILITARY DISCIPLINE

Andra PURAN<sup>1</sup>  
Ramona DUMINICĂ<sup>2</sup>

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## **Abstract:**

*The army of a state, by its structure, organization and mission, shows the degree of development and democratic character of that state. For the good organization of the army, but also for the purposes of its activity, it is important to be respected the military discipline. Failing to comply with military discipline is liable to disciplinary sanctions, sanctions that we intend to analyze in this work.*

**Key-words:** *military personnel, discipline, Regulation, misconducts, disciplinary sanctions.*

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## **INTRODUCTION**

The Romanian army is organized and functions in several structures with their own statute. Regarding the disciplinary liability of militaries from all Romanian army's structures, are applicable the Law 80/1995<sup>3</sup>, the statute of militaries and the provisions of the Regulation of the military discipline<sup>4</sup>, approved by the Order of the Minister of National Defense No 64/2013<sup>5</sup>.

Under the incidence of the Regulation of the military discipline are placed the active militaries, soldiers and professional gradates, reservists during the concentration or mobilization, pupils and students

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<sup>3</sup> The initial text was published in the Official Gazette Part 1, No 155/20 July 1995; the law has suffered a series of modifications and amendments.

<sup>4</sup> Published in the Official Gazette No 399bis/3 July 2013.

<sup>5</sup> Published in the Official Gazette No 399/3 July 2013.

from the military educational institutions, called during this chapter as *militaries*<sup>6</sup>.

Also, according to the Order of the Minister of Internal Affairs No 116/24 July 2013 on the establishment of certain measures in the area of the disciplinary regime of *militaries* within the Ministry of Internal Affairs<sup>7</sup>, the provisions of Section 1-2 from Chapter 1, Chapter 2, 3, 4 and 7 of the Regulation on the military discipline are applicable also for *militaries* from the Ministry of Internal Affairs, except the provisions for matters related to the object of the Order of the Minister of Administration and Internal Affairs No 400/2004 on the disciplinary regime of the personnel from the Ministry of Internal Affairs.

As well as in the common law, the military discipline<sup>8</sup> is an absolutely necessary condition for the activity of the Romanian army's structures.

Art 2 of the Regulation on the military discipline provides us with a definition of the military discipline stating that it consists in the "*compliance by the militaries of the legal provisions, of the norms of order and behavior mandatory for the maintenance of the functioning, the fulfilment of specific missions and the good unfolding of the military activities*" and represents "*one of the factors determining the operational capacity of the army and is based both on the aware acceptance of the established norms of behavior, as well as on the system of rewards and disciplinary sanctions*".

The term of military disciplinary offence is defined by Annex 1 of the Regulation on military discipline as a "*deviation from the military discipline – action in relation to the professional attributions which consists in an action or inaction committed with guilt by the military, by which he violated the legal norms, military regulations, orders and legal orders given by his hierarchic chief/superiors*".

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<sup>6</sup> Art 1 Para 2 of the Regulation of military discipline.

<sup>7</sup> Published in the Official Gazette No 461/25 July 2013.

<sup>8</sup> For an analysis of the military discipline see Laura Georgescu, "Răspunderea disciplinară a militarilor,,,"*Revista română de dreptul muncii* 3 (2009):78-83.

The definition mostly comprises the definition of the deviation from the common law, emphasizing the particularities given by the qualified subject and the sources generating obligations for the subject.

Beside the definition given by the Glossary<sup>9</sup>, for an express limitation of the facts representing military disciplinary offences, trialed by the councils of honor, Art 24 of the Regulation states the mandatory elements for an offence to be considered as a disciplinary deviation:

1. *It represents a deviation from the military discipline, according to Art 47-49, or a violation of Art 8, Art 29 Let a)–c), e) and h) and Art 30 Para 1 of the Law No 80/1995, with subsequent modifications and amendments;*

2. *Has not represented the base for the application of another disciplinary sanction according to Art 60 Para 3;*

3. *Has been committed for more than 6 months ago;*

4. *Has not represented the base for sending the perpetrator in front of the military council for trial.*

For the commission of disciplinary offences, the militaries, after a complex procedure conducted by specialized bodies, may be disciplinary sanctioned.

In the doctrine<sup>10</sup>, the military disciplinary sanction is defined as being “*the mean of constraint stated by the law which has as purpose the protection of the disciplinary order, the development of the spirit of liability and responsibility to fulfil the professional attributions, the norms of behavior, as well as the prevention of certain disciplinary actions*”. The disciplinary sanction applicable for militaries is also defined<sup>11</sup> as a “*coercive measure with an educative purpose applicable for militaries deviating from the provisions of the normative acts, but not by committing offences*”.

The Regulation of the military discipline states specific sanctions for the military deviations committed by militaries. Chapter 4, Section 1 of the Regulation states specific sanctions for each category of militaries.

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<sup>9</sup> Annex 1 of the Regulation of military discipline.

<sup>10</sup> Toader Dumitru, *Statutul juridic al militarilor în societatea românească* (Bucharest: Centrului Tehnic-Editorial al Armatei, 2010), 168.

<sup>11</sup> Georgescu, ”Răspunderea disciplinară a militarilor,,”, 83.

**a) Disciplinary sanctions applicable to militaries are:**

- Warning;
- Written reprimand;
- Reduction to a lower rank;
- Postponing the promotion to the next rank for a period of 1 to 2 years;

- Discharge. Regarding this sanction, we notice a legislative mismatch between Art 33 of the Law No 80/1995 and Art 51 of the Regulation on military discipline. Though, the initial form of the Statute stated this sanction, it has been repealed by the Law No 53/2011<sup>12</sup>, not being reintegrated by Law No 171/2013<sup>13</sup>. The Regulation states the most serious of the disciplinary sanctions applicable for active militaries.

Beside these sanctions applicable to active militaries, discharged militaries or retired militaries, may also be applied the sanction of withdrawing their right to wear the military uniform. This sanction is applicable for unfit behavior in situations in which they wear the uniform.

**b) Sanctions applicable for soldiers and professional gradates:**

- Warning;
- Written reprimand;
- Reduction to a lower rank;
- Postponing the promotion to a superior rank for a period of 1 to 2 years;
- Disciplinary dissolution of the labor contract.

**c) For students of the military superior education institutions** can be applied, for military disciplinary deviations, non-compliance with the rules of social cohabitation, as well as for violating the university ethics, the following disciplinary sanctions:

- Written warning;
- Reduction to a lower rank;
- Expelling;

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<sup>12</sup> Law No 53/2011 modifying Law No 80/1995, published in the Official Gazette No 290/26 April 2011.

<sup>13</sup> Law No 171/2013 modifying Law No 80/1995, published in the Official Gazette No 320/3 June 2013.

- Other disciplinary sanctions stated by the Code of Ethics and university deontology<sup>14</sup>.

These sanctions are also applicable for active militaries attending daily classes held in the military superior education institutions, for the violation of the rules of social cohabitation and violation of the university ethics.

For pupils in military colleges and WOs' and petty officers' schools, the disciplinary sanctions are established by the norms for the organization and functioning of each institution of military education in the pre-university system.

The Regulation of the military discipline not only limitative enumerates the disciplinary sanctions applicable for each category of militaries, but also defines them in Art 55-59.

The warning is applicable for the commission of the first disciplinary deviation, which does not causes special prejudices and consists in the sanctioning drawing attention to the military to take the measures to correct it and that he could face a more serious sanction for a new deviation.

The written reprimand<sup>15</sup> represents the disciplinary sanction consisting in the written notification of the military by the commander or chief of the unit for the actions representing deviations from the military discipline and represents a more serious sanction than the warning.

Unlike the previous regulations of the common law, when the reprimand was stated as a disciplinary sanction, and the regulation of other professional statutes, for militaries the reprimand is more severe than the warning.

The reduction to a lower rank is considered to be the appointment in a position with an inferior coefficient than the one had before. This sanction is applicable for the repetitive non-compliance of the functional attributions or when they constantly prove lack of exigency and liability

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<sup>14</sup> Charter of the National Defense University "Carol I", approved by the Ministry of National Education, with no 46882Bis III/17 April 2012, adopted by the Decision No 35/25 April 2012 of the University Senate, states in Art 163, for deviations from the university ethics committed by students, the sanctions of written warning and expelling.

<sup>15</sup> According to Art 56 of the Regulation.

for the maintenance and strengthen of the military discipline or as an effect of a committed action representing a serious deviation from the military discipline.

Postponing the promotion to a superior rank is applied when the militaries repeatedly deviate from the military discipline, if previously less severe disciplinary sanctions have been applied or commit deviations from the military discipline with a major impact for the military structure in which they are enrolled.

For serious deviations from the provisions of the military regulations or from other legal provisions shall be applied the sanction of discharge for the militaries and the sanction of the disciplinary dissolution of the labor contract for soldiers and professional gradates.

For students or pupils, for serious deviations from the general military regulations, from the specific norms in the area of organization and functioning of the educational institutions where they are enlisted, the most serious disciplinary offence is the expelling.

It has been stated in the doctrine<sup>16</sup> that the procedural rules applicable for the militaries have as purpose, on the one hand, *“the efficiency of combating deviant behaviors within the military system, and on the other hand, to guarantee the exact establishment of the actions and to insure the constitutional right to defense of the militaries, thus avoiding the application of unfair sanctions”*.

The individualization of the disciplinary sanctions<sup>17</sup> is made in relation to the gravity of the deviation committed, and regarding the following aspects: the circumstances in which the offence has been committed; the degree of guilt of the military; the consequences of the military deviation; the general behavior in the military service; possible disciplinary sanctions previously received by the military<sup>18</sup>.

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<sup>16</sup> Aurel Damșa, ”Răspunderea disciplinară a militarilor din armata României în operații multinaționale și de stabilitate” (PhD. diss, Universitatea Națională de Apărarea Carol I, Bucharest: 2012), 26.

<sup>17</sup> See in this regard Georgescu, ”Răspunderea disciplinară a militarilor,, 89.

<sup>18</sup> Art 76 Para 3 of the Regulation.

## CONCLUSIONS

The military discipline is an absolutely necessary condition for the performance of the activity of the Romanian military structures. Non-compliance with it draws the disciplinary sanction.

The Regulation of the military discipline states specific sanctions for the disciplinary offences committed by militaries. Chapter 4 Section 1 of the Regulation states specific sanctions for each category of militaries. Beside the disciplinary sanctions stated by the common law, the legislation applicable for militaries also states specific sanctions.

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# STUDY REGARDING THE TORT AND CONTRACTUAL LIABILITY OF LEGAL PERSONALITIES

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## **Abstract:**

*In the circumstances of modern society development legal entities play an important role in all areas of economic and social life. Liability of a legal person may be engaged in all its forms: civil, administrative, criminal, labor, environmental liability etc. This article addresses the issue of tort and contractual liability of legal persons, the conditions of employment of these forms of liability and the responsibility of the members of legal person's management bodies. A special case which receives a separate treatment in this article is the patrimonial liability of legal persons which are employers.*

**Key-words:** *liability, legal personality, illicit act, tort, guilt*

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## **INTRODUCTION**

The contemporary evolutions of the society enabled the legal personalities to play an important part in all economic and social fields. The liability of the legal personality may be approached in all of its forms as: civil, contraveniently, penal, from the perspective of labour rights, environmentally etc. The hereby material approaches the issue of the tort and contractual liability of legal personality and also regarding the liability of the member of the legal personality. A special situation which receives a distinct treatment in the contents of the hereby material is that of the patrimonial liability of the employing legal personalities. The lack, from the international documents, of a definition on human dignity, the ambiguities and the legal disparities that accompany this concept, have been able to offer the judges wide possibilities to personal appreciation, when determining the actions or the facts that can lead to the violation of the human dignity. Frequently, the cases of moral and sexual harassment,

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along with the subjection to inhuman and degrading treatments, have been considered the most offensive infringements of the dignity.

## **I. THE RESPONSABILITY OF MORAL PERSONS FOR JUDICIAL ACTS**

The Romanian civil code, by art. 1349, foresees that any person should have the duty to respect the conduct rules by which the law or the objective place imposes and does not have to breach, by one's actions and inactions, the legal rights and interests of other persons. One who, with acumen, breaks this duty, is responsible towards all the caused damages/torts, being obligated to fix them fully.

In turn, art. 1357 states that: „One who causes to another a tort by an illicit act, intentionally committed or by guilt, is obligated to fix it. The author of the tort is responsible for the easiest guilt”.

In accordance with the art. 219 p. 1 CCN, concerning the licit or illicit acts committed by the members of the legal personality, are binding for the legal personality itself, but only if they are related with the attributions or with the purpose of the entrusted functions. The responsibility of the legal personality does not waive the liability of the natural personality guilty for the acts of the respective facts as representatives (members) of the legal personality. Therefore, the illicit acts also attract the personal and solidary responsibility of the ones who committed, both towards the legal personality and towards thirds<sup>2</sup>.

The tort liability is concretized in a reparatory obligation concerning a caused damage by an illicit act<sup>3</sup>.

From the analysis of the provisions of art. 219 p. 1 corroborated with the ones of art. 1349 and 1357-1371 from the Civil Code, results that, in order for a tort liability to exist amongst the legal personality for the done damages by own act, the following grounding conditions need to be fulfilled cumulatively:

a) The quality of representative or member in the management organism of the one who made the damage/tort;

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<sup>2</sup> Art. 219 p. 2 CCN.

<sup>3</sup> See Constantin Stătescu and Corneliu Bârsan, *Drept civil, Teoria generală a obligațiilor*, IXth edition revised and completed (Bucharest: Hamangiu, 2008), 125.

- b) The illicit act of the management or administrative organism;
- c) The damage/tort;
- d) The causality report between the illicit act and the tort/damage;
- e) The guilt (culpability).

Only the cumulative gathering of these conditions attracts the tort civil responsibility of the legal personality caused by own act. The lack of one of the mentioned conditions waives this responsibility.

A first condition is that of *the illicit act being committed by the management or administration organisms of the legal personality regarding the attributions or with the purpose of the functions entrusted*. Therefore, if the committed illicit act by the person or persons which have the quality of organisms or, by case, of the organisms of the legal personality, does not relate to their functions, cannot constitute an illicit act of the legal personality and cannot engage its responsibility; it engages only the exclusive responsibility of those persons for own act, under the conditions of art. 1357-1371 Civil Code. Likewise, under the circumstances in which the natural personality commits an illicit act as a simple agent (for example, employee) and nonetheless in that of organism of the legal personality, its responsibility can intervene with a liability title for the done torts by illicit act of another, meaning with quality of doer for the done tort by the agent's act, with the application of the provisions of art. 1373 from Civil Code.

Regarding this special condition, the actual understanding of illicit acts must be stated "regarding the attributions or with purpose of entrusted functions". In the specialty literature, till present time, under the empire of the provisions of art. 35 p. (3) of the Decree no. 31/1954, currently abrogated, two interpretations were formulated: one extensive, wide and the other restrictive and circumstantial. In the extensive interpretation, which we embrace, the liability of the legal personality is hired every time by the illicit act being committed by its management or administration organism in the strict completion of the attributions or in order to perform the purpose of the entrusted functions. Likewise, the liability also intervenes when the respective organism acted with the

exceedance of the attributions, beyond the purpose of the entrusted functions or with their abusive performance, with the condition that between the illicit act and the function to exist a necessary link, and the illicit act would have been performed in the interest of the legal personality or at least the appearance in that time and place to have been existed and acted in its interest. If, during the performance of the act, the victim knew the fact that it was performed beyond the limit of the attributions or by an abusive exercise of them or outside the purpose of entrusted functions, meaning in own interest, the responsibility of the legal personality cannot be held. Additionally, this conditions is not fulfilled in all of those situations where the illicit act was performed by the management outside the purpose of the legal personality, as well as when the respective act does not have any link with the entrusted function, even if committed during its performance. Therefore, the responsibility of the legal personality does not intervene in the hypothesis where the illicit act of the management is totally separated or detached from the entrusted function, with the appreciation of the absence of this link remaining at the discretion of the courts for each case in part.

*The illicit act* performed by the person or persons who have the quality of management or administration organisms of the legal personality may constitute an action (the authorization or demand of performing a such illicit or dangerous activity by which the persons safety is breached; engagement on the market with a faulty product; use of cars, machinery or equipment nonconforming with the standards; lifting and using assets breaking the urban or security regulations; breaking willingly the unorganized negotiation with parties approval started with the purpose of concluding an agreement; performing or encouraging an unfair competition activity) or offense (...).

In order for the legal personality to have a responsibility for the done tort to a third, the respective damage needs to be the effect of the illicit act performed by the person or persons who have the quality of management or administrative organisms of the legal personality concerning the attributions or with the purpose of the entrusted functions.

Within a logical-philosophical approach, *the causing relation* represents a subordinating relation and expresses a generating report

regarding the effect by its cause, to succeed in time and by mutual interaction between cause and effect<sup>4</sup>.

In order for the legal personality to have a responsibility, the done tort to a third (legal or natural personality) needs to be the effect of the illicit act performed by the representatives of the legal personality "regarding the attributions or with the purpose of entrusted functions". By the causality report, the necessary link between the two phenomena is understood, from which one follows and determines another (cause determines the effect)<sup>5</sup>.

The cause action may be interpreted differently, according to the situation:

- When the condition isn't indispensable for the performance of the effect, but only accidental, bears the name of occasion;
- The condition which determines the concrete and cert possibility of the performance of the act which directly produces the tort can be considered as having a causal and fundamental role in the establishment of the liability.

The damaging effect can be generated by one or more causes and these can be principal or secondary, direct or indirect and concomitant or successive.

At the establishment of the causality report, it should be considered that the illicit act cannot be only a positive action, but also an inaction (omission)<sup>6</sup>. The inaction has a causal value, because it cannot be considered a null action, but rather, as being a negative action, consisting in the disrespect of an obligation to act in certain situations, with the consequence of making torts<sup>7</sup>.

The determination of the causality report as a condition of the liability of the legal personality is sometimes extremely laborious in practice. In the complexity of the report between the phenomena a

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<sup>4</sup> Ion Dogaru and Pompil Drăghici (coordinators), *Bazele dreptului civil. Volumul III. Teoria generală a obligațiilor* (Bucharest: C. H. Beck, 2009), 275.

<sup>5</sup> See Sanda Ghimpu and Alexandru Țiclea, *Dreptul muncii* (Bucharest:All Beck, 2000) 624 and the following.

<sup>6</sup> Dogaru and Drăghici, *Bazele dreptului civil*, 277.

<sup>7</sup> Dogaru and Drăghici, *Bazele dreptului civil*, 278.

selection and scaling process is needed in order to establish for each case concretely the act which produced the transformation of the actual tort possibility; so the appreciation needs to be done from case to case, selectively and gradually<sup>8</sup>.

Therefore, the condition is fulfilled if a specific and objective causality report is established between the illicit act – action or inaction – performed by the employee and the done tort.

At the establishment of the causality report the doctrinarians elaborated some systems, respectively the necessary causality system which forges on the definition of the cause as being that phenomena which, predating the effect, challenges it necessarily (only under the necessity of the illicit act being considered as cause) and the system of cause indivisibility with the conditions according to the cause-phenomena do not react separately, but its development is conditioned by certain factors which, without them producing, directly, the damaging effect, although favours its performance<sup>9</sup>.

Art. 1349 and 1357-1371 from the civil code institutes the principle according to which there is no responsibility without guilt. The guilt constitutes the fundamentalism of the responsibility, an essential condition of the civil liability.

The provisions of the Romanian civil code refers to the sanction of all behaviours considered to be "guilty", no matter if or not a special legal provisions is foreseen and which establishes such consequences.

*The guilt* represents the subjective element of the reparatory liability, consisting in the attitude of the author of the act towards its negative consequences. The delict liability imposes with necessity the existence of the act's author guilt causing the tort.

Terminologically, in order to designate the subjective element of the liability, further terms are used: "guilt" (as expressed in penal or disciplinary matters), "culpability" or „mistake”.

The guilt expresses a subjective state, consisting in the psychic

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<sup>8</sup> Alexandru Țiclea, *Tratat de dreptul muncii* (Bucharest: Universul Juridic, 2010), 821.

<sup>9</sup> For details, see Constantin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor* (Bucharest: ALL, 1994), 191; Dogaru and Drăghici, *Bazele dreptului civil*, 280.

attitude of the author of the illicit damaging act (in our case the management or administration organism of the legal personality), towards the action or inaction performed and its consequences, implicating the consciousness of breaking some social relations, existent attitude during the performance of the act.

The guilt implies the awareness of the author (the capacity to represent the link between the act and the damaging result) and the free will during the performance of the act. The responsibility is therefore engaged in equal measure for all forms of guilt, be it committed intentionally (direct or indirect), from imprudence or negligence.

Therefore, the psychic attitude implies the existence of an intellectual and volitional factor.

The intellectual factor, that of awareness, consists in the recon process regarding the social significance and the consequence of the act. The culpability, as an attitude of the consciousness towards the result of the act, does not reduce itself to a psychological process limited as objective to the provision or non-provision, follow-up or non-follow-up of the result, but it has a social content to it<sup>10</sup>.

The volitional factor means the deliberation freedom and decision making. Therefore, if the act does not represent the result of a deliberate act, the responsibility/liability is therefore removed.

The intellectual factor represents the premises of the volitional factor, situating itself in a close link, and together composing the subjective side of the liability – guilt (culpability, guilt)<sup>11</sup>.

The civil code does not rule certain forms of the culpability; in exchange the doctrine performs a hierarchy of that.

The penal code, in art. 19, foresees that the guilt has two forms, and namely the intention and the culpability. The intention can be therefore direct (when the author foresees the result of the act) or indirect (the author foresees the result of the act, does not follow it, but accepts the possibility of it being done). The culpability, in its turn, may have two kinds: imprudence or ease (the author foresees the result, but does not

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<sup>10</sup> Lacrima Rodica Boilă, *Răspunderea civilă delictuală subiectivă*, 2<sup>nd</sup> edition, (Bucharest: C. H. Beck, 2009), 67.

<sup>11</sup> Dogaru and Drăghici (coordinators), *Bazele dreptului civil*, 283.

accept it, minding, groundless, that it will never be done) and negligence (the author does not foresee the result of its action although it needed to and could have prevented it)<sup>12</sup>.

The degree of the culpability has also the application in the civil right, as well as in the penal code; in the case of the severe culpability establishment of the victim it may lead to the waiving of the author from any responsibility.

In the civil right, the doctrine<sup>13</sup> classifies the guilt as it follows:

- The intentional culpability or dourness;
- The unintentional culpability or itself/in fact.

The intentional culpability is divided in the direct and indirect dourness. The intentional culpability or harsh presumes the consciousness and will to cause the damage. It is identified with the intention to do harm, as in the penal right where intentional offences are distinguishable from the unintentional ones<sup>14</sup>.

The unintentional culpability is classified in the imprudence culpability (culpability with provision) and negligent one (without provision).

In the French doctrine, it has been considered that the contractual liability is always based upon the culpability. The evidence of a culpability can be done either hard or easily, according to the nature of the obligation – the result, means or warranty.<sup>15</sup>

In the specialty literature<sup>16</sup> there is a distinction between the three degree of culpability: severe culpability (*culpa lata*); minor culpability (*culpa levis*); light culpability (*culpa levissima*).

In what regards to the degrees of the culpability concerning the contractual liability from the French right, the specialty authors are

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<sup>12</sup> Stătescu and Bârsan, *Drept civil. Teoria generală a obligațiilor*, 201.

<sup>13</sup> See, for elaboration: Dogaru and Draghici (coordinators), *Bazele dreptului civil*, 284-285; Stătescu and Bârsan, *Drept civil. Teoria generală a obligațiilor*, 201-202; Liviu Pop, *Drept civil. Teoria generală a obligațiilor* (Bucharest: Lumina Lex, 2000), 226-227.

<sup>14</sup> Philippe Malaurie, Laurent Aynes and Philippe Stoffel Munck, *Drept civil, Obligațiile*, (Bucharest: Kluwer, 2010), 35.

<sup>15</sup> Malaurie, Aynes and Munck, *Drept civil, Obligațiile*, 528.

<sup>16</sup> For elaboration, see: Boilă, *Răspunderea civilă delictuală subiectivă*, 79-81.

distinguishing between the dourness culpability<sup>17</sup>, severe culpability<sup>18</sup>, inexcusable culpability<sup>19</sup> and the ordinary culpability<sup>20</sup>. Often, the French jurisprudence assimilates the severe culpability to the harsh one, intentional one, in order to eliminate the limitative causes or those of liability waiving. Only when a special law aggravates the liability for only the harsh case, the assimilation is then not possible.

## **II. THE RESPONSABILITY OF THE ORGANISM'S MEMBERS OF THE LEGAL PERSONALITY**

However the legal personality responds for its own act for the torts caused by illicit acts by its organisms, that it is not of nature to remove any consequences legally for its representatives or for the persons which compose the collective management organisms (the administration board, the directors board, etc.). Contrariwise, the circumstance for the act of the management or administration organism is considered the act of the legal personality itself, and doesn't only exclude but also attracts consciously a individual liability of those persons. Therefore, art. 219 p. (2) Civil Code foresees: „The illicit acts also attract the individual and solidary liability of the ones who performed them, both towards the legal personality and towards the thirds”.

The engagement of the individual liability of the ones who performed the illicit and tort act take place under the conditions of art. 1357-1371 Civil Code. The fulfilment of these conditions shapes two legal reports referring to the liability: between the legal personality and

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<sup>17</sup> The harsh culpability, as in the tort liability, is the one which is done with the intention to harm, being assimilated with the dishonesty, as the consciousness and deliberate violation of the agreement, even without the intention to do harm (Maurie, Aynes and Munck *Drept civil, Obligațiune*, 535).

<sup>18</sup> Severe culpability is the one which does not necessarily have an intentional element, it is severe either from the conduct deviations, either from the cause of the consequences (Maurie, Aynes and Munck, *Drept civil, Obligațiune*, 535, note 41).

<sup>19</sup> Inexcusable culpability allows the removal of the limitative causes and those of liability waiving. (Maurie, Aynes and Munck, *Drept civil, Obligațiune*, 536).

<sup>20</sup> Ordinary culpability, or light, being a light culpability, allows the legal limitations or contravention of the responsibility to function (Maurie, Aynes and Munck, *Drept civil, Obligațiune*, 536).

the injured victim, under art. 219 p. (1) New Civil Code and, on the other side, between the person or persons who performed the illicit act as organism or, by case, by the member/members of the collective management or administration organisms of the legal person and the injured third. The victim may opt for a trial either only the legal personality, either for the natural personality in cause, either for both in order to be solidary responsible, in accordance with the provisions of art. 1382 Civil Code, which state: „the ones responding for the damaging act are held solely responsible with the reparation towards the injured one”.

In most of the cases the harmed third acts with trialling only the legal personality in order to be obligated to repair the done damage, for the reason that it is, usually, settling, and its liability is that of an objective one, without the guilt proof being necessary. Likewise, the legal personality liability has an independent character and does not depend from the proof of a personal liability ever existing concerning the one or the ones who activated as management organisms when they've performed the damaging act.

When the legal personality is obligated by the court to repair the done damage, it pays the victim compensations, it in turn has the right to return with a regressing action against the persons who performed the act as management or administration organisms, in the basis of art. 1384 and art. 1456 Civil Code. According to art. 220 p. 1 Civil Code, „the action in liability against the administrators, censors, directors and other persons who acted as members of the organisms of the legal personality for the caused damages by breaking the established duties under their tasks, belongs, to the legal personality, the competent managerial organism, which will decide<sup>21</sup> with most of the required law or in that absence, with most of the required statutory provisions”. Sometimes, the managerial organism of the legal personality who performed the illicit act consisting in an unlawful decision of which performance was damaging, is composed from two or more persons of which individual responsibility, as foreseen by art. 219 p. 2 Civil Code, is solidary. Considering that the

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<sup>21</sup> According to p. 2 of art. 220 Civil Code, the decision may be taken even if the problem concerning the liability of persons foreseen at p. 1 does not appear on the agenda.

decision of those organisms are adopted in respect of a certain attending quorum and favourable votes, the ones who voted against the respective decision, refrained themselves from the vote or absented from it, cannot be called to respond towards the victim and neither towards the legal personality due to the liability failing to be presumable; it needs to be mandatory, expressly and explicitly foreseen by the law. For a rational identity, when the damage is done by failing to make a decision, the liable ones are those who, by their vote, prevented its adoption.

The persons forming the legal personality organism respond individually, both towards the victim and towards the legal personality. The solution is consecrated expressly in the art. 219 p. (2) New Civil Code, reason for which the legal personality has directly from law the benefit of individuality, as an exception from the provision of art. 1383 Civil Code which rules the reports between individual co-debtors. In exchange, the solidarity does not operate in the report between the members of the managerial collective organism, which means that they have the obligation between them to repair the damage proportionally divided according to the measure in which one participated to the performance of the damage or with the intention or severity of culpability of each other, if this participation cannot be established. Under the circumstance in which neither of such cannot be established, nor the severity of ones' guilt, each will have to contribute equally to the repair of the respective damage. Notably art. 255 from the labour code institutes an exception case, removing the individual liability rule which shapes the civil responsibility. In this way, the aforementioned text foresees that, when the damage was done by more employees, the amount of liability for each is established in report with the measure of its performance contributed (otherwise said, the patrimonial liability of employees is an individual one). If under the measure of contribution, the performance of the damage cannot be determined, ones' liability is established proportionally with the net wage from the date of finding the damage and, where appropriate, and according to the effective worked time since the last inventory<sup>22</sup>.

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<sup>22</sup> R.C. Radu, *Dreptul muncii* (Bucharest : C.H.Beck, 2008), 308.

The managerial competent organism designates, with the majority of required law or, in absence, with the majority requested by the statutory provisions, the charged person to perform the action in regression. If the introduction of the action in the liability against the administrators has been decided, their mandate will rightfully terminate and the competent managerial organism will proceed with their replacement. Under the circumstance in which the action is introduced against the directors employed in the basis of another agreement than the individual employment agreement, those are suspended rightfully from their position till the court decision remains definitive.

### **III. THE PATRIMONIAL LIABILITY OF THE EMPLOYER**

#### **1. Notion**

The patrimonial liability of the employer is a *contractual liability*.

The employer is obligated, under the regulations and principles of the contractual civil liability, to compensate the employee under the situation in which one suffered a material or moral damage from the employer's guilt during the fulfilment of the work obligations or work related ones<sup>23</sup>.

#### **2. The conditions of the patrimonial liability of the employer**

In order for the liability of the employer to intervene for the done damages to employees, it needs to be cumulatively met with the following conditions:

a. *illicit act of the employer needs to exist* (either directly from him/her, if the employer is a natural personality, either, in the case of unit-employer, the illicit act should be performed by his/her managerial organisms or by any other employee, as suspect of the unit);

b. *the employee needs to have suffered a damage, during the fulfilment of the work obligations or in relation with the work*. The damage may be either material or moral (in case of loss or diminishing of work capacity, pursuing a work accident or a professional disease);

c. *between the illicit act of the employer and the suffered damage by the employee, a causality report needs to exist*;

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<sup>23</sup> Art. 269 p. 1 from the Labour Code.

d. *the employer culpability needs to exist.* The employer culpability is presumed. The guilt presumption of the employer is relative, with that having the possibility to prove itself that it didn't fulfilled the obligations occurred with the occasion of the employment agreement from a circumstance which cannot be impaired.

### **3. Damage recovery**

In the hypothesis in which the employer is liable patrimonial towards his/her employee, the damage which needs to be covered obligatory consists in both the *effectively done damage and also the unperformed benefit.*

Additionally, the employer also needs to bear *moral damages* for the damage suffered by the employee, especially under the situation in which a work accident has been produced or a professional disease has been contracted, after which the respective person lost or diminished, irreversibly, his/her working capacity. In cases where the employee was damaged by a work accident or professional diseases, the liability of the employer has a subsidiary and complementary character, in the meaning that it is obligated to cover the damage only in the measure in which the suffered damages by the employee are not fully covered by the provisions of the social state insurances<sup>24</sup>.

In cases in which the employer refuses to compensate the employee, the employee may address a claim to the competent courts.

The employer who paid the compensation will be able to recover the afferent amount from the employee guilty of that damage, under the conditions of art. 270 and the following from the Labour Code.

**a. The contractual liability.** The legal and natural personality are patrimonial responsible, in accordance with the civil law, for the done damages to the victims of work accidents or professional diseases, in the measure in which the damages are not fully covered by the state social insurance provisions.

The harmed person by a work accident, due to a temporary work incapacity or impairment, besides the rights concerning the social insurances, may also address an *action in damages against the unit* for the culpability, in order to cover fully the done damage. The action has a

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<sup>24</sup> Art. 44 from Law no. 319/2006 regarding health and safety.

*subsidiary and complementary role*, because it can be introduced after the establishment of the social insurance rights and only for the difference between the indemnity amount and the value of the full damage.

The responsibility of the unit is *a contractual liability*, which derives from the existence of the safety clause within the employment agreement. The liability of the unit has at its basis the principle of guilt, with the culpability being presumed.

A special situation is represented by the *case of persons dispatched*. Therefore, if the dispatched person is harmed or contracts a professional disease, it may refer an action against the unit with which has the employment agreement; it in turn, if it is found that the unit where the dispatch was done, had not been taking measures imposed by the current normative documents regarding health and safety, will have a regressing action against the guilty unit under the tort civil liability.

**b. Tort liability.** The unit in guilt for a work accident or for a professional disease may have a tort civil liability towards the following:

- pupils and students in practice;
- persons fulfilling state or public duties;
- soldiers who perform work;
- Persons performing work during a punishment performance;
- inheritors of the victim – if the work accident or professional disease had a rightful consequence the decease of the victim.

If the damage is followed by an offence, the unit will be called to trial civilly as responsible part.

The civil tort liability of the unit shapes the provisions of art. 998, art. 999, art. 1000 p. 1 and p. 3 from Civil Code.

The units may have also a *tort liability towards the state social insurance organisms* if the work accident or professional disease were due to the violation of the health and safety regulations.

## CONCLUSION

The repair of the damages done to natural persons by work accidents and professional diseases, is dominated by the principle of just and full repair of the damage. The right to an action belongs to the victim or the

ones who are entitled to care or survivorship pension or who actually were under care of the deceased one, if are incapable of work or minors. The compensation will cover both the moral and the material damage.

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# PARTICULARITIES OF MAINTENANCE OBLIGATION BETWEEN SPOUSES

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**Abstract:**

*Each and every marriage is grounded on feelings of solidarity and friendship between spouses. According to these feelings, the spouses owe each other maintenance support, their marriage being the source of the family itself and, therefore, nobody is entitled to such maintenance but themselves. Considering these aspects, the present article tackles the particularities of maintenance obligation between spouses according to the legal provisions, the doctrine and jurisprudence in the field.*

**Key words:** *marriage, maintenace between spouses, fundament, general conditions.*

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## INTRODUCTION

Among all forms of social organisation, the family is a touchstone and a result of the human need of being protected and deeply secure amidst other people. The basement of the family is marriage, a juridical institution which, considering its importance, was provided by the legislator with many legal provisions. Thus, both personal and patrimonial relationships between the members of the family, have a well-thought-of provisions, demonstrating that the state shows concern for protecting them.

Although the source of these relations is the attachement between the members of the family, which implies that specific obligations are fulfilled mainly according to the feeling of natural duty, nonetheless, the legal norm intervenes to correct, where the case is, an unappropriate behaviour towards a member of the family who is need at a given moment of one's life. As a consequence, the special legal regulation of

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the maintenance obligation between spouses is a guarantee of the right application of the legal provisions<sup>3</sup>.

## **NOTION, FUNDAMENT AND RELEVANT PROVISIONS**

The maintenance obligation between spouses is grounded on the feelings of mutual friendship and affection between them, on the solidarity that should naturally epitomise the relation between them, and from a legal point of view, on marriage itself, regulated by the article 325, par.(1) of the Civil Code and article 516 par.(1) of the Civil Code.

According to the previously mentioned legal provisions the spouses have to provide mutual material support, that is they have the obligation to contribute, according to the means of each of them, to the expenses incurred in course of their marriage, if there was no other provision stipulated by a prenuptial agreement.

In legal literature<sup>4</sup> and according to legal provisions, the maintenance obligation between spouses was defined as “the mutual duty, set up by the law and based on marriage institution, of procuring to each other the necessary means for their existence”.

## **THE PARTICULARITIES OF THE MAINTENANCE LEGAL OBLIGATION BETWEEN SPOUSES**

The main particularity of this obligation lies in its foreground feature, as the spouses owe each other maintenance afore other categories of persons, as expressly stated in article 516, par.(1) of the Civil Code.

Traditionally, in the doctrine<sup>5</sup>, as well as at the legislation level, there has been made a delimitation between the obligation of the spouses to contribute to household expenses and mutual material support between spouses, both duties implying the maintenance obligation between

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<sup>3</sup> For further details, one may see: Andreea Drăghici and Ramona Duminiță, *Obligația legală de întreținere* (Bucharest: Universul Juridic, 2014), 8-9.

<sup>4</sup> Alexandru Bacaci, *Raporturile patrimoniale în dreptul familiei* (Bucharest: Hamangiu, 2007), 171.

<sup>5</sup> Emese Florian, *Dreptul familiei* (Bucharest:C.H. Beck, 2011), 98; Flavius A. Baias et al, *Noul Cod Civil. Comentariu pe articole (art. 1-2664)* (Bucharest: C.H. Beck, 2012), 344. In foreign doctrine, one may see the distinction made by Philippe Malaurie and Laurent Aynès, *Les régimes matrimoniaux* (Paris: LGDJ, 2013), 55-56.

spouses. There is a common reason of those obligations, that is the solidarity that must exist between the members of the family and especially between spouses. As to the connection between these two obligations, there has been stated that, *lato sensu*, the spouses' obligation to contribute to "common household expenses, parents' obligations to support the underage children and maintenance obligation between spouses"<sup>6</sup>.

But unlike the expenses proper of the household, the maintenance obligation is not permanent, but it is determined by the state of need in which the spouse that requires maintenance is. As a consequence, the maintenance obligation between spouses is a particular aspect of the obligation of bearing the household expenses, by and large.

During their marriage, the spouses may find themselves in one of the following situations: they cohabit, they are separated in fact, they may be in a divorce process, or they may find themselves in the process of finding their marriage null or in the process of annulment of their marriage. In each of these cases, the maintenance obligation between spouses exists and has certain particularities.

When the two spouses have common domicile and the matrimonial relationship is normal, the issue of fulfilling separately their maintenance obligation to the household expenses, according to their means, does not exist. This problem arises when misunderstandings between spouses occur, situation in which, according to the article 516, par.(1) of the Civil Code, the spouse in need has the legal right to demand the other spouse maintenance over the respective period. The refusal of providing maintenance falls under the criminal law and is defined as criminal offence of family abandonment<sup>7</sup>.

If the spouses are separated in fact, we share the opinion of other authors<sup>8</sup>, that any of the two spouses may find oneself in the situation of

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<sup>6</sup> Ion P. Filipescu and Andrei I. Filipescu, *Tratat de dreptul familiei* (Bucharest: Universul Juridic, 2006), 66.

<sup>7</sup> Drăghici and Duminică, *Obligația legală de întreținere*, 71-72.

<sup>8</sup> Dan Lupașcu and Cristiana M. Crăciunescu, *Dreptul familiei* (Bucharest: Universul Juridic, 2012), 447; Cristian Mareș, *Dreptul familiei* (Bucharest: C.H. Beck, 2013), 468.

being the creditor of the maintenance obligation, considering the following arguments<sup>9</sup>:

- although the spouses are practically separated, they still have the status of married people and the legislator does not make a distinctive provision with a view to the right to maintenance of each on the ground that one of the spouses is liable for the separation.

We obviously exclude the situation in which the creditor is guilty of serious offences, contrary to the law or good morals against the debtor, case in which he/she is deprived of the right to maintenance (but not of the maintenance obligation) according to article 526, par. (1) of the Civil Code, situation in which the court is to decide accordingly for each and every case.

- the guilt for the dissolution of marriage is to be proved during the divorce process, but at the moment of awarding spousal maintenance during marriage there is no final divorce decision;

- considering that the ex-spouse against which the final decree of divorce was pronounced, has the right to maintenance on behalf of the other spouse, under the legal provisions of article 389, par.(2), par. (3) and par.(4) of the Civil Code, for one year since the dissolution of marriage, it would be totally unfair if the transgressive spouse had a more difficult situation by being denied the right to maintenance from his/her spouse.

But in the literature, the majority opinion<sup>10</sup> sets forth that only the spouse who did not generate the separation in fact is entitled to maintenance while the transgressive spouse is not. As to the court solutions, in the course of time, the decisions were contradictory. Thus, some courts explained that the spouse that infringes the duty of living together without any justified reasons has no longer the right to

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<sup>9</sup> Lupașcu and Crăciunescu, *Dreptul familiei*, 447.

<sup>10</sup> Ion P. Filipescu and M. Diaconu, "Persoana cu comportare culpabilă pierde dreptul de a primi întreținere", *RRD* 11 (1981): 10; Florian, *Dreptul familiei*, 383; Alexandru Bacaci, Viorica C. Dumitrache and Codruța Hageanu, *Dreptul familiei* (Bucharest: C.H. Beck, 2012), 278; Adriana Corhan, *Dreptul familiei. Teorie și practică* (Bucharest: Lumina Lex, 2009), 439.

maintenance<sup>11</sup>, but other courts<sup>12</sup> appreciated as irrelevant the creditor's behaviour towards the debtor for obtaining the right to maintenance, if the general conditions of the legal maintenance obligation between spouses are fulfilled: the creditor's state of need arising from the lack of working capacity and the debtor's capacity to pay.

As far as we are concerned, we think that the court requested to provide a legal solution for obtaining the alimony during the separation in fact of the spouses, must analyse the entire context of the case, beyond complying with the general conditions, and identify the reasons that made one of the spouses transgresses and assess the gravity of the fact when referred to as ground for preclusion of maintenance right, so that fair solutions should be provided<sup>13</sup>. The spouses owe each other maintenance during the divorce as, till the final divorce decision, the marriage is not dissolved. During the divorce the spouses have to comply with general conditions regarding maintenance obligations. The spouse in need may apply for maintenance through presidential ordinance<sup>14</sup>.

Maintenance obligation is also preserved in the case of putative marriage but only for the putative spouse who demonstrated good-faith at the conclusion of marriage because he/she preserves the quality of a spouse from a valid marriage till a final court decision that states or pronounces the nullity of marriage according to article 304, par.(1) of the Civil Code. Definitely, the putative spouse is entitled to maintenance only in compliance with general conditions. If both spouses acted in good-faith, then the maintenance obligation is mutual; if only one spouse

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<sup>11</sup> Supreme Court, civ. s., Dec. No. 1043/1978, *RRD* 1 (1979): 55; Hunedoara Court, Dec. civ. s., No. 864/1976, *RRD* 3(1977): 59; Maramureş Court, Dec. civ. No. 933/1976, with note by P. Anca, *RRD* 12(1977): 36.

<sup>12</sup> Olt Court, Dec. civ. No. 447/1982, with critical notes by M. Georgescu and A. Oproiu and annotation by M.I. Eremia and I. Moroianu, *RRD* 3(1983): 47; Hunedoara Court, Dec. civ. No. 243/1969, critical notes by A. Mociora, *RRD* 2(1970): 132; Timiş Court, Dec. No. 1395/1979, *RRD* 8(1980): 59.

<sup>13</sup> Drăghici and Duminićă, *Obligația legală de întreținere*, 73.

<sup>14</sup> For a thorough presentation of the preidential ordinance, Andreea Tabacu, *Drept procesual civil, conform noului Cod de procedură civilă* (Bucharest:Universul Juridic, 2013): 512-525.

acted in good-faith when concluding marriage, the maintenance obligation is unilateral.

## CONCLUSIONS

As a consequence, irrespective the situation in which the spouses are (they cohabit, they are separated in fact, they are in a divorce process or in the process of finding their marriage null or in the process of marriage annulment) in order for the court to decide which of the spouses is entitled to the maintenance pension paid by the other spouse, it is necessary that the general conditions of the legal maintenance obligation must be cumulatively fulfilled as stipulated in article 524, article 526 and article 527 of the Civil Code that is: the creditor should be in need without the possibility of supporting oneself from one's work or goods, the creditor should not be in guilt of serious offences towards the debtor and the debtor should have the necessary means to pay or the possibility to acquire such means.

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# CONSIDERATIONS ON THE MINOR'S GUARDIANSHIP

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**Abstract:**

*The debates involving the various forms of child protection should never be concluded. In a state subject to the rule of law, the need to create a reliable and modern protection framework that is in the best interest of the child and complies with the current European regulations in the field, has determined a deeper concern to develop social services in favor of the child deprived of parental care. This alternative form of protection, as guardianship is named, aims to protect the child by preserving, or at least reproducing an environment similar to that provided by the natural parents.*

**Key- words:** *guardianship, minor, guardian's rights and obligations, guardianship authority, property administration, minor's interest.*

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## INTRODUCTION

The need to create a modern child protection framework that complies with the European regulations in the field has determined over the last years a deeper concern to develop social services in favor of the child deprived of parental care. This alternative form of protection, as guardianship is named, aims to protect the child by preserving, or at least reproducing an environment similar to that provided by the natural parents, considering at the same time an absolutely necessary practical applicability.

The concept of minor<sup>2</sup> is associated with the notion of child, that is, a person who is under the legal age and lacks full legal capacity.

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<sup>2</sup> With Romans the term designated the persons under 25 years – *minores* – who are unable to run their own affairs due to their lack of experience, in Mihnea-Dan Radu, "Protecția minorilor în dreptul roman", *Fiat Justitia* 2 (2014): 84.

The minor`s guardianship is regulated by *Art. 110-163* of Civil Code, Law no.272/2004 on the protection and promotion of the rights of the child and Law no.273/2004 on the legal status of adoption. Also, important provisions regarding the child are stipulated by the Convention on the rights of the child<sup>3</sup>. The Preamble to this important Convention states that *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"*.

The guardianship<sup>4</sup> has been defined by the doctrine in different manners, the most relevant definition suggesting *a task assumed by a person who is capable, in fact and in law, to ensure the minor`s personal protection, the administration of his property and the exercise of his civil rights*<sup>5</sup>.

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At that time, children were not treated as they are nowadays, being considered a helping hand for their parents in the old age or a means to perpetuate the family. Moreover, the poor families regarded the child as an investment, as he was forced to work, in Romulus Gidro and Aurelia Gidro, *Drept privat român* (București: Universul Juridic, 2014), 94.

<sup>3</sup> Adopted by the UN General Assembly on 29.11.1989, it entered into force on 02.09.1990. Romania ratified the Convention by Law 18/1990, Official Gazette no. 314/13.06.2001.

<sup>4</sup> In the late 19<sup>th</sup> century the guardianship was thought of as *the activity and position of the guardian, curatorship and safeguarding, the guardian being considered the protector and curator of a child. The guardian was legally bound to do for his protection everything that a good parent would naturally do for his child. The guardian shall administer the minor`s property in the best interest of the latter but shall not alienate any property; the child depends on his guardian and the latter shall protect the minor`s rights*, August Treboniu Laurian and Ion C. Massimu, *Dicționarul limbii române*, vol. I (București: Noua Tipografie a Laboratorilor Români, 1876), 1515.

The guardianship can be granted by law – *legitimate guardianship*, by the appointment of the mother or father – *testamentary guardianship*, or granted by the family council; for details, see Aurora-Livia Chițu, „Statutul juridic al copilului în Vechiul Regat” in “9 Ipostaze ale copilăriei românești. Istorii cu și despre copii de ieri și de azi”, coordinator Luminița Dumănescu (International Book Access, 2009): 63-91.

<sup>5</sup> Ovidiu Ungureanu and Cornelia Munteanu, *Drept civil. Persoanele* (București: Hamangiu, 2013), 268.

It has been rightfully stated that the guardianship (the term derives from *tutor, eri* which means *to protect*<sup>6</sup>) is a means to supplement the parental care, an alternative form of protection. Thus, there are no similarities between the rights and obligations of the parents and those of the guardians<sup>7</sup>.

## I. REQUIREMENTS TO FILE FOR GUARDIANSHIP

*Art. 110* of Civil Code defines the cases in which guardianship is granted, such as: both parents are deceased, both parents have unknown identities, both parents are subject to the termination of their parental rights, both parents are placed under judicial interdiction, both parents are disappeared or legally declared dead upon termination of guardianship (if the Court holds that the guardianship is in the child's best interest).

Safeguarding the child by guardianship is the power of the Court, particularly the guardianship authority. The appointment of the guardian is accomplished in the board room by final decision. The statement of the 10-year old child is mandatory according to *Art. 264* of Civil Code<sup>8</sup>.

*Art. 114* of Civil Code introduces an important provision regarding the right of the parent to appoint the guardian by authentic unilateral

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<sup>6</sup> In Roman law the guardianship was first regarded as an institution meant to safeguard the family of the incapacitated person, particularly from a patrimonial perspective. The guardian was not responsible for the personal aspects of the child's life, task that would be fulfilled by the mother or the child's next of kin. The child placed under guardianship could act against his guardian by *actio tutelae* and *actio de rationibus distrahendi*, in Radu, „Protecția minorilor în dreptul roman”: 89-90.

<sup>7</sup> Alin-Gheorghe Gavrilă, „Ocrotirea minorilor prin tutelă. Drepturile și obligațiile tutorelui și drepturile și obligațiile părintești. Privire comparativă”, *Analele Universității Constantin Brâncuși* 2(2010): 159.

For divergent opinions, see Ion P. Filipescu, *Tratat de dreptul familiei*, 5th edition, (București: All Beck, 2000), 554.

<sup>8</sup> The child's right to be heard involves the minor's right to ask for and receive any information, depending on his age, to express opinions and be informed on the consequences of his opinions or any other decision that concerns him.

deed/contract or by will<sup>9</sup>. The appointment of the guardian by the living parent in full exercise capacity is inspired by the Anglo-Saxon legislation. The guardianship withdrawal can also be made in deed under private signature<sup>10</sup>.

In the absence of an appointed guardian his nomination shall be made by the Court after consulting the family council<sup>11</sup> (in case such council has been organized).

Filing for guardianship shall be made *ex officio* or upon request of the persons stipulated by *Art. III* of Civil Code<sup>12</sup>.

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<sup>9</sup> If upon his death a parent is being placed under judicial interdiction or subject to the termination of his parental rights the appointment of the guardian shall not come into effect.

<sup>10</sup> The deed by which guardianship is withdrawn shall be inscribed in the Register stipulated by Art. 2033 of Civil Code in Ioan Romoșan, *Dreptul familiei* (București: Universul Juridic, 2012), 437.

<sup>11</sup> Art. 357-360 of the Civil Code of 1864 focuses on the Family Council which was composed of at least 5 relatives, 3 belonging to the father`s family and 2 to the mother`s family. The minor`s male siblings and his brothers-in-law were legally part of the council. If the council was incomplete, the district Court could call for the deceased parent`s next of kin from other regions, or other citizens who were friends of the minor`s mother of father.

The old Family Code considered the family council as the ultimate guardianship authority, whose members were appointed by the Court. For details, see Constantin Hamangiu and Ion Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil*, vol. I, (București: National, 1928), 403-404.

Nowadays, the Family Council has become far more than just a guardianship authority. It must have 3 members, relatives or in-laws, or in their absence, persons who have been connected by friendship with the minor`s parents, in Ungureanu and Munteanu, *Drept civil. Persoanele*, 276.

The Roman Law emphasized a so-called *consilium prinquorum* made up of relatives and friends that *pater familias* used to ask for advice to.

<sup>12</sup> a) the persons who are in close relationship with the minor, as well as the administrators and other dwellers of the house where the child is living;

b) the Civil Registry, on the occasion of recording a person`s death, as well as the notary public, upon opening a probate procedure;

c) the Courts of law, upon sentencing a person to the termination of the parental rights;

## II. THE GUARDIAN

The Court shall appoint guardian a relative, an in-law or a friend of the minor's, depending on the personal relationships, proximity of domicile, living conditions and moral guarantees that the guardian to be must provide (*Art. 118* of Civil Code).

The guardian must be an individual in full capacity of exercise<sup>13</sup>. Questions rise when it comes to granting guardianship to persons who have acquired under the law an anticipated exercise capacity. The doctrine comes to support these persons, considering their possibility to assume civil obligations by acquiring full capacity of exercise, be it anticipated<sup>14</sup>.

The guardian can be an individual, either spouse or both spouses together. If guardianship is granted for several minor siblings, the purpose is not to separate them, so they will all get the same guardian.

The Civil Code also allows the guardianship authority to decide upon entrusting the administration of the minor's property to a specialized legal entity, with the approval of the family council.

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d) bodies of the local public administration, protection institutions, as well as any other individual.

<sup>13</sup> Art. 113 (1) provides that the following categories of individuals shall not acquire guardianship:

- a) a minor, an individual placed under judicial interdiction or curatorship;
- b) the individual who has been deprived of the parental rights or acknowledged as incapable of acting as a guardian;
- c) the individual who has been limited some civil rights, under the law or by Court decision, and the individual displaying malicious behavior observed accordingly by a Court of law;
- d) the individual who during the exercise of guardianship, has been removed from it;
- e) the individual in the state of insolvency;
- f) the individual who, due to some interests that are adverse to those of the minor, could not fulfill the responsibilities of the guardianship;
- g) the individual who, by authentic deed or will, has been removed by the parent that is exercising guardianship alone upon his death.

<sup>14</sup> Ungureanu and Munteanu, *Drept civil. Persoanele*, 272.

The General Directorate of Social Assistance and Child Protection shall provide the Court with an evaluation report on the person or family that will become guardian. The evaluation will concern the living conditions and moral guarantees that the guardian must provide in order to ensure an appropriate environment for raising, caring and educating a child.

The guardianship bears a legal character and is basically an unpaid facultative duty. During his guardianship, the guardian is entitled to a remuneration established by the legal authority and approved by the family council, based on the efforts made to administer the minor's property and depending on the living conditions of both the minor and his guardian, but no more than 10% of the income generated by the minor's property (*Art. 123 (2)* of Civil Code). Unlike the former provisions of the Civil Code, the person appointed guardian can refuse this duty except for the case in which the appointment has been made by contract of mandate, with the exceptions stipulated by law<sup>15</sup>.

The guardian must personally fulfill his duties, cannot appoint a representative and cannot have his obligations transferred to heirs (*Art. 157 (2)*) stipulates as exception the case in which until a guardian is appointed, the heirs shall take over guardianship and if there are several heirs, they can appoint, by special power of attorney, one of them to transitorily exercise this duty.

### **III. EXERCISING GUARDIANSHIP**

This part of the paper relies on two highly important issues, namely the guardian's rights and obligations in respect of the person of the minor and his patrimony.

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<sup>15</sup> a) the person who has already celebrated 60 years old;  
b) the pregnant woman or mother of a child under 8 years old;  
c) the person who raises and educates 2 or more children;  
d) the person who due to infirmity, type of activities performed, remoteness of the domicile relative to the minor's property or any other true and just cause, could no longer carry out this task.

The guardian's powers, as named by the specialty literature<sup>16</sup>, do not involve only subjective rights but also responsibilities.

### **In respect of the person of the minor**

All decisions regarding the person of the minor, with the exception of the current measures, must be made by the guardian, with the consent of the family council.

The child under guardianship shall live with his guardian. By exception, the guardian, after having informed the legal authority, may agree upon a change of domicile to facilitate the minor's professional training.

The guardian shall safeguard the child's mental and physical health, and ensure his raising, education and professional training based on his skills. Thus, just like any other parent, he must provide the best living conditions for the minor. The child shall be guided and supervised and all decisions shall be made in the minor's best interest. The guardian has the right to consent to the child's marriage or even adoption (pursuant to the law)<sup>17</sup>.

The form of education or professional training that the minor under 14 is taking upon commencement of guardianship shall be changed only by consent of the guardianship authority. At its turn, the guardianship authority cannot modify, against the will of a minor over 14, the form of education decided upon by parents or that the minor was taking upon commencement of guardianship (*Art. 138 of Civil Code*).

### **In respect of the minor's property**

Unlike the previous legislation, the current regulations have been improved, with the obvious purpose to protect the minor's property.

After the appointment of the guardian, in his presence and that of the family council, the guardianship authority delegate shall check the entire property of the child, making an inventory that is to be approved

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<sup>16</sup> Marieta Avram, „Puterile tutorelui asupra sumelor de bani din conturile persoanei ocrotite”, *Curierul Judiciar* 4 (2015): 96.

<sup>17</sup> Gavrilesco, „Ocrotirea minorilor prin tutelă. Drepturile și obligațiile tutorelui și drepturile și obligațiile părintești. Privire comparativă”: 161.

by the authority. The inventory must be submitted within 10 days from the appointment of the guardian. According to *Art. 141* of Civil Code, before the inventory, the guardian is allowed to take only urgent conservation or administration measures. Upon inventory of the minor's property, the guardian along with the members of the family council must make a written statement as to the debts or claims addressed to the minor, otherwise it is presumed that they have given them up. Any debts, irrespective of the creditor – guardian or member of the family council, spouse, his relatives, his siblings, shall be paid only upon approval of the guardianship authority.

Perceived as administrator of the child's property (property conservation obligations, useful acts in order to fully enjoy the common use of property, usufruct, debt collection, using and exploiting the frugifer property, making new investments or modifying the current ones, property alienation or encumbrance with the appropriate approval, under *Art. 795-799* of Civil Code), the guardian must act in good will, with the diligence of a good owner, just the way he would do if the property were his own.

The administered property does not include the property acquired by the minor by gratuitous title. However, the tester or donor can also have this property administered by the guardian<sup>18</sup>.

Therefore, in terms of property, the guardian has clearly defined obligations in the administration, legal representation or the prior consent of the legal deeds concluded by the minor, depending on the latter's age and exercise capacity<sup>19</sup>.

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<sup>18</sup> Rodica Peptan, „Gestionarea patrimoniului minorului de către tutore”, *Annals of Constantin Brâncuși University*, 3(2013): 139.

<sup>19</sup> In Roman times, the legislation would distinguish between *infans*, children under 7 years of age, and *impubes*, children over 7 years old who unlike the first, could be part of the juridical life if assisted by an adult. Yet, they were forbidden to get married or to make testamentary dispositions. *Puberati proximus* could conclude himself those deeds that would increase his patrimony or pay off a debt, in Radu, „Protecția minorilor în dreptul roman”: 85-86.

In case a minor is in full exercise incapacity – **the minor under 14 years of age** – the guardian has the duty to represent him in all juridical deeds (*Art. 143* of Civil Code) and to administer his patrimony. The legal representation of the incapacitated persons shall be accomplished by the parents, guardian or curator<sup>20</sup>. For the minor in the incapacity of exercise the guardian is at the same time legal protector (appropriate name for the minors with restrained exercise capacity) and legal representative. The two notions - legal protector and legal representative - have been clearly distinguished by the law-maker<sup>21</sup>.

Thus, on behalf of the minor, the guardian can decide by himself to conclude administration and conservation deeds as well as disposal deeds for the goods that are subject to destruction, fall, alteration, depreciation and have become useless<sup>22</sup> to the minor.

Unless consented by the family council and the guardianship authority, the guardian is not allowed to make donations or conclude deeds that guarantee someone else's obligations, deeds of alienation or encumbrance of the minor's property, deeds of waiver of rights<sup>23</sup>. In this case, the guardianship authority shall authorize separately each of these deeds, only if they are necessary and useful to the minor, and shall also indicate the way money arising from these deeds will be spent.

Even if he has the consent of the guardianship authority, the guardian is forbidden to conclude himself any deed with the minor (the legislation includes in this category even the guardian's spouse, bloodline relatives or siblings<sup>24</sup>).

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<sup>20</sup> Ernest Lupan, *Drept civil. Persoana fizică*, (București: Lumina Lex, 1999), 102.

<sup>21</sup> Ionel Reghini and Șerban Diaconescu, *Introducere în dreptul civil* (Cluj-Napoca: Sfera Juridică, 2004), 195.

<sup>22</sup> The concept of *useless property* is rather precarious and creates the possibility for the guardian to make incorrect decisions with regard to the minor's deeds that are not subject to any form of supervision.

<sup>23</sup> Art. 401 of the Civil Codices of 1864 stipulated that with a view to protect the minor's property, the guardian could neither take common or mortgage loans in the minor's name, nor could he sell the immovable without the consent of the family council (which was given only in extreme situations).

<sup>24</sup> Ungureanu and Munteanu, *Drept civil. Persoanele*, 280.

With the consent of the guardian, the minor with restrained exercise capacity – **child between 14-18 years of age** – can conclude himself administration deeds (they can be only exceptionally concluded without previous consent if they don't inflict damage on the minor) and other deeds concerning his work and profession, or his artistic and sports activities.

The previous consent of the guardian along with the approval of the guardianship authority are prerequisites to the minor's conclusion of deeds of alienation, encumbrance<sup>25</sup>, waiver of rights, or any other deed that goes beyond the administration right<sup>26</sup>.

Just like with the incapacitated minors, the guardian of a minor with restrained exercise capacity shall neither consent to the donations made by the minor other than ordinary presents, or to the deeds that guarantee someone else's obligations, nor shall he conclude himself, his spouse, bloodline relatives or siblings any juridical deed with the minor.

The concluded deeds that violate the aforementioned provisions shall fall under relative nullity, which can be invoked by the members of the family council, by the prosecutor *ex officio*, or by the guardianship authority (Art. 144 (3) of Civil Code)<sup>27</sup>.

Art. 798 of Civil Code regulates the money invested by the administrator, that is, by the guardian. The guardian must invest the amounts of money that are under his administration according to the legal provisions concerning the safe placements. The placements that are presumably safe are established periodically by the National Bank of Romania or the National Commission for Securities. In the event of insecure placements, the guardian shall be bound to compensate for prejudice without acknowledgment of any guilt.

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<sup>25</sup> Only to guarantee some of the minor's own obligations and not other persons' obligations.

<sup>26</sup> Ungureanu and Munteanu, *Drept civil. Persoanele*, 169.

<sup>27</sup> Art. 799 (4) of Civil Code can also be applicable: the conclusion of a deed of alienation without the previous consent entails, in case of prejudice, the obligation to full compensation and the replacement of the administrator.

*Art. 149 (1)* of Civil Code regulates the amounts of money that exceed the child raising costs or the administration of the child's property, as well as the corresponding financial instruments that shall be filed within 5 days from the money reception in the name of the minor with a credit institution selected by the family council. The guardian can use the money and the financial instruments only with the previous consent of the guardianship.

As compared with *Art. 144 (2)*<sup>28</sup>, the provisions of *Art. 149 (4)* bear a special character<sup>29</sup>: the guardian can deposit in the minor's name, in a separate account of a credit institution, the money needed for raising the child, which can be withdrawn by the guardian without the consent of the guardianship authority. The term *to dispose* reminds us of the deeds of disposition but in this case, as mentioned before, there is no need for the consent of the family council. *Art. 130 (4)* of Civil Code regarding the family council stipulates that any deed concluded by the guardian without the advisory opinion can be cancelled and entails the personal liability of the guardian.

The specialty literature<sup>30</sup> gave rise to the issue of money withdrawal from the deceased person's accounts that have been bequeathed to the minor. Therefore, it is considered that pursuant to *Art. 149 (2)* of Civil Code the money withdrawal is not a deed of disposition, so it does not require the consent of the guardianship authority. It is only after the money withdrawal that the guardian, who has previously opened an account in the minor's name, can dispose of this money with the consent of the guardianship authority (the credit institution is selected by the family council).

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<sup>28</sup> Without the consent of the family council and the authorization of the guardianship authority, the guardian shall not alienate, divide, use as a mortgage guarantee or encumber the minor's property, waive the minor's patrimonial rights or conclude any deed that goes beyond the administration right.

<sup>29</sup> Avram, „Puterile tutorelui asupra sumelor de bani din conturile persoanei ocrotite”: 196.

<sup>30</sup> Avram, „Puterile tutorelui asupra sumelor de bani din conturile persoanei ocrotite”: 197-198.

Therefore, the deeds by which the guardian can make use of the money deposited in bank accounts opened in the minor`s name need the approval of the family council and the authorization of the guardianship authority, according to *Art. 144 (4)* of civil Code, with the applicability of *Art. 149 (2)* when only the authorization of the guardianship authority is required.

In terms of the guardian`s powers on the minor`s patrimony, the annual amount needed to cover the living costs and administration of the minor`s property is established by a decision of the family council (*Art. 148 (1)* of Civil Code). The same provision regulates the expenses involved in child raising and administration of his property, that shall be covered by the minor`s revenues. In case these revenues are not sufficient the guardianship authority shall decide upon the sale of the minor`s property, by mutual consent or public auction. The objects with a particular affective value for the minor or his family shall be sold only exceptionally. If the minor does not possess any goods or family/relatives who are legally bound to materially support him or the amount is insufficient, the child is entitled to social assistance, pursuant to law.

Last but not least, an important legal obligation of the guardian is to submit every year to the guardianship authority an account of the way he has administered the minor`s property within 30 days from the end of the calendar year. At the request of the guardianship authority the guardian may also be obliged to provide accounts of the way he has taken care of the child.

#### **IV. TERMINATION OF GUARDIANSHIP AND THE GUARDIAN`S LIABILITY**

The guardianship shall terminate as soon as the minor becomes of age or acquires anticipatedly the exercise capacity under the law, or in case the minor dies or the causes that determined the establishment of guardianship have disappeared. The termination of a person`s role as guardian (due to his death, removal from guardianship or replacement upon his request, appointment of a new guardian following the placement under interdiction of the minor become major) does not involve the

termination of guardianship, as remarked by two famous Civil Law authors<sup>31</sup>.

The guardian's administrative discharge shall be accomplished only after the guardianship authority has checked all the calculations concerning the revenues and expenses involved in the support of the child and his property. Upon termination of guardianship for any reason whatsoever, the guardian or, if the case may be, his heirs must submit to the guardianship authority, within 30 days, an overall report (*Art. 160 (1)* of Civil Code).

The guardian shall be liable for any damages to the minor arising from the unfulfillment or inadequate fulfillment of his duties. The guardian's discharge of duty shall not exonerate him from the damages caused by his own acts. Furthermore, the guardian may even be held criminally liable for crimes like fraudulent administration of estate or child mistreatment. *Law no. 272/2004* clearly stipulates that the exposure and use of a minor with the purpose of gaining personal benefits or influencing the resolutions of public authorities are treated as contraventions.

According to *Art. 158* the guardian shall be removed from guardianship in case he inflicts on the child an abuse, a severe negligence or any other deed that makes him unworthy of being a guardian, or if he does not fulfill his task adequately.

*Art. 1372* regulates the guardian's tort liability for other people's deeds. Thus, the guardian may be exonerated from any liability only in case he proves his incapacity to prevent the prejudicial deed. From parents or guardians, the proof shall be accepted only if they can demonstrate that the child's deed is the result of a cause that is independent of the way they have fulfilled their parental duties<sup>32</sup>.

Under *Art. 155* of Civil Code, the following categories may file complaints to the guardianship authority against the guardian for any prejudicial deed to the minor: the child who is 14 years old, the family

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<sup>31</sup> Ungureanu and Munteanu, *Drept civil. Persoanele*, 281.

<sup>32</sup> For further comments, see Romoșan, *Dreptul familiei*, 445.

council or any of its members, as well as the persons stipulated by *Art. III*<sup>33</sup>. The guardianship authority shall settle the complaint urgently by enforceable title after they have summoned the parties and the members of the family council. The 10-year old minor will be heard only in case the Court finds it necessary.

The law also regulates the special cases when the child's interests are adverse to those of the guardian, which may entail either the replacement of the guardian or the appointment of a special curator. The latter solution may be resorted to even in case the guardian, for medical or other reasons, fails to fulfill a particular duty in the child's name. The appointment of the curator shall be accomplished by the same guardianship authority.

In the *Republic of Moldova*, the guardianship or curatorship shall be established in case the minor has no parents or potential adopters, his parents' rights have been terminated, or the child has been deprived of parental care for other reasons (*Art. 32* of amended Civil Code<sup>34</sup>). The guardianship shall be instituted for persons who lack exercise capacity or minors under 14 years old.

An interesting aspect in the Moldavian law is that while the minor is considered deprived of any exercise capacity before 7 years old, between 7-14 years of age he may conclude himself conservation deeds, less important ordinary deeds enforceable upon conclusion, or various deeds by which the minor applies for benefits and which don't need

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<sup>33</sup> In case they find out about a minor deprived of parental care, the following categories must immediately inform the guardianship authority:

- a) the minor's next of kin, or the administrator and other dwellers of the house where the child is living;
- b) the Civil Registry (for the registration of someone's death) or the Notary Public (to open a succession);
- c) the Court, upon issuing the penal sentence that terminates parental rights;
- d) bodies of the local public administration, social protection services, or any other person.

<sup>34</sup> Code 1107/06.06.2002, published in the Official Gazette of Romania no. 82-86, 22.06.2002.

notarial authentication or the official registration of the rights arising from them (*Art. 22* of amended Civil Code).

The guardianship is a personal and voluntary duty. However, the guardian is entitled to request for the compensation of all expenses involved in the fulfillment of the guardianship obligations.

The guardians are individuals empowered with special authority, whose duty is to safeguard the rights and interests of the minors who have no or restrained exercise capacity.

The guardianship is a social, honorable and trustworthy duty, as defined by the Moldavian doctrine setters<sup>35</sup>. The guardian is the legal representative of the person that he protects and has the right to conclude without mandate all necessary legal deeds in that person's name and interest.

The various bodies of the local public administration act as the child welfare authority that supervises the guardian's activity.

Just like in the Romanian legislation, there is a category of people in charge of providing information on the persons who may need guardianship (*Art. 37* of amended Civil Code): the next of kin of the person in question, the administrator or other dwellers of the house where the person is living, the Civil Registry (for death registration), the Notary Public (to open a succession), the Court, D.A. or police officers (to enforce an imprisonment decision), bodies of the local public administration, social protection services or any other person.

The person who may be appointed guardian may be a sole individual or even two spouses altogether.

At the same time, similar to the provisions of the Romanian Civil Code, the Moldavian guardianship authority may decide, based on the value and components of the guarded person's property, to entirely or partially entrust the property administration to a competent individual or legal entity.

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<sup>35</sup> Moldavian Civil Code, commentary to the articles, accessed February 28, 2016, <http://gandrabur.net/wp-content/uploads/2013/07/Comentariu-CC.pdf>.

The following categories of persons shall not be appointed guardians: a minor, a person with no or restrained exercise capacity, an individual deprived of his parental rights, an individual acknowledged as incapable of acting as a guardian or curator due to health problems, an individual whose quality of guardian has been cancelled following the inappropriate fulfillment of duties, an individual who has been abridged some political or civil rights, under the law or by court decision, and an individual displaying malicious behavior or whose interests are adverse to those of the minor, an individual who, by authentic deed or will, has been excluded by the parent that is exercising guardianship alone upon his death, an individual who has been removed from a guardianship or curatorship, an individual who is developing business relations with the institution that accommodates the person placed under guardianship or curatorship.

The minor`s domicile shall be that of the guardian.

The guardian`s responsibilities are to take care of the minor, to protect his rights and interests, to educate him and to administer his patrimony. An inventory of the minor`s goods, approved by the guardianship authority, shall be made at the very beginning and the guardian must submit every year to the same guardianship authority a report on the way he has fulfilled his duties.

The guardian is legally bound to request the guardianship authority an authorization to conclude any deed of alienation, donation, exchange, rental, gratuitous use, goods used as a pledge, deeds by which he waives the rights of the person under guardianship, conventions that regulate the separation of property and shares of the guarded person, or any other deed that may reduce the minor`s property (*Art. 42* of amended Civil Code).

The guardian, his spouse and relatives up to the fourth degree shall not conclude any agreement with the person placed under guardianship, except for the case in which the property is transferred by donation or given for gratuitous use to the latter.

In case of permanent administration of the valuable movable and immovable property of the person under guardianship, the guardianship

authority shall conclude a living trust agreement with the appointed curator. In this case, the guardian shall maintain empowerment on that share of the guarded person's property that has not been placed under trust administration.

The money that exceeds the living costs and property administration of the person under guardianship can be deposited by the guardian in a financial institution and can only be withdrawn under authorization of the guardianship authority. As for the amounts used to cover the living costs they must be deposited in a separate account and can be withdrawn by the guardian without any authorization by the guardianship authority.

The guardian shall be removed from guardianship in case he commits an abuse, a severe negligence or any other deed that makes him unworthy of being a guardian, or he does not fulfill his task adequately.

Shall the guardian, for true and just cause (*e.g.* severe disease, change of family status, change of domicile), cease activity while the person still needs protection, the guardianship authority may appoint another guardian<sup>36</sup>.

The guardianship shall terminate once the minor is 14 years old, when the guardian becomes curator without any additional court decision in this respect (*Art. 47* of amended Civil Code).

In *Italy*, the guardianship represents a civil law institution, a gratuitous task, with the exception of some cases in which the guardian shall be remunerated based on the size of the minor's property that he administers and the difficulties arising from this administration.

An interesting particularity of the Italian legislation in this matter is the existence of a registry kept by the judge appointed by the guardianship authority and which records the appointment of the guardian, an inventory of the minor's property, the guardianship final account, any modification to the personal or patrimonial status of the minor, different reports, and any action to be taken by the guardian in

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<sup>36</sup> Valentina Cebotari, *Comentariul Codului civil al Republicii Moldova*, vol. I, (Chișinău: Arc, 2006), 65.

order to fulfill his responsibilities. The establishment and termination of guardianship shall be notified within 10 days to the Civil Registry which shall mention it on the minor's Birth Certificate.

From a procedural perspective, the following categories of persons shall inform the guardianship authority if the minor no longer benefits from guardianship (*e.g.* the notary who has authenticated a will by which a guardian is appointed; the Civil Registry, which has issued the Death Certificate of the minor's deceased parent(s)). If several siblings end up in the aforementioned situation, a common guardian shall be appointed to all of them.

A guardian shall also be appointed if both parents are deceased or they are unable to exercise their parental authority for any other reason. The institution of guardianship aims to protect the minor, from a position that is similar but not identical to that of parental authority.

The guardian can be appointed by the parents either by means of a will or an authentic deed. If the parent has not appointed any guardian or if, for any other reason, the appointment of such guardian cannot be made, guardianship shall be ensured by one of the parents' relatives. The appointment of the guardian shall always be preceded by a hearing of the minor under 16 years old. Before he assumes the prerogatives of guardianship, the guardian shall swear an oath in court to assure that he will exercise guardianship loyally and diligently.

The guardian can renounce his duties in case he joins the army, is already a guardian, is over 65 years old or he has 3 children (*Art. 352* of Italian Civil Code).

The guardian shall watch over the minor, ensure his education, represent him in all civil deeds and administer his property. However, his powers are rather limited considering that he must obey the rules set forth by the judge of the guardianship authority at the proposal of guardian (*Art. 371* of Italian Civil Code).

The property administration must be accomplished by the guardian with the diligence of a *good father of the family* (*buon padre di famiglia*, *Art. 382* of Italian Civil Code); in other words, he will be held responsible for any prejudice to the minor.

The first step in the child's property administration is to provide an inventory within 10 days from the appointment of the guardian (*Art. 362* of Italian Civil Code); this inventory must be carried out in the presence of a notary selected by the guardianship authority, the minor who is 16 years old and two witnesses who are relatives or friends of the minor's parents.

The guardian shall need the authorization of the guardianship authority for any deed of disposal in respect of the minor's property. In the absence of this authorization, the guardian cannot sell or use the child's property as a mortgage guarantee.

The guardian shall deposit in the minor's name all amounts of money (except for the money that should cover the living and education costs) in a credit institution authorized by the guardianship authority.

*Art. 360* of Italian Civil Code also stipulates the replacement of a guardian if his interests are adverse to those of the minor (of course, by the intervention of the guardianship authority). If the same conflict of interest occurs between the child and the new guardian, the Court shall appoint a curator.

The guardian can be removed from guardianship by the Court in case of negligence, abuse of power, going beyond his duties, inability to administer the minor's property or insolvency.

Within 2 months from the termination of guardianship, the guardian must deliver all the minor's goods and present a report, a final account of his administration before the guardianship authority (*Art. 385* of Italian Civil Code).

Any legal action of the minor against his guardian or of the guardian against the minor shall be limited to 5 years after the minor has become of age or upon his death (except for the actions concerning the payment of the balance resulting from the final account). Any agreement between the minor and his guardian that has been concluded before the authorization of the guardianship account shall be void and legal action can further be taken by the minor or his heirs.

## **CONCLUSIONS**

The debates involving the various forms of parental protection will never be concluded. Be it family placement, guardianship or adoption, their ultimate purpose will always be the attempt to find the best solutions to provide the child with an environment similar to that of a real family. The best interest of the child who is unable to protect himself must prevail in finding these solutions.

The paper analyses guardianship in the Romania of the 21<sup>st</sup> century, with references to the Roman period and the 19<sup>th</sup> century. At the same time, some elements have been added that approach the guardianship in the Republic of Moldova and Italy, other states being currently analyzed for a future study in this matter.

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# NAME'S MODIFICATION. FAMILIAL INFLUENCE OR CONSTRUCTION OF THE IDENTITY?\*

Oana-Nicoleta RETEA<sup>1</sup>

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## **Abstract**

*Family relations determine the operation of name acquisition. The name is attached to privacy, by being a means of individualization of a person. Civil status of the person represents that legal means of individualization of peoples by indicating personal qualities which the law has conferred this meaning. Both the name and civil status are self-standing legal concepts but both are a way of identification for each individual . The purpose of this article is to underline the relationship between civil status and the modification of the family name as a direct result of a certain change in civil status and not as a result of an administrative judgment.*

**Key- words:** *civil status, name modification, individual, name change by administrative means, filiation.*

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## **INTRODUCTION**

Family relations determine the operation of name acquisition. Therefore, any change in these relations attracts, implicitly, the modification of the family name. So by the words modification of family name we understand " its replacement due to changes in civil status of the person<sup>2</sup>.

## **DEBATES ON NAME'S MODIFICATION**

Civil status or civil statute of one person represents that „legal means of individualization of individuals by indicating personal qualities

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<sup>2</sup> Gabriel Boroι, *Drept civil. Partea generală. Persoanele* (Bucharest: Hamangiu, 2010), 361.

which the law has conferred this meaning”<sup>3</sup>. Thus, by showing those elements we can establish for a person the beginning of the quality of subject of rights and obligations, whether or not is born of married parents, if is a person who was adopted, whether married or not, whether single or divorced, what sex it is, which age or nationality is. In the absence of legal provisions on personal qualities entering into the content of civil status, we cannot draw up an inventory unanimously accepted. As a result, civil status is based on relationships that spring from the filiation (consanguinity in lineal descent), kinship and marriage and reflects all legal relations arising between those members of the same family community.<sup>4</sup>

Additionally, it must be noted that both the name and civil status are self-standing legal concepts but both are a way of identification for each individual. The method we establish filiation (of marriage, out of marriage, of unknown parents) results in the determination of the last name, and changes in civil status (adoption, marriage, in filiation) causes or may cause the surname’s modification.<sup>5</sup> Even if the name *lato sensu* is passed in the „certificate of civil status”, it is not a part of „civil status” of a physical person, being distinct from it.<sup>6</sup>

Parentage (filiation) is only one of the sources of family relationships. Parentage’s basis is represented by the blood tie between the child and his parents, this in turn is the result of birth and conception. In our approach, we must, first, to elucidate the concept of „filiation”. So, according to Andrei I. Filipescu, the term has two meanings: *lato sensu*, filiation represents only „a continuous string of births” which creates a bond with that person with his forefather, and *stricto sensu*, filiation consists in the "the report of lineage" of a child and each of his parents, in other words it takes two forms: filiation to mother or motherhood and

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<sup>3</sup>Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil* (Bucharest: Universul Juridic, 2005), 429.

<sup>4</sup>Dumitru Lupulescu and Ana Maria Lupulescu, *Identificarea persoanei fizice* (Bucharest: Lumina Lex, 2002), 36.

<sup>5</sup> Beleiu, *Subiectele dreptului civil*, 430.

<sup>6</sup> Cercel Sevastian, *Drept civil. Persoana fizică* (Craiova: Universitaria, 2007), 246.

filiation towards father or fatherhood<sup>7</sup>. In addition, filiation can be from marriage or outside marriage. Instead, kinship<sup>8</sup> that can be defined as symbolizing the relationship which is based on the lineage of people from one to another or the fact that more people have a common ancestor, or being based on the blood tie between two or more persons, (natural kinship<sup>9</sup>) or resulting from adoption (civil kinship<sup>10</sup>). In other words, natural kinship is determined by the fact of filiation.

It should be noted that the name change does not attract any change in civil status but those changes aimed consanguinity in lineal descent (filiation) of the person concerned, those occurring as a result of the adoption or produced by the institution of marriage, where spouses as to marriage have decided to bear a common name.<sup>11</sup> For instance, where a person marries and keeps the family name had until marriage or if he divorces and retains, with the approval of the court, the name of the other spouse used during marriage, the change in civil status does not change the family name<sup>12</sup>.

Article 12 paragraph (3) from Decree no. 31/1954<sup>13</sup> provided that: „change in any way of the last name and the first name is not permitted except in cases and under conditions determined by law”. In terms of terminology, the «change of family name» means not only the actual change, but the name’s modification. Ordinance no. 41/2003<sup>14</sup> regarding name acquisition and the change of the names by administrative means for individuals, provides in article. 2 paragraph (1) that „ surname changes by the change in civil status of individuals as provided by law”. Like in above mentioned Ordinance, the name’s modification was

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<sup>7</sup> Andrei I. Filipescu, *Filiația firească și filiația din adopție* (Bucharest: All Beck, 2002), 2.

<sup>8</sup> See for further information: Filipescu, *Filiația firească*, 1-25.

<sup>9</sup> Filipescu, *Filiația firească*, 1;

<sup>10</sup> Filipescu, *Filiația firească*, 19-20.

<sup>11</sup> Eugen Chelaru, *Drept civil. Persoanele- în reglementarea NCC* (Bucharest: C.H. Beck, 2012), <http://www.legalis.ro/> chap. 1, sect.2.

<sup>12</sup> Ernest Lupan and Ioan Sabău-Pop *Tratat de drept civil român. 2-nd Volume: Persoanele* (Bucharest: C.H.Beck, 2007), 117.

<sup>13</sup> Published in Official Bulletin No. 8 from 30/01/1954.

<sup>14</sup> Published in the Official Gazette, No.68 from 2/02/2003.

provided also in Decree no. 975/1968<sup>15</sup>, in article 2, paragraph (1), now repealed. The terms and expressions used corresponded to the regulations included in the Family Code, resulting, therefore that the surname of the person changes as a result of the changes that interfered in personal status and marital status. Government Emergency Ordinance no.50/2004<sup>16</sup> could have achieved a unification of expressions and their currently use. By this ordinance, the Government wanted the modification but also the amendment of certificates of civil status inclusively. For accuracy and precision using expressions with based scientific content, is necessary to harmonize the various regulations in the matter of modification (by right) resulting of changes appeared in personal status and the change (administratively) of one's family name<sup>17</sup>.

The new Civil Code, concerning the surname's modification provides in article 84 paragraph(1): „The surname is acquired by parentage effect and can be modified by changes in civil status, as provided by law”. Issues relating to the modification of surname are included in other articles of the Civil Code as well: article 282- choose of a family name once with the marriage celebration, article 383-family name after marriage, article 449- child's name from marriage, article 450- name of the child born out of marriage, article 473-the name of the adopted person, etc.

Not to be confused the modification of the family name with the name change by administrative means<sup>18</sup>. In his work, entitled „Persoana fizică în dreptul R.P.R.”, Traian Ionașcu stated the fact that the „transformation”<sup>19</sup> of the family name is realized by both operations namely modification and change except that the name modification is a result of the change of civil status while the name change is achieved as a result of an administrative decision.

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<sup>15</sup>Published in Official Bulletin, No.136 from 29 October 1968.

<sup>16</sup>Published in the Official Gazette, No. 595 from 1-st of July 2004.

<sup>17</sup> Lupan and Sabău-Pop, *Tratat de drept civil român*, 116.

<sup>18</sup>See: Retea Oana-Nicoleta, “Unpacking the Right to a Name: A Diachronical Legal Analysis of the Administrative System and Regulations”, *Journal of Political Sciences* 46 (2015): 356-364;

<sup>19</sup>Traian Ionașcu, *Persoana fizică în Dreptul R.P.R.* (Bucharest: Academia Republicii Populare Române, 1963), 117.

A single person can change its name by administrative means remaining unmarried at all and after. In other word, by the change of surname by administrative means, the civil status remains unchanged<sup>20</sup>. So in the situation of the name changed through administrative means, the interested person shall proceed an administrative procedure<sup>21</sup>, for the replacing of the name that it bears, in the perimeter of the grounds expressly provided for this operation. While, family name modification, representing the effect of changes in personal status, is enrolled in the act of civil status which is recorded or enrolled by reference in the ledger of civil status. Based on these records it will be issued the certificates with the new surname. On the other hand, the name obtained by change through administrative means is the result of the applicant's request, having no influence on personal status.

Furthermore, the change of the name by administrative means deals with both the change of the last name and of the first name, while the institution of the name's modification relates only with the family name. Therefore, the two juridical institutions<sup>22</sup> are subject to different legal regimes, each being due to certain causes.

## CONCLUSION

Legal norms establish both the substantive and the form conditions when a person may acquire a certain personal status, when one can change it, and the situations in which personal status change also have automatic influence on the change of surname. As a result, name's<sup>23</sup> modification, due to changes in personal status, shall be realised in full compliance with the legislation provisions because the name is one of the principal means of identifying a person.

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<sup>20</sup> Lupulescu and Lupulescu, *Identificarea persoanei fizice*, 39.

<sup>21</sup> Vasile Val-Popa, *Drept civil. Partea generală. Persoanele* (Bucharest: C.H.Beck, 2006), 397.

<sup>22</sup> Eugen Chelaru, *Drept civil. Persoanele* (Bucharest: All Beck, 2003), 19.

<sup>23</sup> Lupulescu and Lupulescu, *Identificarea persoanei fizice*, 38.

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# CONSIDERATIONS REGARDING THE SERVICE INVENTIONS

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## **Abstract:**

*Currently, the service inventions are regulated by Law no. 83/2014, which, as a novelty, defines them by the following: they are created by an individual inventor or by a group of inventors and the individual inventor or at least one member of the group of inventors is an employee of a legal person of public or private law; they can be protected by patent or utility model registration and: a) they resulted from the inventor having carried out their job as expressly assigned in the individual employment contract and job description or set by other binding acts for the inventor which provides for an inventive mission or b) they were obtained during the individual employment contract and for a period of up to two years after its termination, as appropriate, through the knowledge or use of the employer's experience by using their resources as a result of preparation and training acquired by the inventor employee by the care and at the expense of the employer or by the use of informations resulting from the employer's activity or made available by it.*

**Key-words:** service invention; patent; inventor; employee; State Office for Inventions and Trademarks

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## **INTRODUCTION**

The issue of the service inventions has constituted the object of numerous debates in specialized literature, and the Romanian legislation has provided several solutions at different moments. Law no. 102/1906<sup>3</sup>, which provided for invention patents and stayed in force until the 30<sup>th</sup> of December 1967, included no mentions of the service inventions. This

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<sup>3</sup> Approved by the Royal Decree no. 102/1906 and published in the Official Gazette no. 229 of the 17<sup>th</sup>/30<sup>th</sup> of January 1906.

category was first referred to in the preliminary draft of the Law of invention patents issued in 1921. Thus, it was mentioned that no Romanian company, be it private or state-owned, was entitled to require an invention patent “*unless it produced a contract stipulating that the author(s) of the respective invention had been obligated to transfer the right of use of their invention to the establishment or department to which they belonged*”<sup>4</sup>. Finally, it is worth mentioning the fact that the draft was not presented to the Parliament.

## **I. HISTORICAL REFERENCES REGARDING THE REGULATION OF THE SERVICE INVENTIONS**

The Resolution of the Cabinet Council no. 943/1950 regulates the service inventions in art.11. The persons who invented something upon request of the state or who were financed by the state in order to invent something would only receive an author's certificate. The author's certificate stood for a cession to the state of the right to exploit the respective invention<sup>5</sup>. Certificate applications were submitted to the Committee for Inventions and Discoveries, through the innovation collectives functioning within various companies and institutions, by their employees. In their turn, the companies and institutions were obligated to submit the applications to the Committee within 5 days, along with a notice. In case the Committee agreed to patent the invention, the certificate was issued to the state, on behalf of a certain ministry, which held all the rights conveyed by the patent. The petitioner was informed of the approval to examine their invention within 45 days since the submission of the patent application, as well as of the estimated date when the invention would be approved and the author's certificate would be issued. According to art. 5 of the Resolution, the Committee for Inventions and Discoveries was obligated to examine the inventions for which an author's certificate was required, in terms of novelty, utility and

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<sup>4</sup> Alexei Bădărău and Nicolae Mihăilescu, *Scurtă istorie a brevetării invențiilor în România* (Bucharest: OSIM, 2005), 95.

<sup>5</sup> Bădărău and Mihăilescu, *Scurtă istorie a brevetării invențiilor în România*, 106.

feasibility. Therefore it is worth emphasizing the fact that, in the case of the service inventions, the new regulation introduced a *merit test system*. It is worth noticing the fact that in the case of the inventions for which an author's certificate was granted to a company, institution or other organizations, the financial reward was given to the manager thereof, to distribute among the employees who had contributed to the respective invention. As described by art. 16 of the C.C.R. no. 943/1950, the amount of the reward was determined according to the savings which a year's use of the invention would bring to the company. If the savings were higher in the following years, the author received a difference two months after the end of the year. The final reward calculation was done after no more than 5 years of use, a time limit set by the Committee for Inventions and Discoveries depending on the importance of the respective invention. For those inventions transferred to the state, for which an estimated value of the savings could not be determined, the amount of the reward was set by the Committee upon the recommendation of the ministries interested in the invention.

An important change introduced by the Decree no 884/1967 consisted of the patent being the sole protection title for inventions. In the previous versions, a patent only consecrated the sole right to exploit the invention, and the copyright certificate was the consequence of the inventor's own will to grant the state the right to use their invention and to accept the state's offer. According to the new regulation, the author of an invention or the legal successor thereof is entitled to ask for the invention patent to be issued, or to transfer the right to use their invention to a company, in which case both the invention patent and the inventor certificate were issued. It is necessary to emphasize the fact that, unlike the copyright certificate in the previous version<sup>6</sup>, the inventor certificate is no longer a protection title for the invention, but merely a proof of the fact that the person is the author of the respective invention and the

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<sup>6</sup> The copyright certificate for inventions transferred to the state was regulated for the first time by the Resolution issued on the 7<sup>th</sup> of September 1950. See Yolanda Eminescu, *Invenții și inovații* (Bucharest:Scientific and Enciclopedic, 1977), 8.

grounds for the inventor to exercise certain rights, the most important of which being the one to receive proper payment to the amount provided by Law<sup>7</sup>.

An exception to the provisions of art. 6 of the Decree no. 884/1967 is the fact that the right to obtain a patent resulted ex lege in favor of the companies, for those inventions which they have requested or supported, provided that the financial support was of at least two thirds of the total cost incurred by the production of the invention. This refers to the hypothesis of company inventions for which it was not necessary to have a transfer act, since it was provided by law. In this case, the petition for an invention patent was generally submitted by the inventor on behalf of the company. Should the inventor or their legal successor fail to have the petition registered within one month since receiving the invitation to do so sent by the company, the latter could submit the petition themselves.

In the case of those inventions requested or financed by the company, the invention patent was granted to the inventor or to their legal successor if the resolution to reject the invention for lack of utility was definitive, according to art. 22 of the R.C.C. no. 2250/1967. If the invention patent had already been granted to the company before the result of the utility test, the former would be changed along with the holder. Whenever the patent the issuance of which determined the granting of an inventor's certificate was annulled, the corresponding inventor's certificate was annulled as well<sup>8</sup>.

An interesting provision was the one in art.9 of Decree no. 884/1967, according to which the invention patent was granted to the company within which the invention had been achieved, as a result of collective experiments or practices, with no identifiable author. Such patent would not grant the nominated person authorship of the invention,

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<sup>7</sup>Yolanda Eminescu, *Legislația invențiilor, inovațiilor și raționalizărilor. Texte comentate* (Bucharest: Scientific,1969), 13.

<sup>8</sup> Eminescu, *Legislația invențiilor, inovațiilor și raționalizărilor. Texte comentate*, 116.

given the fact that the respective title was issued as such precisely because a definite author could not be identified<sup>9</sup>.

According to art. 20 of Decree no. 884/1967, the inventors who had received an inventor's certificate or their rightful successors were entitled to patrimonial rewards. It is important to emphasize the fact that the law only mentioned this right in relation to the *applied inventions*, and the extent of the right was determined according to the economic and social advantages resulting from the application at the national level and valorification abroad of the respective invention. Therefore, the right to a reward had a complex source, going from the issuance of an inventor's certificate to the legal action of applying the invention<sup>10</sup>. It must be mentioned the fact that Decree no. 884/1967 eliminated the limit of the amount to be paid to the inventors for those inventions which constituted the object of an invention patent held by a socialist organization. Therefore, an inventor's certificate only created the possibility to obtain the right to receive a reward, which could only be effectively realized if applied for, and the amount of the reward would be determined according to the production savings resulting from the implementation of the respective invention<sup>11</sup>.

According to art. 33 of Resolution no. 2250/1967 for the application of the Decree, the reward for implementing the invention at a national level depended on the economic or social advantages of implementing the invention for 1 year, and the inventor was entitled to receive more money, depending on the most beneficial year of the first 5 years of implementation. The economic advantages were calculated according to accountancy, technical and operative data. In the absence of such data, the reward would be determined by estimating the economic or social advantages, by taking into account the extent to which the

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<sup>9</sup> Eminescu, *Legislația invențiilor, inovațiilor și raționalizărilor. Texte comentate*, 63.

<sup>10</sup> Yolanda Eminescu, *Legislația invențiilor, inovațiilor și raționalizărilor. Texte comentate*, 19.

<sup>11</sup> The resulting savings corresponded to the reduction of the work-related expenses and materialized in production tools or materials which could be used to manufacture the respective products.

invention could be implemented<sup>12</sup> and, whenever it was possible, by comparing the respective reward to other rewards granted for similar inventions. However, in the event of a reward set according to social or economic advantages, if it later became possible to use accountancy, technical and operative data to calculate the amount of the reward, the inventor could request a recalculation of the amount of the reward on accountancy, technical or operative grounds, within 6 months since the beginning of the implementation of the respective invention.

As provided for by art. 35 of Resolution no. 2250/1967 for the application of the Decree, the reward for an economically or socially beneficial reward consisted of a percentage of the amount which represented the economic advantages obtained after 1 year of use, and of a fixed quota established by the law. The minimum amount for the application of an invention at a national level was 1000 lei<sup>13</sup>.

In case the economic advantages obtained within one year of applying the invention ranged between 10001 and 50000 lei, the reward consisted of a fixed quota of 1500 lei, and of 15% of the respective savings. The fixed quota increased along with the savings, to up to 260000 lei, in the case of savings ranging between 20000001 and 50000000 lei, and the percentage was 0.2% of the savings. If the savings exceeded the above-mentioned amount, the fixed quota was 310000 lei, and the percentage was 0.1% , with no maximum amount of the final reward. The same term was used for the payment of appreciation rewards, depending on how much the use plan was accomplished by using the invention<sup>14</sup>.

The Resolution also regulated the situation in which, even if the author of the invention was not to blame, the benefits obtained as a result

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<sup>12</sup> Mentioned in the use planning.

<sup>13</sup> All rewards were paid from a special fund called the "Fund for the promotion of inventions, innovations and rationalizations", which constituted 0.25% of the yearly foreseen salary funds. See art. 84 and 85 of the R.C.C. no. 2250/1967.

<sup>14</sup> Yolanda Eminescu, *Dreptul de autor în Republica Socialistă România* (Bucharest: Academiei Republicii Socialiste România, 1969), 153.

of applying the invention was lower than that foreseen in the use plan<sup>15</sup>. In this case, the company could change the application year, without exceeding a 2-year limit since the invention had been accepted for application.

It is worth mentioning the fact that, according to art. 36 of the Resolution, the rewards granted for the implementation at the national level of an invention increased by no more than 50% for: a) an invention which significantly improved the quality of certain products as compared to the approved technical documentation; b) an invention which resulted in a product export or in the replacement of imported products; c) an invention which considerably influenced the start-up of certain machines or the fulfilment of the company's industrial objectives before the set deadline; d) an invention which resulted in the foundation of a new industrial (sub)branch or in the creation of new materials suitable to replace the faulty ones; e) an invention of an extraordinary technical importance. In case the invention fulfilled more than one of the conditions mentioned above, the reward was increased by taking into consideration all the above-mentioned criteria, without exceeding the 50% limit.

As an aspect of novelty, art. 44 of the R.C.C. no. 2250/1967 consecrated the right of the holder of an invention patent to receive a reward in foreign currency for the valorification of the invention abroad. The amount of the reward was paid in the national currency of the country in which the invention was valued, to an account opened on the holder's name at the National Bank. R.C.C. no. 2250/1967 provisioned a detailed calculation of the respective reward. It consisted of a percentage which decreased in inverse ratio to the income and increased progressively. For amounts lower than 500 dollars, the foreign currency money resulting from the valorification of the invention abroad was paid in full to the holder of the inventor's certificate. The reward was paid all at once, not in installments, regardless of the amount set for the

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<sup>15</sup> Art. 39 of the R.C.C. no. 2250/1967 listed the following examples of objective reasons: changes of plan, lack of raw materials, machines, investment funds or orders.

application of the invention at a national level, within 2 months since the money had been deposited by the foreign companies to the bank account of the respective company, or since the transfer had been perfected, in the case of a licence exchange.

The patrimonial rights of the holder of the inventor's certificate were paid by the company which held the invention patent, including for the generalized implementation of the invention at a national level<sup>16</sup>. The other companies which used the invention had to pay a certain percentage of the reward to the company which held the patent, depending on how much they applied the respective patent.

Art. 47 of R.C.C. no. 2250/1967 consecrated the regulation of not adding rewards to prizes. Thus, the holder of an inventor's certificate was obligated to choose between a reward and other prizes determined on account of other legal provisions; if they chose the prize, and the amount of the reward was higher, they were entitled to receive the remaining amount. The exception consisted of the fact that rewards could be added to state prizes, prizes offered in invention competitions, innovations and rationalizations, monthly, trimestrial and annual prizes offered for the main activities conducted by the author, as well as prizes offered by other states and international organizations.

Law no. 62/1974 on inventions and innovations<sup>17</sup> rescinded Decree no. 884/1967 and any other opposing provisions. The following part of this work consists of several observations regarding the changes brought to the category of service inventions. In synthetic terms, art. 14 of Law no. 62/1974 distinguished between three situations regarding the holders of invention patents, namely:

For service or company inventions, the patent was granted to the socialist organizations. Unlike the previous version of the regulation, the category of service inventions included those achieved by the people who worked in the respective socialist organization and who made the

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<sup>16</sup> See art. 46 of the R.C.C. no. 2250/1967.

<sup>17</sup>Published in the Official Gazette no. 137 of November 2, 1974.

invention during their normal activity and upon request or with the financial support of the respective organization.

For those inventions the use of which had to absolutely be supervised and controlled, such as those the object of which constituted various substances obtained by chemical or nuclear methods, medicine, diagnosis and medical treatment, disinfectants, food and spices, as well as new types of plants, bacteria and fungi, new breeds of animals and silkworms, regardless of the conditions under which they were achieved, the patent was granted to the state organizations, to the detriment of cooperatives and public councils.

For the rest of the inventions, the patent was granted to individual or collective authors. They had to choose between transferring their rights related to their invention to a socialist organization and requesting a patent.

If the holder of the invention patent was a socialist organization, the author was granted an inventor's certificate.

Once Law no. 62/1974 has come into effect, the research institutes were given an important role in the patenting procedure, as well as in the later stages. Thus, the invention patent was granted by the SOIT following an examination of the request in terms of the compliance with the criteria for a patentable invention, based upon a favourable notice issued by the research institutes within 30 days since the necessary documentation had been submitted.

Law no. 62/1974 also brought some important changes to the moral and financial rewards to be paid to the inventors. According to art. 37 of this piece of legislation, moral rewards included: scientific titles, orders and medals, professional degrees and higher positions, whereas financial rewards included prizes and other pecuniary advantages depending on the economic and social benefits of the company. For each invention, the amount of the pecuniary reward had to be approved by the National Council for Science and Technology and by the Ministry of Finances, upon the proposal of the socialist organization which held the invention patent, with a favourable notice issued by the research institutes. The reward was paid by the socialist organization which held the invention

patent with money resulting from the effective savings generated by the application of the respective invention. Unlike the previous version of the regulation, art. 38 of the Law provided a limit to the pecuniary reward for an invention which had been applied in the economy which could not be three times higher than the annual tariff retribution of a main scientific researcher in the field of the respective invention. The reward period could not be longer than five years. Unlike the provisions of the Decret, rewards could be added to the salaries granted for the same inventions.

In relation to the scientific and technical employees of the research and planning units, who had an employment contract, the pecuniary reward for the application of their inventions in the economy did not consist of remuneration, but of prizes, the amount of which was limited to three times the annual tariff retribution and which were determined according to the same criteria as the pecuniary rewards.

For highly important technical, scientific, technological, economic or social inventions, the State Council for Science and Technology, upon approval of different Ministries or central institutions, could suggest that the Cabinet Council approve special rewards, which exceeded the legal limit.

## **II. LAW NO. 83/2014 REGARDING THE EMPLOYEES' INVENTIONS<sup>18</sup> VERSUS THE FORMER ART. 5 OF LAW NO. 64/1991 REGARDING THE INVENTION PATENTS<sup>19</sup>**

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<sup>18</sup> Law regarding the service inventions published in the Official Gazette of Romania no. 471 of the 26th of June 2014.

<sup>19</sup> Republished as of art. 18 of Law no. 83/2014 regarding the service inventions, published in the Official Gazette of Romania, Part I, no. 471 of the 26<sup>th</sup> of June 2014, with a different numbering of the texts. The law regarding the invention patents was republished in the Official Gazette of Romania, Part I, no. 541 of the 8<sup>th</sup> of August 2007, amended in the Official Gazette of Romania, Part I, no. 638 of the 18<sup>th</sup> of September 2007 and later amended by: Law no. 76/2012 for the application of Law no. 134/2010 regarding the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 365 of the 30<sup>th</sup> of May 2012, with subsequent amendments; Law no. 187/2012 providing for the application of Law no. 286/2009 regarding the Penal

The employees' inventions were regulated by the provisions of art. 5 of Law no. 64/1991 and by Chapter V of the Regulation for the application thereof<sup>20</sup>. It is necessary to make some mentions regarding this regulation. In general terms, it can be stated that art. 5 of Law no. 64/1991 highlighted the inventors' ownership of their own inventions. This was meant to correct the provisions of the previous communist law no. 62/1974 which dissolved this ownership.

According to art. 5 of Law no. 64/1991 and to art. 89 of the Regulation, the right to an invention patent in the case of the employees' inventions belonged to the company, under the following circumstances:

1) The invention was created during a contract with an inventive mission<sup>21</sup>;

2) The invention was created during a research contract. Usually, the right to the invention patent belonged to the company which ordered the research, but the research contract could provide otherwise;

3) The invention was created by the employee either during the exercise of their position, or in the field of activity of the employing company, by knowledge or use of the available technology or specific means of the unit or of the existing information, or with financial support from the company and there was a special article in the contract stipulating the fact that the right to the invention patent belonged to the company.

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Code, published in the Official Gazette of Romania, Part I, no. 757 of the 12<sup>th</sup> of November 2012, further amended in the Official Gazette of Romania, Part I, no. 117 of the 1<sup>st</sup> of March 2013.

<sup>20</sup> See Resolution no. 547/2008 for the approval of the Regulation providing for the application of Law no. 64/1991 regarding the invention patents published in the Official Gazette no. 546 of the 18<sup>th</sup> of June 2008.

<sup>21</sup> According to the law, the mission contract could be an individual employment contract signed upon hiring, a renewed employment contract, which stipulated an inventive mission, or an appendix to the existing employment contract, if an inventive mission intervened.

Art. 5 of Law no. 64/1991 and art. 88 of the Regulation provided that the right to the invention patent belonged to the employee under the following circumstances:

1)The invention was created by the employee during the exercise of an employment contract which expressly mentioned an inventive mission, corresponding to their position, and there is a specific article in the contract stipulating the fact that the right to the invention patent belonged to the employee;

2)The invention was created by the employee either during the exercise of their position, or in the field of activity of the employing company, by knowledge or use of the available technology or specific means of the unit or of the existing information, or with financial support from the company and there was no special article in the contract stipulating the opposite;

3)The invention was created by the employee during the exercise of their employment contract with no connection to the activity of the company, but not as a result of their function, nor of using the existing technology, means or information, nor financially supported by the company (free inventions);

4)The invention was the result of a research contract and there was a special article in the contract stipulating the fact that the right to the invention patent belonged to the inventor;

5)If, within 60 days since the employee had received a written notice informing them of the drafting of the description of the invention, the petition for the granting of the invention patent had not been filed to the State Office for Inventions and Trademarks, unless otherwise agreed upon by the parties, the employee was entitled to file the petition and to receive the invention patent<sup>22</sup>.

Unlike the previous piece of legislation, Law no. 83/2014 defined the service inventions as those inventions created by an individual

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<sup>22</sup> For a detailed analysis of the previous regulation regarding the invention patents, see Yolanda Eminescu, *Legea brevetelor de invenție. Comentariu* (Bucharest: Lumina Lex, 1995), 33-48.

inventor or by a group of inventors when the individual inventor or at least one member of the group of inventors was employed by a legal person; they could be protected by an invention patent or a utility model and they met the following criteria: a) They resulted from the exercise of the inventor's job responsibilities, expressly mentioned in the individual employment contract or in the job description or set by other documents which mentioned an inventive mission; b) They were obtained during the exercise of the individual employment contract and two years after the termination thereof, by knowledge or use of the employer's expertise, material means or information resulting from the employer's activity or made available to the inventor.

The purposes of the new regulation were: to stimulate the employers to assume inventions; to give a clear definition of the category of service inventions and of the right to patent the service invention; to impose an obligation for the employee to report the invention and for the employer to comply with a response procedure; to define the employer's "obligation" to claim the right to the invention; to define the negotiation for the pecuniary rights of the employee, given the fact that the right to the patented invention belonged to the employer; to have the employers use "internal regulations" to define clear procedures for reporting, rewarding and patenting the service invention at the company level<sup>23</sup>.

Art. 2 of Law no. 83/2014 defined the term "employee" as any natural person who conducts a remunerated activity for and under the authority of a legal person, as of an individual employment contract. In legal terms, the employer could only be a legal public<sup>24</sup> or private<sup>25</sup>

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<sup>23</sup>Alexandru Ștrenc and Gheorghe Gheorghiu, „Invenția de serviciu”, *Revista Română de Dreptul Proprietății Intelectuale* 3(2009):106.

<sup>24</sup>The public legal persons are those who conduct public activities, generally those activities pertaining to state and public administration. See Ionel Reghini and Șerban Diaconescu, *Introducere în dreptul civil. Vol. I* (Cluj-Napoca:Sfera Juridică, 2004), 350.

<sup>25</sup> The private legal persons did not have a public interest. They conducted various activities in order to fulfill with their personal or collective interests. This category includes the commercial companies with one of the following forms: collective societies, limited partnerships, partnerships limited by shares, joint stock companies and

person, therefore excluding the natural persons who hire people as of an employment contract<sup>26</sup>.

The right to the service inventions, in their narrowest meaning of resulting from inventive missions differed depending on whether or not the activity of the public legal person included research and development, according to art. 2 para. (1) of the G.D. No. 57/2002 regarding the scientific research and technological innovation<sup>27</sup>.

The specialized literature, as well as Law no. 83/2014, identifies three types of service inventions, namely:

1) Inventions resulting from an inventive mission or service inventions *stricto sensu* were those inventions created by the employee during the exercise of their job attributions as set in the individual employment contract and in the job description, or in other documents which were compulsory for the inventor, which stipulated an inventive mission (art. 3 para. 1 let a)). The employment contract had to mention a specific inventive mission, not a general one, related to any technical creation of the employee. Thus, art. 3 para. (2) of the Law emphasized the fact that the inventive mission determined the technological field of the problem(s) for the solution of which the employee had a contractual

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limited liability companies. See Ovidiu Ungureanu and Cornelia Munteanu, *Drept civil. Persoanele în reglementarea noului Cod Civil* (Bucharest: Hamangiu, 2011), 282.

<sup>26</sup> According to art. 14 para. (1) of the Work Code, the employer is the natural or legal person who has the right to employ labor force as of an individual employment contract. For further developments, see Alexandru Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență* (Bucharest: Universul Juridic, 2015), 12. Art. 1 of Law no. 83/2014 limits the applicability of the category of service inventions as compared to the former art. 5 of Law no. 64/1991, which also applied for employers who were natural persons.

<sup>27</sup> Published in the Official Gazette of Romania, Part I, no. 643 of the 30<sup>th</sup> of August 2002, amended and completed by the G.D. no. 6/2011 published in the Official Gazette no. 80 of the 30<sup>th</sup> of January 2002. The research-development activity includes the scientific research, experimental development and innovation based on scientific research and experimental development. Scientific research includes fundamental research and applied research. In the appendix to G.D. no. 57/2002 there are definitions of the fundamental and applied research, experimental development and innovation.

obligation or one resulting from other compulsory documents to creatively contribute according to their job attributions;

2) Inventions related to the employer or service inventions *lato sensu* were those inventions created during the individual employment contract, and two years after the termination thereof, provided they were obtained by: knowledge or use of the employer's expertise or financial means, professional training provided to the inventor by care and at the expense of the employer or by use of the information resulting from the employer's activity or made available to the inventor. There was a limited number of similar cases;

3) Free inventions – those inventions created by the employees, but which were not requested by the employer nor resulted from an inventive mission.

A substantial change consists of the fact that the right to the invention patent depended on the type of employer. Thus, the law distinguished between the following situations:

- The right to the inventions resulting from inventive missions belonged to the employer;
- The right to the inventions resulting from inventive missions belonged to the employer, unless otherwise provisioned, if they were a public legal person and their activity included research and development;
- The right to the service inventions *lato sensu* belonged to the employee, provided that the public or private legal person failed to claim the invention within 4 months since the employee had received a written notice of the presentation of the respective invention. In the notice, the employee had to describe the solution to the problem in terms that were clear enough as to define the invention and the conditions in which it was created;
- The right to the free inventions belonged to the employee, as provided by Law no. 64/1991.

For the service inventions *lato sensu* which had been claimed by the employer, the employee was entitled to receive a certain amount of money determined by the employer, according to art. 7 of Law no.

83/2014. This piece of legislation stipulates that the employer determined the criteria for granting the reward in the internal regulation of the company. If not, one or more of the following criteria applied: the economic, commercial and/or social effects resulting from the use of the invention by the employer or by any third party authorized by the employer; the extent to which the employer was involved in the invention, including the resources they had made available for the inventor to use in order to achieve the invention; the creative contribution of the employee, if the invention was created by a group of authors.

For those inventions resulting from an inventive mission, if the employer was a public legal person whose activity included research and development, if they held the invention patent and had already patented the invention, the inventor was entitled to at least 30% of the income generated by the application of the respective invention.

If the holder of the protection title was a higher education institution, and the invention resulted from various research, development or educational activities conducted within the institution, the inventor was entitled to request a right to exploit the invention in their field of educational or research activity, based on a non-exclusive license contract. The law expressly provided that this also applied to the case of the inventor not being an employee of the higher education institution. The contract was valid throughout the duration of the research and educational activities conducted by the inventor.

If the employer held the right to the invention patent, they could decide whether or not to request protection. However, according to art. 9 para. (3) of the Law, if the employer no longer wanted to continue the procedures after the filing of a petition to the SOIT or to protect their invention abroad, they could transfer the protection right to the employee, provided that the latter grant them a non-exclusive license for the patented invention.

The employer who held the invention patent had to inform the inventor of their intention to renounce the patent. Upon the inventor's request, the employer had to transfer them the right to hold the patent and the written documentation related to the respective invention, provided

that the employee grant them a non-exclusive licence for the patented invention.

## CONCLUSION

This study emphasized the changes of the legislation regarding the service inventions, since the R.C.C. no. 943/1950. The transition from a centralized type of economy to a market economy and from communism to capitalism made it necessary to adopt a set of new regulations in the field of the industrial property in accordance with the fundamental changes which have occurred within the Romanian society. Law no. 64/1991 aimed at correcting the injustice generated by the communist Law no. 62/1974, namely the deprivation of the inventors of the ownership of their own inventions. Law no. 83/2014 aims at eliminating the negative effects of the previous piece of legislation and at stimulating technological innovation in our country. It is intended to achieve a significant increase of the number and quality of the service inventions, as a result of the support and stimulation of the employees by their own employers from a professional, administrative and financial point of view and an improved valorification of the inventions by the employers. Lastly, it is worth emphasizing the fact that in June 2015, the Executive Unit for the Financing of Higher Education, Research, Development and Innovation (E.U.F.H.E.R.D.I.) issued a guide for the application of the existing legislation pertaining to the service inventions, a guide which could prove useful to employer as well as to the employees, given the fact that it provides detailed information regarding the useful, fair and efficient valorification of the industrial property resulting from the professional activity.

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# CURRENT REGULATION OF CHEQUE FRAUD

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## **Abstract:**

*Cutting a cheque in absence of funds is an offence. Not long ago, the Criminal Code used to incriminate the cheque fraud as an offence different from the one provided by Law no. 59/1934. At present, the cheque fraud offence, as regulated by the old Criminal Code, does no longer exist. In the current Criminal Code, the article incriminating the fraud does not include the paragraph regarding rubber cheques. We appreciate this lawmaker's omission as very harmful for the economic activity, seriously jeopardizing the safety of the judicial and commercial relationships which suppose the use of some payment instruments, such as the cheque or the promissory note.*

**Key- words:** *cheque, cover, fraud, offence, Criminal Code.*

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## **INTRODUCTION**

A cheque can be issued only by complying with two essential conditions:

- The existence of funds in the bank;
- The existence of an agreement between the drawer and the drawee regarding the cutting of the cheque.

In order to cut a cheque, respectively to utter a cheque, it is always necessary to have funds into the drawer's account open at the bank drawee entity. The amount available from the drawer's account, also known as provision, should be at least equal to the amount written on the cheque.

The funds can consist in own financial resources or in a credit granted by the bank<sup>3</sup>.

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## REGULATION OF CHEQUE FRAUD

Cutting a cheque in absence of funds is an offence. Pursuant to art. 84 (2) from the law, it is considered an offence and it is punishable by imprisonment from six months to one year or by a fine, if the deed is not considered a more serious offence: „Cutting a cheque without the drawee having enough funds available, or totally or partially disposing of the funds available before the falling in fo the terms established for exposure”.

Not long ago, the Criminal Code used to incriminate the cheque fraud as an offence different from the one provided by Law 59/1934. Pursuant to art. 215 para.4 from the old Criminal Code, cutting a cheque to a credit institution or to a person, being aware that there is no provision or the necessary cover for its capitalization, as well as the deed to withdraw the provision totally or partially, after cutting the cheque, or the deed to forbid the drawee to pay before the expiry of the exposure term in order to obtain for himself/herself or for another person any unlawful material benefit, if some damage was caused to the cheque’s holder, is sanctioned with the punishment provided by law”.

By means of an appeal for the convenience of the law, i.e. by Decision no. IX of 24<sup>th</sup> October 2005 regarding the application of the provisions of art. 84 para.1 (2) from Law no. 59/1934, related to the given regulation, by art. 215 para.4 of the Criminal Code (in force at that moment), to the deeds of fraud committed in relation to cutting a cheque (published in the Official Journal no. 123 of 9<sup>th</sup> February 2006), The High Court of Cassation and Justice emphasized that the deed provided by art. 215 para.4 of Criminal Code did not represent an offence if the beneficiary was aware, at the moment of cutting the cheque, that there were no funds available necessary to cover the cheque. Such a deed was still sanctioned by the provisions of art. 84 para.1 (2) (current art. 84 (2)) from Law no. 59/1934.

At present, the cheque fraud offence, as regulated by the old Criminal Code, does no longer exist. In the current Criminal Code (Law no. 286/2009 regarding the Criminal Code, published in the Official Journal no. 510 of 24<sup>th</sup>.07.2009), the article incriminating the fraud does

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<sup>3</sup> Vasile Nemeş, *Commercial Law* (Bucharest: Hamangiu, 2012), 430.

not include the paragraph regarding rubber cheques. We appreciate this lawmaker's omission as very harmful for the economic activity, seriously jeopardizing the safety of the judicial and commercial relationships which suppose the use of some payment instruments, such as the cheque or the promissory note. The consequences of such omission are more worrisome, as it comes with a constant increase of the cheque fraud cases, more and more cheques being refused to be paid by the credit institutions in Romania.

The lawmaker's omission could be explained by his desire to simplify the legal text incriminating the fraud. In theory, they appreciate<sup>4</sup> that "an enumeration of some situations singularized in the context of committing the deed, would lead to the risk of omitting some other important situations, as well". According to the same opinion, such particular form of fraud offence, the cheque fraud respectively, is equally important, but it will be the object of criminal liability pursuant to art. 244 of Criminal Code in force, regulating the fraud offence, the deed still being considered a way of committing an offence.

Pursuant to some other opinions in the theory, by the lawmaker's omission, the deed representing the fraud offence by cutting a rubber cheque was dis-incriminated<sup>5</sup>.

The High Council for the Judiciary [HCJ] itself appropriated this opinion, appreciating in the Report on the functioning of justice in 2010<sup>6</sup>, that the project (at that time) of the Law no. 286/2009 regarding the Criminal Code emphasized "the lack of preoccupation of the initiator of

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<sup>4</sup> Mirela-Carmen Dobriță, „Historical evolution of regulaing the fraud offence (II)”, *Analele Științifice ale Universității "Al.I.Cuza"*, Iași, Tomul LIX, Științe Juridice 1(2013): 82.

<sup>5</sup>In this regard Valerian Cioclei, *Criminal Law. The Special Part. Offences against patrimony assets* (București: C.H. Beck, 2011), 135-136, Mihai Adrian Hotca, *New Criminal Code and Former Criminal Code. Comparative and Transitory Issues*, Bucuresti: Hamangiu, 2009), 236; Nasty- Marian Vlădoiu, *Criminal Law Course. The Special Part* (Bucuresti: Hamangiu, 2012), 229; Gheorghe Ivan, *Criminal Law. The Special Part. With references to New Criminal Code (Law no.286/2009)* (Bucharest: C.H. Beck, 2010), 314.

<sup>6</sup> "Report of the High Council for the Judiciary on the functioning of justice" for 2010, is available on <http://www.juridice.ro/141882/raportul-privind-starea-justitiei-pe-anul-2010.html>, accessed on 03<sup>rd</sup>.04.2016, time 10.30.

the law project concerning some really important issues for the safety of the judicial relationships between the natural and legal persons or between legal entities, regarding the use of the bank payment instruments”<sup>7</sup>.

Also, HCJ stated and emphasized “the criminal lawmaker’s omission to establish criminal judicial rules meant to protect the interests of the natural and legal persons involved in commercial relationships in the private sector, compared to the unprecedented increase in the number of economic offences lately, expansion due to a lack of resolute and serious regulation in matter of offences committed regarding the issue and use of bank payment instruments (cheque, bill of exchange, promissory note etc.)”<sup>8</sup>.

Furthermore, regarding the law project initiating the amendment and completion of some rules, such as Law no. 59/1934 on cheques, with further amendments and completions, HCJ pointed out that it leads to dis-incrimination of the offence provided by art. 84 para.2 from such law, solution correctly appreciated as being “considerably unhappy and dangerous for the safety of the judicial relationships between the natural and/or legal persons, either businessmen or mere participants to the judicial route”<sup>9</sup>.

Finally, the HCJ opinion, also adopted by the specialised theory and by the law specialists, was that a new regulation would be necessary regarding the issue and use of bank payment instruments, regulation that should correspond to the new contemporary social and economic realities. In this regard, they rightfully consider that the deed of cutting a rubber cheque or of withdrawing the funds from the account with the aim to cause prejudice to another person, should remain within the limits of criminal unlawfulness, as it is necessary to sanction such deed with a more severe punishment.

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<sup>7</sup> “Report of the High Council for the Judiciary on the functioning of justice for 2010”.

<sup>8</sup> “Report of the High Council for the Judiciary on the functioning of justice for 2010”.

<sup>9</sup> “Report of the High Council for the Judiciary on the functioning of justice for 2010”.

In this regard, in 2014 it was formulated a proposal to amend Law no. 59/1934 on cheques<sup>10</sup>, i.e. to reintroduce the more severe punishments provided in the Criminal Code of 1968 regarding the deed of cutting the cheque without the drawee's authorisation and of cutting the cheque without having the necessary funds or of disposing totally or partially of the funds before the cheque beneficiary present it to cash it. Such proposal has not yet received an "answer" from the Romanian lawmaker.

## CONCLUSIONS

They said about fraud or deceit that it led to the "disappearance" of the law. It is obviously about the fact that undiscovered fraud has the ability to change an illegal deed into a legal one, leading to the non-enforcement of the law and to the impossibility to hold the offender liable.

In this regard, we support the opinion expressed in the legal theory<sup>11</sup>, according to which "in the new Criminal Code, the fraud undoubtedly kneeled the repression of the law". The author of the opinion believes, and so do we, that the significant decrease of the punishments in the matter of fraud, including the offence of cutting rubber cheques, as a way of committing of the offence, brings "more silence to the active subjects of this offence".

In the end, we mention that, at present, the only legal provision sanctioning the deed of cutting a rubber cheque is art. 84 para.2 from Law no. 59/1934, the legal punishment being imprisonment from six months to one year or a fine, if the deed is not considered a more serious offence.

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<sup>10</sup> Document available on [www.senat.ro/legis/PDF%5C2014%5C14L410EM.pdf](http://www.senat.ro/legis/PDF%5C2014%5C14L410EM.pdf), accessed on 05<sup>th</sup>.04.2016, time 16.30.

<sup>11</sup> Eliza Ene-Corbeanu, "Fraud in the New Criminal Code. Reconciliation of the Parties or the decision of the court", available on <http://www.businesswoman.ro/ro/index.php?p=articol&a=9419>, accessed on 06<sup>th</sup>.04.2016, time 15.30.

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# LEGAL-PHILOSOPHICAL APPROACH OF THE HUMAN RIGHTS CONCEPT

Corina Florența POPESCU<sup>1</sup>

Maria-Irina GRIGORE-RĂDULESCU<sup>2</sup>

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**Abstract:**

*Inherent human nature , human rights have a deep resonance in every historical epoch , and the concept itself is the result of a long evolutionary process of human thought, following the philosophy of natural law and the theory of the social contract.. The concept of human rights has withstood time, raising to new philosophical principles humanistic values through the resumption of religious thought and components of general desires of freedom.*

**Key-words:** *human rights, legal-philosophical theory.*

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## INTRODUCTION

The concept of human rights, recognized in the current sense with the assertion of the human rights and fundamental freedoms in the social order and their confirmation as legal realities, became, in the political, legal and economical contemporary context, an essential mark for substantiation of a new moral order, social and legal, built around ideas and principles that allow free and full affirmation of the individual's dignity and ontological value.

The historical and philosophical roots of the concept must be sought in ancient humanism, revived in the spiritual climate offered by the Renaissance and later, by the Century of Enlightenment, which made possible the crystallization of the ideas about the existence of a natural and universal law, eternal and immutable, first perceived as an extension of the divine order, and then, as attribute inherent to human being, so intrinsic to this quality, acquired outside any regulation, higher and State opposable.

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## LEGAL-PHILOSOPHICAL THEORY ON THE SUBSTANTIATION OF THE HUMAN RIGHTS CONCEPT

Human rights issue can be approached from different perspectives, in the legal doctrine analysis being carried out, mainly, in terms of philosophy politico-juridical, whose development led to the affirmation of the individual as a human being holder of subjective rights opposable first to the State, complementary to legal aspect, aiming the internal normative acts and international legal documents where the ideas find their consecration, the principles and the mechanisms meant to ensure the recognition and guarantee of human rights and, not least, in terms of cooperation between countries for the promotion and protection of human rights through specific instruments<sup>3</sup>.

An important mark in identifying the ancient roots of the concept of natural law (expression of the conflict between law and right, the first is relative, temporary and imperfect, and the last is absolute, universal, immutable), abandoned with the spread of the doctrine of social contract, is represented by the Aristotle's political and legal conception<sup>4</sup>. For him, *"the best organization for states and for most people is produced by the middle way, composed of equal and similar beings that form the natural basis of society"*<sup>5</sup>. If men are not equal by nature, they can have equal social situation created by rules for conviviality<sup>6</sup>. On the basis of democratic society must stand the virtue of wisdom, the only one that eliminates the harmful extremes and only able to avoid social convulsions. Practical wisdom is that *"directs the action and deliberation"*<sup>7</sup>.

In ancient Rome, the law, designed by reference to moral categories (*"jus est ars boni et aequi"*<sup>8</sup>), is considered to be given

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<sup>3</sup> Raluca Miga-Besteliu, *International Law. Introduction to Public International Law* (Bucharest:All, 1997), 169.

<sup>4</sup> Aristotle (384-322 BC) was the greatest philosopher and scientist of the ancient world.

<sup>5</sup> I. Popa, *"Giver of law and the law - covenant moving through history"* in the Orthodox Church and human rights. Paradigms, foundations, implications, (Bucharest: The Legal Universe, 2010), 113.

<sup>6</sup> Iulia Boghirnea, *General Theory of Law*, (Craiova: Sitech, 2013), 15.

<sup>7</sup> Aristotle, *Nicomachean Ethics* (Bucharest: Scientific and Encyclopedic, 1988), 142.

<sup>8</sup> "Justice is the art of the justice and the fairness."

naturally to all people. *"It is a true law, right reason, in conformity with nature, prevalent in all, constant, eternal. This law is not allowed to be repealed, nor be derogated from it. Nor is it another in Rome, another in Athens, another now, another later, but one eternal and unchangeable law will govern all men and all times"*<sup>9</sup>.

For Hugo Grotius<sup>10</sup>, whose politico-juridical ideology find its roots in Greek philosophy, the individual is essentially a "social animal" ("zoon politikon"), characterized by the need to live in society ("*appetitus societatis*"), endowed with a social instinct that is based on his inability to live outside the community<sup>11</sup>. The freedom of will and action of man find its justification in the principles of natural law, the only one able to ensure social unity, and the rules of positive law are considered to be the expression of natural law only to the extent that occur as rules of common sense, and therefore, they are universally accepted, in accordance with right reason.<sup>12</sup> *"Natural law consists of rules of right reason, showing that an action is morally right or wrong, as it fits or not to rational nature."*<sup>13</sup> Thus, the natural law, that makes life possible in the community, has, by Hugo Grotius, a rational substance, consistent to social nature of man, and not revealed, which, as observed, makes it possible to understand the harmonious combination of law doctrine with the contractualist theory about the creation of the state.<sup>14</sup>

Natural law, as individual right cannot exist outside the objective law, understood as "*coordination of freedom as imperative form*"<sup>15</sup>, as "*true freedom begins only when natural opportunity for action is*

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<sup>9</sup> Marcus Tullius Cicero, *De Republica*, III, 17.

<sup>10</sup> Hugo Grotius (1583-1645), Dutch jurist, historian and diplomat, specialist in international law.

<sup>11</sup> M.-I. Grigore Rădulescu, *General Theory of Law*, Second edition, revised and enlarged, (Bucharest: Legal Universe, 2014), 28.

<sup>12</sup> N. Popa, I. Dogaru, GH. Dănișor, D.C. Dănișor, *Philosophy of law. Large trends* (Bucharest: C. H. Beck, 2010), 106.

<sup>13</sup> H. Grotius, *About the Law of War and Peace*, (Bucharest: Scientific Publishing, 1968), 108.

<sup>14</sup> S. Munteanu, *Landmarks in the history of philosophy of law*, (Bucharest: Wolters Kluwer, 2009), 34.

<sup>15</sup> Giorgio del Vecchio, *Legal philosophy sessions*, fourth edition, translated by Iosif Constantin Drăgan, (Bucharest: Europa Nova, 1992), 248.

*accompanied by security, by the existence of the respect.*"<sup>16</sup> The legal norm, law order establishes and legitimizes the formations and the assertion of the subjective right. The effective promotion of human rights by a law regime implies not only the possibility expressed in legal terms to recognize the identity of individuals, to allow free and full expression of the human being, but also defining the limits of political power stately organized, creation of protection tools of the individual in his relations with the collectivity.<sup>17</sup>

Coherent human rights theories have been crystallized in the political European culture in the eighteenth century and nineteenth century, when there appeared the first legal instruments that enshrine these rights, the normative developments knowing an unprecedented development after the Second World War, when the protection of human rights enforced as the imperative of the international community. This has facilitated the strengthening of the unity of international law, subject to a comprehensive encoding process, by building an universal and regional system of regulations, while adding new dimensions of certain rights or even the consecration of new rights. In this regard, there are witnessing statements of rights from the late eighteenth century: Declaration of Human Rights and of the Citizen in France (1789), United States Declaration of Independence (1776)<sup>18</sup>. As modern omnipotent state cannot provide effective guarantee of human rights, these must "*go beyond narrow, enter the international regulations, i.e. to be internationalized.*"<sup>19</sup>

Even if promotion of human rights is a constant concern of the international community, aiming at creating a framework to support the efforts of states insurance internally of the fundamental rights, the effective action in protecting the human rights is conducted, by

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<sup>16</sup> Giorgio del Vecchio, *Legal philosophy sessions*, 245

<sup>17</sup> I. Muraru, S. Tănăsescu, *Constitutional Law and Political Institutions, Vol. I*, ninth edition, (Bucharest: All Beck, 2003), 135.

<sup>18</sup> B. Selejan-Gutan and L. Crăciunean, *Public International Law*, 2nd edition (București: Hamangiu, 2014), 112.

<sup>19</sup> I. Moroianu Zlătescu, R. Demetrescu, *Human rights. Mechanisms and specialized institutions of the United Nations* (Bucharest: Romanian Institute for Human Rights, 2002), 3.

excellence, nationally.<sup>20</sup> United Nations Charter (1945) had a special role in penetrating the human rights in the international law order, beyond the state barrier separating the internal law to the international law.<sup>21</sup>

Human rights institution has experienced a laborious and lengthy process of crystallization. Today is a complex institution, which regards both the legal internal order and the international one. In this context, human rights are the object of modern international law<sup>22</sup>, respectively of the international Protection of human rights or of the international Law of human rights or the Protection of Human Rights and European law on human rights if concerns doctrinal relate to all regional regulations in Europe or the legal Protection of human rights or the Law of human rights when is considering the assembly of all regulations, without any spatial or temporal report.<sup>23</sup>

The Universal Declaration of Human Rights adopted and proclaimed by General Assembly of United Nations, Resolution 217 A (III) of 10 December 1948 was the first international document of universal vocation that states solemnly the fundamental rights and freedoms that must be guaranteed to every human being. It is not binding, not being an international treaty generator of legal rights and obligations.<sup>24</sup> *"The axial coordinate of the fundamental rights and freedoms, on which is based the Universal Declaration of Human Rights, namely the universality of human values (which strengthens the second coordinated of this construction, the unity of the human species) can survive and is to be understood as functional only by overcoming the relativity of the inherent particular values of different cultures and civilizations, each of the cultures and civilizations of each specific*

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<sup>20</sup> D. Smith, A. Năstase, F. Coman, *Public International Law*, (Bucharest: Șansa LLC, 1994), 109.

<sup>21</sup> O. Predescu, N.M. Vlădoiu, *European and international law of the human rights* (Bucharest: Hamangiu, 2014), 9.

<sup>22</sup> L. Barac, *Europe and Human Rights. Romania and Human Rights* (Bucharest: Lumina Lex, 2001), 7.

<sup>23</sup> C.F. Popescu and M.-I. Grigore Rădulescu, *Legal Protection of Human Rights* (Bucharest: Universul Juridic, 2014), 37.

<sup>24</sup> M. Udroi, O. Predescu, *European protection of human rights and Romanian criminal trial. Treaty* (Bucharest: C. H. Beck, 2008) 4.

*historical peoples in their historical-cultural becoming, participating, by the entire historical and spiritual historical experience, to the permanence and universality of human values".*<sup>25</sup>

The Economic, Social and Cultural Rights International Covenant<sup>26</sup> and Civil and Political Rights International Covenant<sup>27</sup> (that has two optional Protocols), were adopted by the General Assembly of United Nations through Resolution no. 2200 A (XXI) of 16 December 1966. They develop the principles stated in the Universal Declaration of Human Rights, setting out in detail the civil and political rights, economic, social and cultural rights recognized by the international community and that have to be suitably guaranteed by the state.<sup>28</sup>

In addition to human rights protection system within the United Nations Organization there have also developed regional systems of protection and promotion of them, respectively the European, Inter-American, African and Arab one.

## CONCLUSIONS

The illustration of the evolutionary complex process of the concept of human rights leads to the conclusion that the universal vision of human rights does not preclude the existence of regional systems of consecration and protection of them, the universal characteristic of human rights and inalienability of them, these are only some features required by these rights as common values of the states.

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<sup>25</sup> E. Moroianu, *Human rights between universalism and the right to legal differentiation. A socio-anthropological approach* in Community law and national law. Issues regarding legislation and practice (Communications presented at the Scientific Session of the Institute for Legal Research 17 April 2008 (Bucharest: Hamangiu, 2008)), 165.

<sup>26</sup> Entered into force on January 3, 1976.

<sup>27</sup> Entered into force on March 23, 1976.

<sup>28</sup> R. Miga-Beșteliu, C. Brumar, *International Protection of Human Rights*, 5th edition (București: Universul Juridic, 2010), 43.

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# EVOLUTION OF THE RIGHT TO EDUCATION OF CHILDREN WITH DISABILITIES IN THE EUROPEAN SPACE

Adelina MIHAI<sup>1</sup>

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**Abstract:**

*Right to education of persons with disabilities is still an unsolved problem for the Romanian education system, which has its origin in a deficient legislative framework if are taken into consideration the legislative amendments adopted over time.*

*Adoption of some new laws regarding the inclusion of persons with special educational needs in schools raise new problems, especially at the level of the practical applicability from the institutions, as these are not ready from the economic or social point of view to comply in totality with the process of school inclusion of persons with disabilities.*

**Key-words:** *right to education, school inclusion, persons with disabilities, deficient legal framework*

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## INTRODUCTION

Diogenes said that “the foundation of every state is the education of its youth”, in another words, the evolution of the society depends to a certain extent on the education which every child receives from the educational system of each state. Most often, the educational institutions place less emphasis on the education of children with special educational needs (SEN), as there is a variety of economic, social, legal etc. factors that they face. Where, in the past, children with problems were sidelined and attended special schools, at present they can have access to regular schools as the other children, due to the process of school inclusion also supported by the Salamanca Statement (1994), where the fundamental principal is that all children should learn together, wherever possible, regardless of any difficulties or differences they may have, even if some

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of them suffer from disabilities or behaviour problems<sup>2</sup>. The concept of « school inclusion » can be explained in legal terms as the « right to education of children with special educational needs in regular schools ». School inclusion is a complex process by which are designed modalities to answer to different physical, psychic needs etc, or, more exactly, specially designed modalities for students so that they be able to learn to live with the « difference » and to learn from the « difference». Inclusion is concerned with identification and removal of barriers of any social, psychological, economic nature etc. Consequently, it involved collecting, collating and evaluating information from a wide variety of educational sources in order to plan for improvements in policy and practice. Inclusion is about the presence, participation and achievement within the group and moral responsibility<sup>3</sup>.

We consider that the process of school inclusion faces different legislative barriers, as the law is partially enforced depending on the legal context of each country. Although the right to education of persons with disabilities was promoted since 1948 by the Universal Declaration of Human Rights, followed by the Convention on the Rights of the Child (art. 23, 28, 29), the World Declaration on Education for All (Thailand 1993), the Salamanca Statement (Spain, 1994), the World Declaration on Education for All (Dakar 2000) and the Convention on the Rights of Persons with Disabilities (art. 24 ) the last one being considered the representative instrument to promote school inclusion<sup>4</sup>.

Problems related to the education legislation both at European level and at the level of Romania regarding persons with disabilities raised numerous unclear aspects over time, and because of this many legislative amendments were performed. The purpose of these amendments is to fulfil the rights of persons with disabilities in terms of education, but also their inclusion in the educational and social system.

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<sup>2</sup> The Salamanca Statement and Framework for action on special need education, adopted by the world conference on special need education: access and quality, Salamanca, Spain, 7-10 June 1994, art.3.

<sup>3</sup> UNESCO, Guidelines for Inclusion: Ensuring Access to Education for All, 2005.

<sup>4</sup> Hannah C. Gilles and Ceralli S. Boisseau, "Inclusive education, technical resources division" A Handicap International Publication, Technical Resources Division Knowledge Management Unit, 15.

## **INTERNATIONAL LEGISLATIVE SOURCES AND THE RIGHT TO SCHOOL INCLUSION**

A representative document regarding the rights of children with special educational needs to school inclusion is the Salamanca Statement (1994), statement also ratified by the Romanian State. This document is based on the principle of inclusion, that to recognise the right to education of all children and to ensure the creation of a school where all children, regardless the special educational needs, may participate. In this document, the States Parties emphasize also the role of an inclusive school. They consider that the purpose of the school is not only that to integrate children with disabilities among the normal ones. First of all, the purpose of some inclusive schools is to remove discrimination. Non-discrimination, viewed objectively, is carried out by learning together of the two categories of students: « special » and regular and through the effort of the school to answer to all the needs of students, both those with difficulties and without, thus trying to ensure quality of education, according to the provisions of art. 3 of the Statement: « Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system”<sup>5</sup>.

Within the Salamanca Statement, too, (1994), the States Parties call upon the governments and urge them to make financial investments in inclusive schools in order to improve the education system, to be able to meet the academic needs of all children. Another process important in the development of an inclusive school is based, according to art. 40 of the Statement, on the „Appropriate preparation of all educational personnel stands out as a key factor in promoting progress towards inclusive schools. Furthermore, the importance of recruiting teachers with disabilities who can serve as role models for children with disabilities is

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<sup>5</sup> The Salamanca Statement and Framework for action on special need education, adopted by the World Conference on Special Need Education: access and quality, Salamanca, Spain, 7-10 June 1994, art.3

increasingly recognised”<sup>6</sup>.

In the Convention on the Rights of Child, the provisions of art.2 express for the first time, in an international treaty on human rights, the obligation of governments to ensure the enforcement of the rights of every child, including the right to education, without discrimination, implicitly the right to education of children with disabilities. Article 28 of the Convention on the Rights of Child affirms the right to education on the basis of equality opportunity and emphasises the role of primary, secondary and vocational education, being explicitly provided “an inclusive education system at all levels”. It also imposes to all education system to provide adequate programmes so that all children with disabilities be able to reach their academic, creative and social potential. In addition, article 8 of the Convention on the Rights of Persons with Disabilities, urge to all schools to promote “at all the levels of the education system, including to all children of young age, an attitude of respect for the rights of persons with disabilities”<sup>7</sup>.

The UN Convention on the Rights of Persons with Disabilities was elaborated not to introduce new rights – the rights of persons with disabilities are exactly the same with those of other persons – but to introduce additional obligations for governments, safeguarding the rights. The Convention on the Rights of Children with Disabilities includes detailed dispositions regarding the right to education, emphasizing, more explicitly than in the Convention on the Rights of Child, the obligation of the governments to ensure “an inclusive education system at all levels”<sup>8</sup>. In the Convention on the Rights of Child, Inclusive Education is not explicitly mentioned. The right to education is protected by the stipulations of art.28 of Convention on the Rights of Child, as “it obligates the States to ensure the right to education for all children”, but also the stipulations of art. 29 of the same Convention which describes

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<sup>6</sup> The Salamanca Statement and Framework for action on special need education, adopted by the World Conference on Special Need Education: access and quality, Salamanca, Spain, 7-10 June 1994, art. 40, 27.

<sup>7</sup> R. Tardi, “The Right of Children with disabilities to inclusive education”, World Vision, March, (2012):10.

<sup>8</sup> UNICEF, “The right of children with disabilities to education. The Approach of a new scholar inclusion” 2010.

the purposes of education. The text of art.28 clearly imposes to the States Parties to take measures to ensure the right to education for every child. This article provides that every child has the right to education, and the right to education includes not only the right to free primary education, but also the right to access to vocational and higher education. Although this article extended the content of the right to education, the systemic amendments necessary to make education accessible to all children have not been developed in detail. Therefore, it is given to the States Parties the freedom to implement the right to education in a way that best suits with the capability and the conditions of every State to implement it progressively. From the point of view of children with disabilities, an omission in the text of article 28 is a specific reference to inclusive education. Although the article refers to the accessibility of education for all children, it does not provide directions regarding the way to carry it out and does not explicitly specify the legal obligation of the States to ensure accessibility in providing inclusive education<sup>9</sup>.

## **ROMANIA AND THE EUROPEAN SPACE**

The legislative framework in Romania relating to the right to education of children with SEN in regular schools is not too comprehensive, but there are also other important international sources regarding the rights of « special» youth to education, such as: Convention on the Rights of Child, Convention on the Rights of Persons with Disabilities, Salamanca Statement and the action framework in special needs education – World Conference on Special Needs organized by UNESCO (Salamanca 1994), World Conference of ministers of education from Jomtien (Thailand), 1990, with the title “Education for All”, where it was signed the World Declaration on Education for All (1990), World Declaration on Education for All (Dakar, 2000) etc .

In the legislative sources from Romania the concept of “school inclusion” is replaced with the concept of “integrated education”, and

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<sup>9</sup> L.Waddington and C. Toekpe „Moving Towards Inclusive Education as a Human Right An analysis of international legal obligations to implement inclusive education in law and policy”, Maastricht Working Papers Faculty of Law (2014): 23-22.

legally there is no consensus regarding the definition of inclusive education. We consider that there is a small discrepancy between what is wanted at the level of the European Union as compared to what is the current situation in Romania when we speak about the integration of persons with SEN. UNICEF brings to the attention of the Member States that the school inclusion process tends to be more appropriate than the integration process, as the integration process refers only to the physical integration in regular schools, while the inclusion process calls on the capability of the society to integrate and to empathize with persons with disabilities.

The concept of inclusive education has several meanings, starting from the idea of inclusion of children with disabilities in regular schools – to a very large notion of social inclusion as it is used by the international governments and communities, as a way to respond to diversity among students <sup>10</sup>

Within the legislation regarding education, specifically the Law on Education and Instruction no.28 of 21 December 1978, during communism, to persons with disabilities was dedicated only the article 191, in the stipulations of which was written nothing concrete regarding the rights of these persons. Moreover, reference is made only to the fact that “students with physical and intellectual deficiencies benefit from special education under the conditions of law” and the concepts of integration and inclusion are not expressed. After 1990, the Law on Education and Instruction changed and was entered into force the Law on Instruction 1995, and the problem of education of persons with disabilities was introduced at chapter VI, “Special education”, and within the context also occurred the notion of “persons with special educational needs”; and the use of this syntagm enlarges the area of meaning in terms of the types of disability, thus representing a completion of art.191 of the Law on Education and Instruction 28/1987. With the Law on National Education 1/2011 is placed greater emphasis on the integration of persons with special educational needs in regular schools.

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<sup>10</sup> M. Ainscow, “From special education to effective schools for all: a review of the progress so far”, in L. Florian (ed.) *The Sage Handbook of Special Education*. London: Sage (2007).

Inclusive education received a legal ground on the moment of adoption of the Convention on the Rights of Persons with Disabilities, being also the first international legislative source that protects the right to inclusive education, based on the idea elaborated by other international instruments, for example World Conference on Education in 1990, the World Declaration on Education For All: Meeting Basic Learning Needs (Jomtien Declaration), and another step was UNESCO World Conference on Special Needs Education: Access and Equality in 1994. The Convention on the Rights of Persons with Disabilities writers have not agreed from the very beginning on the right to inclusive education as it has been raised the question if special schools were still necessary<sup>11</sup>.

What is very clear is that inclusive education is not equal to education in special schools, this leading to the segregation of the education system. But inclusive education is not equal to integration, which practically means access of children with disabilities to regular schools but without providing them education in compliance with their special needs. This interpretation was confirmed by the Committee on the Rights of Persons with Disabilities' Concluding Observations to Austria's initial report, which noticed that there was some confusion between inclusive and integrated education<sup>12</sup>.

Legislation is a very important step in this process of transformation of education system by mandatory dispositions which must be carried out within the education system. Insofar as the provisions of legislation will be interpreted, the participation of children with disabilities to education system will be determined. A special attention is required during this period when both the education system and the status of children with disabilities are perceived as being in a transition status. The passage to inclusive education was the consequence of promotion of the right to education of persons with disabilities. Removal of barriers

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<sup>11</sup> Gauthier de Beco, "The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: background, requirements and (remaining) questions", *Netherlands Quarterly of Human Rights*, Vol. 32/3, 263–287 (2014):272

<sup>12</sup> M. Ainscow, "From special education to effective schools for all: a review of the progress so far", 275.

which prevent these children to attend regular schools is the responsibility of the national education system and must be carried out by the reorganization of the way in which schools are operated, so that every child is welcomed and can learn. Children with disabilities are the largest group of children who were exposed or limited to a separate education system and their right to equal education was denied<sup>13</sup>.

It seems that the applicability of the process of school inclusion is hard to put into practice, even at the level of developed countries in Europe. The conclusions of the legal article written by Mona Niemeyer (2014) regarding the right to inclusive education in Germany showed that “the German experience shows that the exclusion rate of 85% has to be addressed by litigation of the relevant UN documents. Further the experience demonstrates the central role the monitoring body of the German Institute for Human Rights plays in clarifying and advising on human rights obligations so as to avoiding misunderstandings. Further, it is important to distinguish between integration and inclusion as only the latter will accommodate diversity instead of difference. However, the question arises as to why the debate and measures taken to realize an inclusive education system only happen in relation to the Convention on the Right of person with Disabilities while other earlier UN documents have been ignored in this context. This is partly because of the legally binding character of article 24 and on the other hand, because of the vague definition of the Right to Education in the International Covenant on Economic, Social and Cultural Rights leading to segregating policies in a country with a fundamentally hierarchical education system. The problem is that while social inclusion suggests legitimate changes of anti-discrimination law it does not inevitably provide a comprehensive approach to universal equality because of its focus on absolute disadvantage<sup>14</sup>.

Problems regarding the process of school inclusion occurred also in Italy, country considered the world leader in the educational area of

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<sup>13</sup> UNESCO, “Towards Inclusive Education for Children with Disabilities: A Guideline” (2009):35

<sup>14</sup> Mona Niemeyer, ”The Right to Inclusive Education in Germany”, *The Irish Community Development Law Journal* Vol.3 (1) (2014): 64.

persons with disabilities and being also part of the Council of Europe. She succeeded the best in understanding and adopting at national level the process of school inclusion, being based on the premise that all children must learn together. The reason for which Italy is considered the country with the highest level of school inclusion is due to laws. Thus, in 1987, the Constitutional Court of Italy recognised the full and unconditioned right of students with disabilities to participate in schools, including post-secondary schools. All agencies involved in education were required to implement support services for school integration. Moreover, in 1992 the legal framework no. 104/92<sup>a</sup> was introduced in order to reflect a change in the legislative interpretation/thinking from a strictly medically point of view regarding the disability towards a social model of human rights. The medical model localised the problem as being the disability of the person, who was seen as a patient/ victim who needs treatment. On the other hand, the social model of disability considered that the problem was not the disability of the person, but rather the society which creates psychic, physical, legal problems. These barriers stand in the way of the process of inclusion and the equal participation of persons with disabilities, although it is considered to be the school inclusion system the most developed in the world, it seems to have deficiencies, too, in the implementation of law<sup>15</sup>.

## CONCLUSION

The right to education of persons with disabilities can be fulfilled after a certain period, as the art 4, par. 2 of CRPD affirms, “with the maximum available resources. States Parties have therefore to put in place their resources with a view to fully realising the right to inclusive education and immediately take steps to this end, even though the objective does not have to be reached right away”<sup>16</sup>.

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<sup>15</sup> Arlene S. Kanter, Michelle L. Damiani and Beth A. Ferri, „The right to inclusive education under international law: Following Italy's lead”, *Journal of international law special need education* ( 2015): 25

<sup>16</sup> Gauthier de Beco , “The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: background, requirements and (remaining) questions”, *Netherlands Quarterly of Human Rights*, Vol. 32/3, 263–287 (2014): 275.

For the process of inclusion to work it is necessary to put in practice the principles of inclusive education: educating children with disabilities to a human right model, availability of inclusive education at all levels providing adequate individual support to succeed, the concept “reasonable accommodation” should not be misinterpreted as a rejected policy, segregated schooling and segregated classes within mainstream schools should not be supported<sup>17</sup>.

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# THE CITIZENSHIP OF CHILDREN

Oana GHIȚĂ<sup>1</sup>

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**Abstract:**

*Rights and obligations arising from granting citizenship to the child tend to create a link to identity. The importance of granting it is determined through the effects it produces.*

*It is precisely from this perspective, international acts say nothing about citizenship as a right that a child has, but as a direct result of the right to identity.*

*In this study we aim to analyse ways of granting citizenship, the rights and obligations that this entails for the child and, in particular, the way in which citizenship - national or European - through its effects, manages to convey some kind of behaviour from the State towards the legal subjects.*

**Key- words:** *child, right to identity, citizenship, state, affiliation.*

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## INTRODUCTION

Citizenship is regulated by Law no. 21/1991<sup>2</sup>. According to this normative act, the child acquires Romanian citizenship through birth, repatriation of parents, adoption or application.

In the Romanian legal system, citizenship is considered to be a legal relationship, a legal situation or legal status that is concentrated in a set of rights and obligations.<sup>3</sup>

Citizenship is linked to the individual in this way, which could constitute a quality of the natural person.

In current constitutional law doctrine, the generally accepted definition of citizenship is “that quality of the individual that expresses the permanent social, economic, political and legal relationship, between the individual and the State, proving affiliation to the Romanian State

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<sup>2</sup> Published in Monitorul Oficial no. 44/1991 and modified by General Ordonance no. 226/2002.

<sup>3</sup> Bianca-Maria-Carmen Predescu, *Drept internațional privat* (Craiova: Universitaria, 2002), 358.

and assigning to the individual the opportunity of being the holder of all rights and obligations under the Constitution and the laws of Romania.”<sup>4</sup>

In this sense, citizenship can give rise to effects when the rights conferred based on it actually represent competences that are based on the privileged political link between the individual with the State, but not in matters of fundamental rights which are not related to the exercise of such powers. “Citizens have rights and competences while humans only rights; so if citizens may have competences imposed upon them, humans cannot.”<sup>5</sup>

With regards to the citizenship of children, it can be seen as a sensitive issue given the scope and reality of the situations to which they give rise. We must bear in mind that in general, citizenship as the result of the manifestation of a state’s sovereignty is a topic that draws in much controversy.

### **THE CITIZENSHIP OF CHILDREN - THE SOURCE OF RIGHTS**

“Citizenship is acquired by right when the simple intervention of a fact, without the need for a any state authority to express its will and without the request of the person, the person becomes a citizen.”<sup>6</sup>

Internationally, there are two dedicated systems for which state legislators may opt in order to grant citizenship. *Jus sanguinis* system is based on the fact of birth, the effect being the acquisition by the child of the parents’ nationality. As we can see throughout the study, in this situation it is not necessary for any state to intervene in the sense that no state authority should not issue proof of nationality. The simple proof that the parents or at least one of the parents is a citizen of a state is sufficient for the child to acquire the citizenship of his parents. In general this system is typical of countries with Roman tradition.

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<sup>4</sup> Gheorghe Iancu. *Drept constitutional si institutii politice*. (Bucharest: C.H. Beck, 2010), 131.

<sup>5</sup> Dan-Claudiu Danisor. *Drept constitutional si institutii politice. Teoria generala*. (Bucharest: C.H. Beck, 2007), 191

<sup>6</sup> Dan-Claudiu Danisor. *Constitutia Romaniei completata, Titlul I. Principii generale*. (Bucharest: Universul Juridic, 2009), 206.

On the other hand, the *jus locci (jus soli)* system involves the acquisition of citizenship by way of exercise of sovereignty over a certain territory. The lack of sovereignty of certain territories or the increasingly wide-ranging situations of transitioning European or non-European areas (the case of ships or aircraft) have attracted numerous critiques on this system that basically can give a child a citizenship of a State towards which it has no sentimental or material claim. The simple justification is practically that the child “happened” to be born there.

The United Nations Convention<sup>7</sup>, the International Convention on the Rights of the Child, and at a national level the Constitution and Law no. 274/2004<sup>8</sup> on the protection and promotion of children’s rights enshrine the rights and duties enjoyed by the child.

In the category of civil rights and liberties we can find that children’s right to identity is regulated, materialized also by the right of every child to be registered immediately after birth, to acquire a name, a nationality and, as far as possible, the right to know their parents and to be cared for by them. This right is governed by Article 7 of the International Convention on the Rights of the Child and the domestic legislation echoes similar rules in Article 9 of Law no. 274/2004.

Article 9 of Law no. 274/2004 and those of Article 7 of the International Convention on the Rights of the Child is a consecration of the importance of the individual child and the child’s legal status through regulating the obligation to register a birth registration and the right to acquire an identity. According to these provisions, the content of the right to identity includes: the child's right to a name, the right to citizenship, the right of children to know their parents and be cared for, raised and educated by them.<sup>9</sup>

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<sup>7</sup> Ratified through Law no. 18/1990, republished, with subsequent amendments, and all other international agreements in this field which Romania has signed, Monitorul Oficial no. 314/2001.

<sup>8</sup> Republished in Monitorul Oficial, Partea I, no. 159 from 5 March 2014.

<sup>9</sup> For further details, please refer to Ramona Duminičă and Andreea Drăghici, “A Short Analysis of Children’s Right to a Citizenship as a Constitutive Element of Their Identity”, *Valahia University Law Study*, Supplementary Issue (2013): 141-147.

The national normative act regulating children's nationality is Law no. 21/1991<sup>10</sup>. Indeed, Article 4 of this law stipulates that Romanian citizenship is acquired by birth, adoption or may be granted upon request.

Therefore, children born in Romania, of Romanian citizen parents are Romanian citizens, as explicitly stated by Article 5 paragraph (1) from Law no. 21/1991.

Those who were born on Romanian territory, even of only one Roman citizen parent are also Romanian citizens, likewise those who were born abroad and both parents or only one of them has Romanian citizenship. A child found on Romanian territory is considered a Romanian citizen, until proven otherwise, if neither parent is known.

In these circumstances it is clear that of the two systems established by internationally legislation, the Romanian legislator has opted for *jus sanguinis*.

As regards adoption, Article 6 of Law no. 21/1991 stipulates that Romanian citizenship is acquired by a child of foreign citizenship or without citizenship, if the adopters are Romanian citizens. If the adopted person is of age, consent is needed.

If only one of the adopters is a Romanian citizen, the citizenship of the adopted minor will be decided jointly by adopters. If adopters do not agree, the court will decide to approve the adoption of the minor's citizenship, taking into account its interests. If the child has reached the age of 14 his consent is needed.

If the adoption is made by one person, and that person is a Romanian citizen the child acquires the adopter's citizenship.

In the case of annulment or cancellation of the adoption, all children under the age of 18 are considered as never having been a Romanian citizen if they reside abroad or leave the country to live abroad.

Similarly, in case of dissolution of the adoption the child who has not reached the age of 18 loses the Romanian citizenship the day the adoption is dissolved if the child lives abroad or leaves the country to live abroad.

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<sup>10</sup> Republished in *Monitorul Oficial al Romaniei*, Part I, no. 98 din 6 martie 2000.

Romanian citizenship can be granted, upon request, to a person without citizenship or holder of a foreign citizenship if he was born and lives at the time of the demand in Romania or, if not born in this country, living legally on Romanian territory for at least 8 years or, if married and living with a Romanian citizen for at least 5 years of marriage.

The child born of foreign parents or without citizenship and who has not reached the age of 18 acquires Romanian citizenship together with his parents.

If only one parent acquires Romanian citizenship, the parents will decide by mutual agreement on the child's citizenship. If the parents do not agree, the tribunal will decide where the child resides, taking into account the child's interests. If the child has reached the age of 14 his consent is needed.

The child acquires Romanian citizenship on the same date as his parent, as stipulated by Article 9 of Law no. 21/1991.

If the minor has acquired Romanian citizenship in the conditions mentioned above and was not included in the citizenship certificate of the parents or was not issued a citizenship certificate in accordance with Article 20 paragraph (7) or (11), the parents or, where applicable, the parent, Romanian citizens can apply for the transcription or registration in the Romanian civil registers or extracts from civil status certificates issued by foreign authorities under Law no. 119/1996<sup>11</sup> on the civil status.

Also, the child who has reached the age of 14 may submit in his own name the application for registration certificate transcript or birth certificate excerpt. In this case, the minor's identity card or passport issued by the Romanian authorities to the parent or the certificate provided for in art. 20 paragraph (4) of the Citizenship Act constitutes proof of citizenship.

Proof of citizenship of a child up to age 14 can be made through the passport, the travel title without the words "uncertain identity" or through the birth certificate, together with the passport or identity card, if applicable, or the passport of either parent.

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<sup>11</sup> Modified and completed by Law no. 61/2012, published in *Monitorul Oficial al României*, Part I, no. 257 from 18 April 2012, which gives the texts a new numbering.

It should be noted that the loss of the Romanian citizenship by renunciation has no effect upon the spouse or underage children.

However, if both parents obtain the renunciation of their Romanian citizenship and the underage child is with them abroad or leaves the country, the child loses Romanian citizenship together with his parents, and if they lost the Romanian citizenship on different dates, it is the last of these dates that counts as the date of expiration for the child's citizenship. Underage children who leaves the country to live abroad, after both parents have lost their Romanian citizenship, loses the Romanian citizenship on his departure from the country.

The underage child entrusted by the court to the parent residing abroad and having renounced citizenship, also loses the Romanian citizenship on the same date as the parent to whom the child has been entrusted and with whom the child lives, subject to the agreement of the other parent, who is a Romanian citizen. In all these situations, if the child has reached the age of 14 consent shall be asked.

The underage child, Romanian citizen, adopted by a foreign citizen loses Romanian citizenship if, at the request of the adopter or adopters, the child acquires citizenship under the foreign law. In this situation also, it is necessary to obtain consent from a minor that has reached the age of 14.

The date of loss of Romanian citizenship is the date of acquisition by the adopter of his/her citizenship.

In the case of annulment or cancellation of adoption, children under the age of 18 are considered as never having lost Romanian citizenship.

According to Article 30 of Law no. 21/1991, a found child loses the Romanian citizenship if by the age of 18 the affiliation to both parents was established, and they are both foreigners. Romanian citizenship is lost if the affiliation has been established to only one foreign citizen parent, if the other parent remains unknown. The date of loss of citizenship is the date when the child's affiliation is established.

## **CONCLUSIONS**

The choice of the *jus sanguinis* made by the Romanian legislator in order to allow the child to acquire citizenship as a result of his birth by

Romanian citizen parents is the system that justifies its existence by the emotional connection and belonging between the child and his parents, a relation once again emphasized and maintained by the law in our country.

Thus, if nationality is the “blood” link of an individual to a particular people/nation, citizenship is a political and legal connection to a particular State. The manner and criteria for granting citizenship to the child make it that the two theoretically different concepts intertwine and condition each other, citizenship being in reality the “instrument” by which a person’s nationality is protected.

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- **Law no. 21/1991** on citizenship republished in Monitorul Oficial al României, Part I, no. 98 from 6 March 2000.

# THE LIMITS OF STATE POWER IN A DEMOCRATIC SOCIETY

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**Abstract:**

*The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economic, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensable both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.*

*In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.*

**Key-words:** *constitutional norms, constitutional norm establishing criterions, technical - juridical structure, supremacy of Constitution, normative content.*

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## HISTORIC ARGUMENT

From the beginning up to the present the human society is marked by two constants that have ontological value: the struggle for power and on the other hand the fight against the power, both in situations where it is illegitimate because it takes the form of dictatorship or tyranny, also in the versions of apparent legitimacy, especially in democratic societies, such as for example the legitimate political activity

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of the opposition to come to power or the actions of civil society and individuals against abuse of power.

These ontological constants of any human society are inevitable no matter of the social form of organization or characteristics of political regimes, including in democratic societies because the existential and functioning essence of any social system is the expression of the contradictory difference between governors and the governed, between society as a whole and on the other hand, the man in his concrete and personality, between the normative order and moral values, between law and liberty, between public interest and private interest and of course between the vocation of human intangible fundamental rights, and on the other hand the public interest of the state to condition, limit and restrict their exercise.

These contradictions, if they remain in their absolute form, by antagonist excellence can be destructive to an organized state society, as history has shown. History shows the political and legal solutions which, especially in the modern period, were devoted to avoid dictatorial forms of power exercising. Here are some of them established since the first written constitution in the world - the US Constitution, adopted in 1787 - Declaration (French) of human and citizen rights on 1789, up to the internal and international contemporary political and legal instruments: supremacy of the Law and Constitution, separation and balance of powers within the state, proclamation and guarantee of the fundamental rights and freedoms, constitutional and judicial control.

Incontestable these principles in fact and the features of the lawful right materialized and guaranteed constitutionally define the contemporary democratic societies and virtually eliminates totalitarian, dictatorial forms of state power.

However the differences and contradictions mentioned above, because they are ontological constants of society, they exist in any democratic society. In addition there is a subtle situation, namely the difference between the legality of state decisions and on the other hand the state legitimacy. These realities may cause or encourage excess of the power of authorities in societies built upon the principles of modern constitutionalism.

In this context remains a problem of essence, not only theoretical but also practical to determine the limits of state power in a democratic society in concrete in România and to find solutions in cases of excessive form of manifestation of state authority.

## **IDEALITY AND REALITY OF DEMOCRACY. ABOUT THE DICTATORSHIP IN DEMOCRACY**

The doctrine, in its majority reveals an insurmountable contradiction that exists between the democratic political regimes and, on the other hand those considered to be dictatorial, or simply between dictatorship and democracy.

Dictatorship means centralization and concentration of power, denial of pluralism in all its forms, absolute or discretionary power of the governors, coercion and excessive limitations of individual liberties, rigid separation of the governors from the governed, inexistence or formal existence of constitutional guarantees of human rights, inexistence or fictitious, formal character of principles essential to the state organization of society, such as principle of supremacy of law and constitution. For a synthetic manner of speech, dictatorship represents the annulment, dissolution or in the best case, the minimizing of the individuality of the singular, of diversity and affirmation of unity as abstract and constraining generality.

Unlike this, democracy is associated with the idea of a lawful state, focused on the principle becoming real and applicable of the supremacy of law and constitution. The centralization and concentration of power is replaced, as a modality of organizing of state powers, with the principle for their separation and balance. Pluralism in all its forms is institutionalized and guaranteed. The individual freedoms are also consecrated and guaranteed, while their exercise is governed by the rule according to which: the limit of any individual freedom is the need to respect others' similar freedoms. The legitimacy of state power involves the distinction between the being or essence of power and on the other hand, its exercise. In a democratic regime is not necessary to demonstrate the legitimacy of power as such because the axiom according to which " the holder of power is the people or nation" does not require

demonstration, being a prerequisite for the entire political and legal construction of the state organized society. Instead, any democratic government must find ways through which the exercising of power, in other words, the phenomenality of power be legitimate and lawful. Such a legitimacy is achieved when between essence (power in itself owned by the people) and forms of exercising (the phenomenon of power) there are no irreconcilable contradictions. The legitimacy of the exercise of power in case of democratic political regimes means reflecting the essence of power in its phenomenality, respectively in the organizing and exercising manner. Therefore, in case of democracy there is always a conceptual distinction, and a real one between the legitimacy of the essence of power that requires no demonstration, this results as such by the mere proclamation of the principle that the power has as its holder the people and on the other hand, the phenomenal legitimacy of organizing and exercising of power, that is not a "given" but a construction, firstly constitutional, realized in the concrete forms of institutional organization and exercising of state power. The legitimacy of the organizing and exercising of power is outside the power's phenomenality, in the meaning that the phenomenality is not the source of its legitimacy, but this is constructed in a relation whose content is the correspondence between the essence of power and the manifestation forms.

The power, in its essence, can be considered a "thing in itself", in the Kantian sense, because the full knowledge of the essence will never be possible. Reality of the state power considered in the relationship between essence and phenomenon reveals another aspect: the phenomenality of power can never fully correspond to the essence of power. The object of knowledge for the legal or political science is the phenomenon of power and not its essence. Therefore, the legitimacy of power phenomenal manifestation represents an ideal of which, the concrete forms of organization and exercising of power, get closer without ever touching it.

The legitimacy of power's phenomenality lies among others in achieving the principle of representation. This principle highlights very well the distinction between the being or essence of power and on the other hand the phenomenon of power. The holder of power cannot

exercise it directly, only in exceptional circumstances. The essence is not the manifestation of power. The exercise of power reflects the being of power without containing it. Thus, the state institutions exercise the power without holding it, therefore, they need a recognition of the legitimacy of the acts of power, actually conferred mainly by applying the principle of representation.

The power and its phenomenality are undoubtedly at the heart of democracy. If the phenomenal legitimacy of power is an ideal of which the concrete forms of institutional embodiment through the principle of representation can get closer, results thus that democracy in its essence is still an ideal related to which the social and political reality is constructed and manifested, without letting the democratic ideal to coincide with the social and political reality. It is relevant in this regard the statement of Professor Ion Deleanu: "Democracy is a form of moral perfection. It dimensions the organization and operation of a power to humanize it and also the way of life of citizens to shape it."

It is necessary to distinguish between the *ideal democracy* that is a purely speculative construction based on the possible coincidence between the essence and the phenomenality of power, but also an ethical imperative that should mean the unity of will between the individual and society, and on the other hand, the *real democracy*, characterized through the contradictory dichotomy between the essence and the phenomenality of power, between the individual and society. Real democracy takes concrete forms, multiple manifestations (such as the form of "parliamentary or representative democracy"), is not an immutable given, but is in a continuous evolutionary process, in considering the historical progress as a finality, never possible to be achieved, the ideal democracy. The science of law has as a study topic the real democracy, or more precisely its forms of manifestation and for its implementation. Paradoxically, however, the legitimacy of any form of real democracy is conferred by the values and principles of ideal democracy, the latter forming mainly the studying topic for metaphysics.

Unlike dictatorship, democracy involves the rehabilitation of the individual, of the particular that is no longer absorbed and dissolved into the social abstract general or of the concentrated power. In democracy

the individual has ontological value and manifests into existential coexistence with the social general. In other words, the individual has the meaning and power of the general, the latter being legitimate, precisely because it recognizes to the individual the existential and ontological dimension. The power, even in its concrete manifestations is the expression of the general as such, reflected for example in the notion of "public interest". In a democratic society the legitimacy of the act of power lies not in reflecting own generality (of public interest) but in respecting the individuality of diversity in all forms specific to existential pluralism. In constitutional terms, this evokes the relation between "majority and opposition".

The issue of democracy cannot be reduced to the phenomenon of power as it seems to result from the constitutional definition of democracy that we find in Article 2 of the Constitution of French Republic: "government of the people by the people and for the people". The essence of democracy, in our opinion, is the forms and content of the concrete relation between society and individual. The relation expresses a unilateral contradiction because the society can contradict the individual (particularity and diversity), which is proper to dictatorship, but the individual does not contradict the society, situation particular to democracy. Furthermore, the dialectic report between the individual and society specific to democracy is an affirmative one, not containing a negation, such as Hegel argued. It is proper to democracy so that society asserts the individual (individuality and diversity), not to deny, therefore, to consecrate and guarantee the individuality and diversity. Any further analysis of the phenomenon of democracy involves references to the concepts of civilization and culture, the relationship between civilization, society and the individual.

In our opinion between dictatorship and democracy is obviously a contradiction, but one-sided: dictatorship is inconsistent and excludes democracy, yet democracy does not exclude the forms of dictatorship. The space and scope of this study do not allow further analysis of this interesting problem. However we mention that in doctrine are made referrals to forms of dictatorship that can characterize any democratic regime: parliamentary dictatorship, dictatorship of masses or the

dictatorship of the majority. In all these situations the democratic reality, contradictions highlighted above become negative (majority excluded or ignoring the minority). Consequently, it gets to the exercising of authority in discretionary forms, which obviously contradicts the essential values of ideal democracy.

John Stuart Mill, in his works "Civilization," published in 1836 believes that civilization is contrary to the nature status or barbarism. A nation is civilized when the social conditions in which lives gives sufficient safety guarantees, so that social peace be a reality. Among consequences of higher civilization the most striking one, is the philosopher's opinion that the power tends to move from individuals and small communities to the masses. The importance of masses increases when that of individuals decreases. With the decreasing of individual's role, decreases the power of individual beliefs and the public opinion acquires supremacy. In this ideational context Stuart Mill pointed out that "the drawbacks of democracy lie precisely in this tyranny exercised by the masses, the majority of public opinion. Therefore, the political organization of representative governing must contain all guarantees for the individual against the tyranny of the masses. Among other measures, Stuart Mill suggested the representation of opinions minority in the Parliament.

The great philosopher findings are, in our opinion, fully valid also for the contemporary forms of real democracy or representative. That's why the realization of the principle of representation in any of the types of electoral system should allow as much as possible, the reduction or even elimination of the forms of dictatorship in a real democracy through enhancement of individualities, of the political minorities or otherwise. In this way, the progress of a democratic society becomes a balanced one based on a unilateral affirmative contradiction in which the masses affirm and do not deny individual, and the majority affirm the minorities. Thus, the famous *parliamentary principle* "the minorities express and the majority decides" should become: *legitimacy of the decision is given by the representativeness and power to express of minorities.*

## **BRIEF CONSIDERATIONS REGARDING THE CONCEPTS OF "LAWFULNESS" AND "LEGITIMACY"**

Legality, as a feature that must characterize the legal acts of public authorities, has as central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers after deliberation, entailing direct or indirect acceptance of the governors<sup>2</sup>. Ion Deleanu defines just the "document that contains general and mandatory rules sanctioned through the coercive force of the state, when its application is not done out of conviction and is prone to produce application whenever arise the conditions foreseen in its hypothesis<sup>3</sup>."

In a broader meaning, the concept of law includes all legal acts that contain legal norms. The law in its restricted sense is the legal act of parliament drawn up in accordance with the constitution, according to an established procedure and which regulates the most important and general social rules. A special place in the legal system administered has the constitution defined as fundamental law, located on the top of legislative system, which includes legal rules of a higher legal force, which regulates fundamental and essential social relations, especially those concerning the establishment and exercising of state power.

The state of legality in the work of public authorities is based on the concepts of supremacy of the constitution and supremacy of law. The supremacy of constitution is a quality of the fundamental law that basically expresses its supreme legal force in the legal system. An important consequence of fundamental law supremacy is the compliance of entire law with the constitutional norms<sup>4</sup>. The notion of juridical supremacy of law is defined as "its feature that finds expression in the fact that the norms it establishes must not meet either of other norms, apart from the constitutional ones and the other legal acts issued by state bodies are subordinated to it in terms of their legal

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<sup>2</sup> André Hauriou, *Droit constitutionnel et institution politiques* (Paris: Montchrestien, Paris, 1972), 137.

<sup>3</sup> Ion Deleanu, *Drept constituțional și instituții politice* (Bucharest: Europa Nova, 1996), 509.

<sup>4</sup> For developments see: Marius Andreescu and Florina Mitrofan, *Drept Constituțional. Teoria generală* (Pitești: University of Pitesti, 2006), 61-68.

effectiveness<sup>5</sup>". Therefore, the supremacy of law in the sense above is subsequent to the principle of supremacy of constitution. Important is that the legality, as a feature of the legal acts of state authorities involves the observance of the principle of supremacy of the constitution and law. The observance of these two principles is a fundamental constitutional obligation consecrated by the provisions of article 1 paragraph 5 of the Constitution. Failure to observe this obligation attracts the appropriate sanction of unconstitutionality or illegality of legal documents.

The legality of the legal acts of public authorities involves the following requirements: legal document to be issued in compliance with the competence prescribed by law; legal act to be issued in accordance with the procedure prescribed by law; legal act to respect the rules of law as superior legal force.

The "Legitimacy" is a complex category with multiple meanings and which is the topic for research for the general theory of law, philosophy of law, sociology and other disciplines. There are multiple meanings of this concept. We mention a few: legitimacy of power; the legitimacy of the political regime; legitimacy of governance; the legitimacy of the political system, etc. Referring to this concept Jean Leca said: "The term legitimacy designates the quality which enables the holder to a power to order or prohibit the ability to be heard without resorting to physical violence explicit or, what is meaning the same thing, an option recognized as normal to successfully use coercion if necessary<sup>6</sup>". The concept of legitimacy can be applied in case of legal acts issued by public authorities being related to the "margin of appreciation" recognized to them in the exercise of their prerogatives.

The application and observance of the principle of legality in the work of state authorities is a complex issue, because the exercise of state functions assumes the discretionary powers with which state bodies are invested or otherwise said, the right for appreciation of authorities regarding the moment of adoption and the contents of the measures

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<sup>5</sup> Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 362.

<sup>6</sup> Dictionary of Sociological thinking (Bucharest: Polirom), 431.

ordered. What is important to note is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In our opinion, the legality represents a particular aspect of the legitimacy of the public authorities' legal acts. Thus, a legitimate legal act is a lawful legal act, issued within the margin of appreciation recognized by the public authorities, which does not generate discriminations, unjustified privileges or restrictions of the subjective rights and is appropriate to the situation in fact that determines its legal purpose. The legitimacy distinguishes between the discretionary power recognized by the state authorities, and on the other hand, the excess of power.

Not all legal documents which satisfy the legality conditions are legitimate. A legal act that complies with the formal legality, but is generating discriminations or privileges or unduly restricts the exercising of some subjective rights, or is not appropriate to the situation in fact, or to the purpose pursued by the law, is an illegitimate legal act. The legitimacy, as a feature of the legal acts of public administration authorities must be understood and applied in relation to the principle of supremacy of the Constitution.

## **THE DISCRETIONARY POWER AND POWER EXCESS IN A DEMOCRATIC SOCIETY**

Antonie Iorgovan says that a problem of the essence of the lawful state is to answer the question: "where ends the discretionary power and where starts the abuse of law, where ends the legal behavior of administration, materialized through its right of appreciation and where it begins the infringement of a subjective right or a legitimate interest of the citizen?"<sup>7</sup>

Addressing the same issue, Leon Duguit in 1900 is doing an interesting distinction between the "normal powers and the exceptional powers" conferred by the Constitution and laws to the administration, and on the other hand the situations where state authorities act outside the legal framework. The latest situations, are divided by the author into three categories: 1) the excess of power (when the state authorities go

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<sup>7</sup> Antonie Iorgovan *apud*. Dana Apostol-Tofan, *Puterea discreționară și excesul de putere al autorităților publice* (Bucharest: All Beck, 1999).

beyond the legal powers); 2) misappropriation of power (when the state authority accomplishes an act which falls within its jurisdiction following another purpose, other than the one prescribed by law); 3) the abuse of power (when the state authorities act outside their powers, but through acts that have no legal character) <sup>8</sup>.

Therefore, the application and observance of the principle of legality in the work of state authorities is a complex issue because the performance of the state's functions assumes the discretionary power with which the state bodies are invested, in other words "the right of appreciation" of the authorities regarding the moment of adoption and the contents of the measures ordered. What is important to highlight is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In the administrative doctrine, that is primarily studying the issue of discretionary power, it was emphasized that the opportunity of administrative acts may not hinder their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on expediency<sup>9</sup>. Consequently, the legality is the corollary of validity conditions, and the opportunity is a requirement (size) of legality<sup>10</sup>. However, the right of appreciation is not recognized by the state authorities in exercising all the prerogatives they have. One needs to remember the difference between the competence of state authorities that exist when the law imposes on them a certain strict behavioral decision, on the other hand the discretionary power, in which situation the state authorities may choose the means for achieving a legitimate aim or in general, when the state body can choose between several decisions, within the law and its jurisdiction limits. We will remember the definition proposed in the literature to the discretionary powers: "there is a margin of freedom at the discretion of the authorities, so in order to achieve the purpose indicated by the law maker to have the possibility of use any means of action within its jurisdiction. <sup>11</sup>"

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<sup>8</sup> Leon Duguit, *Manuel de Droit Constitutionnel* (Paris, 1907), 445-446.

<sup>9</sup> Antonie Iorgovan, *Tratat de drept administrativ* (Bucharest: Nemira, 1996), 301.

<sup>10</sup> Antonie Iorgovan, *Tratat de drept administrativ* (Bucharest: Nemira, 1996), 292.

<sup>11</sup> Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, 22.

Although the problematic of the discretionary power is studied mainly in the administrative law, the right of appreciation in exercising some prerogatives represents a reality that is encountered in the work of all state authorities.<sup>12</sup> The Parliament, as the supreme representative body and the sole legislative authority, has the broadest limits to manifest discretionary power, which identifies itself through the characterization of the legislative act. Since the period between the two world wars I.V. Gruia pointed out: "The need to legislate in a particular matter, the choosing of enactment timing, the choosing of the timing for implementation of the law by fixing by the legislator of the date of application of the law, revising of previous legislation, which may not restrict and compel the activity of future Parliament, limitations of the social activities from the free and uncontrolled way of carrying out and their subjecting to law rules and sanctions, the contents of the legislative act etc, prove the sovereign and discretionary appreciation of the legislative body's function."<sup>13</sup>

That is the case today, because every Parliament has the freedom to exercise its powers almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable to the legislative activity and the mechanism for controlling the constitutionality of laws.

The discretionary power exists also in court's activity. The judge is required to decide only when it is noticed, within the referral's limits. Beyond that is manifested the sovereign right of assessment of the facts, the right to interpret the law, the right to set a minimum or a maximum punishment, to grant or not extenuating circumstances to determine the amount of compensation etc. The exercise of these powers means nothing else but discretionary power.

Exceeding the limits of the discretionary powers means breaching of the principle of legality or what in legislation, doctrine and

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<sup>12</sup> In doctrine, Jellinek and Fleiner claimed the thesis according to which the discretionary power is not specific only to the administrative function, but it appears in the activity of other functions of the state, under the form of a liberty of appreciation on the contents, on the opportunity and covering of the juridical act. (see Apostol Tofan, *Puterea discreționară*, 26).

<sup>13</sup> I.V.Gruia, "Puterea discreționară în funcțiunile Statului", *Weekly Pandectales* (1934): 489.

jurisprudence is called to be "abuse of power". The excess of power in the activity of state bodies is equivalent to the abuse of rights, as it means the exercising of some legal competences without any reasonable motivation or without any appropriate relation between the imposed measure, situation in fact and the legitimate aim pursued.

The problematic of the excess of power forms mainly the subject of the law doctrine and administrative jurisprudence. Thus, the jurisprudence of the administrative prosecution courts in other countries delimited the freedom of decision of the administration from the excess of power. French State Council uses the concept of "appreciation manifest error" to describe situations where the administration exceeds, by legal acts adopted, the discretionary power. German administrative courts can annul the administrative acts for abuse of power or "wrong use of power". In such cases the legal acts of the administration have the appearance of legality, since they are adopted within the scope prescribed by law, but the excess of power consists in the fact that the administrative acts are contrary to the purpose of the law.

The Romanian Administrative Litigation Law<sup>14</sup> uses the concept of "abuse of power of the administrative authorities", which it defines as "the exercise of the appreciation right belonging to public authorities, through the violation of the fundamental rights and freedoms of citizens consecrated in the constitution or by the law" (Article 2, paragraph 1, letter m). For the first time the Romanian legislator uses and defines the concept of abuse of power and also recognizes the competence of the administrative prosecution courts to sanction the exceeding of the limits of the discretionary powers through administrative acts.

The exceptional situations represent a particular case in which the state authorities, and especially administrative ones, may exercise their discretionary power, with existence of the obvious dangers of power excess.

In the doctrine there is no unanimous agreement on the legal significance of the exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the liberty of decision of the administration within the law permitted framework, and

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<sup>14</sup> Law nr.554/2004 published in Official Gazette. no.1154/2004.

the opportunity evokes an action in fact of the public administration, under exceptional circumstances, action not necessary (therefore advisable) but contrary to the law<sup>15</sup>. Jean Rivero believes that through exceptional circumstances means certain factual circumstances that have a double effect: suspending of the application of the ordinary legal system and triggering of the application of a particular law to which the judge defines the requirements. Another author identifies three specific elements for exceptional situations: 1) the existence of some abnormal and exorbitant situations or serious and unforeseen events; 2) inability or difficulty to act in accordance with the natural regulations; 3) the need to intervene quickly to protect a considerable interest, gravely threatened<sup>16</sup>.

The excess of power can manifest itself in these circumstances at least by three aspects: a) an appreciation of a factual situation as being an exceptional case, although it has not this meaning (lack of a reasonable and objective motivation); b) the measures taken by the competent state authorities, by the virtue of the discretionary powers, exceed what is necessary for the protection of the public interest seriously threatened; c) if these measures restrict excessively, unjustified the exercise of the rights and freedoms constitutionally recognized.

The existence of an economic, social, political or constitutional - crisis does not justify the abuse of power. In this respect Professor Tudor Drăganu said: "the idea of the lawful state requires that they (the exceptional circumstances) to find adequate regulations in the constitution texts, whenever they have a rigid character. Such constitutional regulation is needed to determine the limits of the areas of social relations, in which the transfer of competence from the Parliament to the government may take place, to highlight the temporary character, by setting deadlines for application and by specifying the purposes in view of which it is carried out."<sup>17</sup>

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<sup>15</sup> Iorgovan, *Tratat de drept administrativ*, 294.

<sup>16</sup> Tofan, *Puterea discreționară*, 81.

<sup>17</sup> Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 131-132.

Of course, the excess of power is not only a phenomenon manifesting itself in the practice of the executive bodies, it can also be found in the work of Parliament or of the courts.

We appreciate that discretionary power recognized by the state authorities is exceeded, and the measures ordered represent an abuse of power, wherever the following situations occur:

1. The measures decided do not pursue a legitimate aim;
2. The decisions of public authorities are not adequate to the factual situations or the legitimate aim pursued, as they go beyond what is necessary to achieve that purpose;
3. There is no rational justification of the measures imposed, including the situations in which is established a different legal treatment for identical situations, or an identical legal treatment for different situations;
4. Through the measures ordered the state authorities restrict the exercise of fundamental rights and freedoms, without any rational justification to represent, in particular the existence of an appropriate relation between these measures, the situation in fact and the legitimate aim pursued.

### **EXAMPLES OF POWER EXCESS IN THE ACTIVITY OF STATE AUTHORITIES. POSSIBLE CONSTITUTIONAL SOLUTIONS**

In the final part of this study we will refer to some issues that we believe that need to be considered in a future proceeding for revising the Constitution.

As shown above in regard to the excessive politicianism and the power discretionary manifestations of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of violation of fundamental rights and freedoms, manifested throughout the last two democracy decades in Romania, we consider that the scientific approach and not only in reviewing matters of the basic law should be directed to find solutions to guarantee the values of the lawful state, to limit the violation of the constitutional provisions in view of some particular interests and to avoid the excess of power by state authorities.

1. The provisions of art. 114, paragraph 1 of the current drafting state: "The Government may assume responsibility before the Chamber of Deputies and the Senate in joint session on a program of general policy statement or a bill."

The engagement of Government liability has a political nature and is a procedural instrument which avoids the phenomenon of "*dissociation of majorities*"<sup>18</sup> where the Parliament could not meet the required majority to adopt a certain action initiated by the Government. To determine the Legislative forum to adopt the measure, the government through the accountability procedure, conditions to continue its work requiring a vote of confidence. This constitutional process ensures that the majority required for the government dismissal, in case of submitting a motion of censure to dismiss to coincide with that for rejecting the law, program or political statement of which the government binds its existence.

The adapting of the laws as a result of the political liability engagement of the Government has as an important consequence the absence of any discussions or parliamentary deliberations on the bill. If the government is supported by a comfortable majority in the Parliament, through this procedure one can achieve the adoption of the laws by "bypassing the Parliament", which can have negative consequences on the principle of separation of powers in the State, but also in regard to the role of Parliament, as defined of Article 61 of the Constitution.

Consequently, the use of this constitutional procedure by government for adopting a law must be exceptional, justified by a political situation and a social imperative, well defined.

This particularly important aspect for respecting the democratic principles of the lawful state by the Government was well highlighted by the Constitutional Court of Romania: "To this simplified form of regulation one must reach *in Extremus*, when the adopting of bill in the ordinary procedure or emergency procedure is no longer possible or when the Parliament's political structure does not allow the adopting of

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<sup>18</sup> Gheorghe Iancu, *Drept constituțional și instituții publice* (Bucharest: All Beck, 2010), 482.

the bill in the current or emergency procedure.<sup>19</sup> The political practice of the Government in recent years is contrary to these rules and principles. The Executive frequently used the assuming of responsibility not only for a single law, but for packages of laws without a justification in the sense shown by the Constitutional Court.

The politicianism of the government clearly expressed by the high frequency of assuming such a constitutional decision seriously harms the principle of political pluralism which is an important value of the lawful system as consecrated in the provisions of article 1, par. (3) of the Constitution but also of the principle of parliamentary law that shows that "the opposition expresses and the majority decides"<sup>20</sup>. "To deny the right of the opposition to speak is synonymous with the denial of political pluralism which, according to Article 1, paragraph (3) of the Constitution is a supreme value and is guaranteed ... the principle the 'majority decides, opposition expresses "implying that in the entire organization and functioning of the Parliament's Chambers to ensure, on one hand that the majority is not obstructed, especially in the conduct of the parliamentary procedure and, on the other hand the majority to decide only after the opposition has voiced"<sup>21</sup>. The censorship of the Constitutional Court has not proved to be sufficient and effective to determine the Government to respect these values of the lawful state.

In the context of these arguments we support the proposal to revise these constitutional provisions that limit the right of the Government to use its liability for a single bill in a parliamentary session. However, in our opinion there is no justification to exclude from the limitation of Government's liability, situations aiming the government draft law on state budget and state social insurances.

2. All post-December governments have massively used the practice of Emergency ordinances, fact widely criticized in the literature.

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<sup>19</sup> Decision nr. 1557 on 18<sup>th</sup> of November 2009, published in the Official Gazette. Nr. 40 on 19,01,2010.

<sup>20</sup> Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 55-69.

<sup>21</sup> Muraru and Constatinescu, *Drept parlamentar românesc*, 56.

The conditions and prohibitions established by revising law in 2003 on the constitutional regime of emergency ordinances, in practice proved to be insufficient to limit this practice of the Executive and the control of the Constitutional Court also proved insufficient and even ineffective. The consequence of such a practice is the violation of the Parliament's role as "the sole legislative authority of the country" (art. 61 of the Constitution) and creating of an imbalance between the executive and legislature by emphasizing the discretionary power of the Government, which most often turned into the abuse of power.

We propose in the perspective of a new revision of the Basic Law, that art. 115 par. 6 of the Constitution be amended so as to prohibit the adopting of emergency ordinances in the field of organic laws. In this way is protected an important area of social relationships as the constitutional legislature considers essential for the social and state system, the excess power of the executive through the practice of issuing emergency ordinance.

3. In our opinion is necessary that the Constitutional Court's role as guarantor of the Basic Law to be amplified by new responsibilities in order to limit the excess of power by the state's authorities. We disagree with the assertions in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional court<sup>22</sup>. It is true the Constitutional Court ruled some questionable decisions regarding their compliance with the limits of exercising their duties according to Constitution, by assuming the role of a positive legislator<sup>23</sup>. Reducing the powers of the constitutional court for this reason is not a solution as a legal basis. Of course reducing the powers of the state authority has the consequence of eliminating the risk of improper exercise of those powers. This is not a way of doing things in a lawful state, but it should

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<sup>22</sup> Genoveva Vrabie, "Natura juridică a curților constituționale și locul lor în sistemul autorităților publice", *Revista de Drept Public* 1(2010): 33.

<sup>23</sup> We refer with the title for example to the Decision No.356/2007, published in the Official Gazette.no.322on 14<sup>th</sup> of May 2007 and to the Decision no..98/2008 published in the official gazette no. 140 on 22<sup>nd</sup> of February 2008.

be done by seeking legal solutions to achieve better conditions of the tasks which prove to be necessary to the state and social system.

To the powers of the Constitutional Court may be included the one to rule on the constitutionality of administrative acts, exempted from the review of legality by the administrative courts. This category of administrative acts, to which refers Article 126 paragraph 6 of the Constitution and the provisions of Law no. 544/2004 of administrative litigation, are particularly important for the whole social system and state. Therefore it is necessary a constitutional scrutiny because in its absence, the discretionary power of the issuing authority is unlimited with the consequent possibility of restricting the excessive exercise of fundamental freedoms and rights or of breaching the important constitutional values.

For the same reasons our constitutional court should be able to control in terms of constitutionality also the Presidential decrees establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in an appeal on points of law that are binding on the courts. In the absence of any control of legality or constitutionality, the practice has shown that in many cases the Supreme Court has exceeded its power to interpret the law, and such decisions amended or completed acts behaving as a genuine legislature thus violating the principle of separation of powers in the state<sup>24</sup>.

In these circumstances, in order to avoid the excessive power of the Supreme Court, we consider it necessary to assign the Constitutional Court the power to decide on the constitutionality of the decisions of High Court of Cassation and Justice adopted in the procedure of appeal on points of law.

4. The abuse of authority of all state authorities, paradoxically within the law limits, whenever, the normative documents recognize a marge of appreciation from the decider body (Parliament, administrative authorities or courts), on the moment of decision or on the measures decided. The State practice in Romania showed that in many

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<sup>24</sup> For developments see Andreescu Marius, “Constituționalitatea recursului în interesul legii și ale deciziilor pronunțate“, *Curierul Juridic* (2011): 32-36.

instances the content of the decision which may materialize in: law, government ordinance, acts of administrative authorities at all levels, judicial documents of the prosecution or court orders, exceed through provisions, particularly the restrictive nature what is necessary to achieve the purpose of the law or inadequate to the situation in fact. Such manifestations of power can cause severe damages to fundamental human rights or public interest, in a word to the features of the lawful state. The criterion that could allow censorship by the courts of these forms of abuse of power is in our view *the principle of proportionality*.

Proportionality is a fundamental principle of law consecrated explicitly to the constitutional, legislation and international legal instruments regulations. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or appropriate relation between actions, situations, events, being a criterion for limiting the measures ordered by the authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess of power by the state's authorities. Proportionality is a fundamental principle of EU law being expressly consecrated by article 5 of the Treaty on European Union<sup>25</sup>.

We consider that this principle's express regulation in the content of the provisions of Article 53 of the Constitution, with application in the restriction of certain rights, is not enough to highlight the full significance and importance of the principle of the lawful state.

It is useful that to article 1 of the Constitution to add a new paragraph stating that "The exercising of state power must be proportionate and non-discriminatory". This new constitutional regulation would be a veritable constitutional obligation for all state authorities to conduct their duties in a way that the measures adopted to enroll within the discretionary power recognized by law. At the same time it creates the possibility for the Constitutional Court to sanction by means of the constitutional reviewing control of the laws and ordinances, the excess of power in the work of Parliament and Government, using as criteria the principle of proportionality.

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<sup>25</sup> For developments see: Marius Andreescu, "Proportionalitatea, principiu al dreptului Uniunii Europene", *Curierul Judiciar* 10(2010): 593-598.

Of course, the existence of an institutional state viable, efficient qualitatively, well structured and harmonized, including under the aspect of moral and professional quality of the civil servants and magistrates dignitaries is obviously an ontological factor to eliminate or at least diminish the excess of power of state's authorities in all its forms, especially we would emphasize on the situation in which the measures decided by the political and legal manifestations will take the *form of legality* but are in obvious contradiction with the requirements of *the principle of legitimacy*.

Strengthening the judiciary power, the control of the courts and control of constitutionality, particularly, mainly in situations where being questioned the violation of human rights or of the principles of lawful state, particularly the separation and balance of powers, can be a viable solution to ensure not only the legality of the measures taken by the state authorities, but also of their legitimacy.

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# THE USEFULNESS OF METHODS FOR IDENTIFICATION OF ALTERNATIVES IN THE PROCESS OF DEVELOPMENT OF PUBLIC POLICY

Manuela NIȚĂ<sup>1</sup>

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## **Abstract:**

*Identification of alternatives is a very important step in the process of development of public policy because the viability and effectiveness of possible solutions to solve problems submitted to the authorities depend largely by techniques and methods that decision-makers decide to apply.*

*Choosing solution for maintaining the current situation at the time of analysis or identification of a single alternative, are realities that we find in authorities' practice, sometimes justified, sometimes the solutions are extremes deriving from the impossibility of decision-makers to find a possible way of solving the problem found in society.*

*In this study we will conduct a review of the main methods used to identify alternatives and support the authorities in order to find solutions to a given problem.*

**Key-words:** *words alternative, solution, public authority, public policy, brainstorming*

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## **INTRODUCTIONS**

The process of developing and carrying out each stage of public policy is extremely important and should be given due attention to them, because any malfunction in one of the steps can lead to the failure of the entire policy and we refer here to problem identification and agenda setting for authority, defining the problem, identifying alternatives and choosing the solution, implementation, monitoring and evaluation of it.

Each step individually has to be carefully constructed due to the interdependence existing between them and any deficiency of one affects any steps that is succeeding.

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The problem which is the subject of a public policy represents an impairment of the society, regardless of field, of such intensity so is requiring intervention of the authority for its regulation<sup>2</sup>.

A definition of a problem which is imprecise, vague, undocumented, so poor achievement of one of the steps leads to the generation with difficulty of the solution to solve the given problem or to find a solution that does not have the desired effect, expected by beneficiaries.

### **CONSTITUTION OF STAGE OF OPTIONS IDENTIFICATION AND CHOOSING A SOLUTION**

For celerity reasons, we might consider that in the same time with defining the problem would be easier to identify the solution and thus would simplify the entire process of public policy making. This approach to policy is not supported by practice, which demonstrated that each stage has its role in the entire process of implementing a policy. Defining the problem correctly is essential. Going through documents which are defining the problem, the decision maker must know precisely the problem, clearly recognized evidence-based, official data of the problem. Otherwise, this can be seen as a mere attempt to alleviate more than the effects of the problem, but without being consider as solving the problem. If the main decision maker does not know and does not understand well himself the issue, public policy that will be started would not have a chance to succeed because it would not find the right solution and also could not coordinate policy implementation.

Merging the two stages would only put a strain on the decision maker, marked by the passage of time, the authority being interested in inclusion on the working agenda of the problem that requires its intervention, sustained by a reasonable definition. Once these steps done doesn't means that we can delay the rest of the public policy making process and not given due consideration.

From this moment the authority must submit the entire effort to identify one or more relevant and effective solutions. Unfortunately, both

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<sup>2</sup> Luminita-Gabriela Popescu, *Administratie si politici publice* (Bucuresti: Economica, 2006), 230-234.

in theory and in practice is known as variant maintaining the "status quo" in case when the decision-maker is unable to know at the time a potential solution, for technical reasons, financial reorganizations, season, being preferred to maintain current situation and in the near future will be resumed the approach of the problem.

Thinking and design alternatives is a complex process that can not be the prerogative of one person, because it requires consultation with other authorities that have a direct or indirect link with the subject submitted to them, a consultation with interest groups, with other authorities that already faced this experience, with beneficiaries. Also, the difficulty of the subject may require collaboration with specialists grouped into a center of research, academia, institutes that can support the decision-maker to explain the phenomenon and which may indicate possible solutions that authority can have in view depending on the real possibility of achievement.

The size of the problem, the local, regional or national level cause a different involvement of actors decision makers. The problem itself is approached differently as a solution.

## **USING THE EXPERTISE TO IDENTIFY ALTERNATIVES**

The multitude of issues brought before the authorities, some of them not necessarily requiring a specific public policy, but others requiring inclusion on the agenda of a policy authority, force the authority to act in a position to elaborate a decision.

No matter how well prepared is the structure of civil authority, the nature of the problem or its size can put in difficulty the decision-makers regarding the decisions that need to be adopted. The difficulty comes from the fact that officials do not have enough knowledge of an area that is not part of its sphere of responsibilities. In such a situation there are several questions: can the decision maker decide on issues?; solutions are based?; it requires a process of consultation with experts in the field?

The answer to these questions can be provided starting with the last one. It is impeditos necessary that the authority, in case it faces a problem that exceeds its sphere of competence, to consult with experts in the field which own the expertise on the issue in order to identify alternatives.

Expertise can be offered by specialists within a research institute<sup>3</sup>, academic, university, economic environment, business, from some professional organizations, so any structure known comprising an elite corps who have dedicated their work research and knowledge of a specific area or phenomenon, which authority is facing too<sup>4</sup>. Also, the expertise can be gained from specialized works, magazines recognized nationally and internationally, either through a direct agreement by officials consulting these works, either by requesting meetings with specialists or even request certain views expressed in writing.

Also, people preoccupied by knowledge of a particular field, while, besides specialized knowledge they hold, get to know those persons with similar interests and can discuss, develop specific issues, forming communities specialty being to date with everything that is new, and the latest solutions adopted by other authorities. Meanwhile, specialists can provide the pros and cons of the alternatives adopted at national and international level, taking into account the specific local or group of beneficiaries, being possible that a viable solution in a particular county, region or another state, not to be the best for case under review.

Expertise can be offered by a nongovernmental organization, either by specialists drawn in here, either through experience gained by its members over time, which through their efforts and their policies that they have developed can share to authorities the result of their work. They also can join during implementation stage, having their own activities which can sustain the public policy adopted, aiming the success of these efforts.

## **METHODS USED IN GENERATING ALTERNATIVES**

It should be noted that regardless of the method used in generating solutions, always there will be opponents, those who criticize the chosen solution because an alternative can not satisfy completely all the beneficiaries due to the fact there are cases that have certain features, compared to the remaining beneficiaries and however you will try to

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<sup>3</sup> Nicoleta Miulescu, *Politici publice* (Bucuresti: Universul Juridic, 2009), 10-11.

<sup>4</sup> Luminita-Gabriela Popescu, *Administratie si politici publice* (Bucuresti: Economica, 2006), 240-241.

cover also these cases it is possible that the resolution is not complete. Also, an alternative regarding a problem in society can have a positive or negative influence on other ongoing policies.

For finding the best solutions, not necessarily the perfect one, which is hard to find, but not impossible, are mainly used as methods and techniques: Brainstorming technique, Delphi technique and scenario method.

#### *4.1. Brainstorming technique*

Brainstorming is a usual technique in all stages of public policy, but it is used mainly in the stage of identifying alternatives. As mode of functioning, it implies the existence of the group of officials selected based on their knowledge and skills relative to the problem that will be solved, which will have several meetings till identifying the best alternative<sup>5</sup>.

Brainstorming is a technique based on an efficient organization of the leading decision maker that will set either constant existence of a grup coordinator or at each meeting the team will appoint their team moderator by agreement.

Also, another feature is the way to record all the ideas of the participants, because the technique is essentially a technique to stimulate the creativity to generate a greater number of ideas that can be improved over time, so the solution chosen to be suited to the problem. Means of record may be different: board, flipchart, projector, on paper, but what is important is that all ideas expressed by the participants to be note and to be read by all participants.

The moderator's role is to organize and coordinate the meeting and to ensure that all fellow team members understand the issue that will be debated or which point was reached compared to previous meetings.

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<sup>5</sup> **Sandra Briggs et al.** *Manual de metode folosite în planificarea politicilor publice și evaluarea impactului. Manualul a fost elaborat în cadrul Proiectului Phare Twinning al Uniunii Europene pentru „Consolidarea capacității instituționale a Guvernului României de a gestiona și coordona politicile publice și procesul decizional” (RO2003/IB/OT-10)*, (Bucharest: Secretariatul General al Guvernului, 2006), 32-33, 63-64

Otherwise, the meeting represents stagnation, loss of time without efficiency.

It is recommended that all participants agreed to establish estimated time for session work, which can be extended depending on the complexity of the difficulties in overcoming the problems analyzed.

Related to the size of the working team, there is no preset number. The decision maker is the one who appreciates the size of the team. In a greater team there may be difficulties of communication and control of the meeting that will be passed on identifying alternatives.

Also it is preferable that the team who knows the details of the problem to formulate also possible solutions before the meeting or they are generated ad hoc during the meeting. All this will be noted, respecting each participant, they will subsequently be debated extensively, when will take place a stage of their selection. Some of them, with the agreement of the participants, will be excluded, maintaining those that have sustainability.

Later they will undergo in-depth analysis of cost-benefit and risk analysis and therefore it is good that in this stage to settle all agreed a set of minimum criteria with which to be able to delimited between the different solutions resulting from the brainstorm.

As mentioned, the aim of this technique is to stimulate the generation of ideas and that is why it is essential to encourage creativity of participants and therefore it is advisable to consider the following issues:

- to encourage the active participation of all those present, since it may be in the group people shy, retained in communication, which can be intimidated by the rest of the participants, but with a high level of knowledge and which can have a significant contribution to the meeting's results. In such cases it is indicated that the moderator to connect with everyone present.

- to note the initial ideas as they are expressed, and in the selection step, if necessary, to further clarify, in order to do not lose precious ideas and engage in the discussion that deviates from the basic idea

- to require participants not to criticize or praise the ideas for this could lead to risk that in another meeting the person criticized to have not

the courage to generate an idea that can be good or maybe even in that meeting that he proposed to give up easily on a solution which should be substantiated. Also, the moderator is preferable not to make such findings as himself because can block the generation of ideas.

- not to exclude from the beginning ideas that seem unachievable, radical or possibly raise a smile. These can sometimes be a starting point and ultimately may prove viable.

#### *4.2. Delphi technique*

Delphi technique is a technique that tries to perform prospective analysis forecasts of social, political and technological developments on medium and long term. It is based on analyzes that aim to identify the major social trends that you should consider when the decision maker seeks to find solutions that require an action plan of authority. In this respect each alternative is analyzed prospectively. It must consider which were the causes that generated the problem that is assessed and their prospective evolution in the medium and long term.

We say it is a prospective technique, as it tries to determine who will be the evolution of a problem and what kind of policy is best suited to resolve. Delphi technique involves interaction between participants in the survey, offering the chance of changing opinions, because those who disagree can argue and they can influence other opinions. The central goal to identify these trends is finding the most likely course of events starting from the opinions of connoisseurs.

The stages of technique are: Identification of participants; Invitation and launch of Guide of the investigation; Identifying contradictory issues; Analysing contradictory issues; Extracting common elements; Writing the final report.

Unlike other prospective method, this technique has the advantage of providing a basis for analysis and design of public policies.

#### *4.3. Method of development and analysis of scenarios*

If the technique Delphi as prospective method was initially used in military field, method of development and analysis of scenarios, another prospective method was originally developed in the private sector, business in order to adapt companies in an environment marked by competitiveness and sometimes even unsafe. Its positive elements caused

it to be taken in public policy field because enables a consensus for certain actions, based on monitoring environmental changes, facilitating practical understanding of the future. By developing and analyzing scenarios we can foresee the emergence of new issues on the agenda of the authorities, the construction of alternatives and strategy development management framework and the implementation of public policies.

Given the known problem of authority for each possible solution can be built 4-5 maximum scenarios which will form the basis for making decisions. To develop scenarios to be closer to the socio-economic reality there is necessary to identify the main factors that cause the problem, regardless of their type: social, economic, environmental or technological. The next phase involves drawing up scenarios of interaction between these factors, projection including also the likely impact on the problem studied. After this moment in the analysis will be included all relevant data, quantitative or qualitative, and that could be important in the future.

From the variants of the proposed scenarios will be selected the one that is closest to the actual values for the authority to be prepared to face challenges and adapt them as well as possible.

As the last stage decider will develop public policy based on the alternative that is considered as the most viable scenario.

## **CONCLUSIONS**

In the entire process of public policies, each stage has its role to achieve the ultimate goal of solving the problems the society faces. Identification of alternatives stage is the one that generates the solution, solving the problem. If the decision maker does not know the exact details of the problem, if there is not organized at institutional level, if there are not made consultation processes with experts, interest groups, with recipients, the stage itself, but also a whole policy will be doomed to failure.

Therefore, the methods presented can support a decider which will be supported in the development of effective, coherent, realistic alternatives to be accepted by beneficiaries and members of society as a whole.

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# THE ROLE OF THE MAGISTRATE REFLECTED IN INTERNATIONAL REGULATIONS

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## **Abstract:**

*Considered as the third power in a democratic state, justice has the fundamental role to insure social peace. Currently, for the parties of litigation and for the society, the legal process represents some kind of an alternative democratic arena in which takes place the exchange of arguments between segments of the public and the state powers and are debated matters of general interest<sup>2</sup>. Starting from this new attribute, each state has the obligation to adopt all necessary measures to promote the role of the judges as individuals and of the legal system in its ensemble, to state their independence and efficiency. Regarding the prosecutors, the principles governing their activity aims the independence and autonomy.*

*The current study aims to make a short overview of the international regulations reflecting the fundamental principles regarding the judicial position.*

**Key words:** *magistrate, role, principles, international regulations, rule of law*

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## **INTRODUCTION**

The independence of justice is the premise of the rule of law and a fundamental guarantee of a fair trial. Therefore, the judge shall protect and serve as an example of independence of justice, both as individual, as well as an institution<sup>3</sup>. In this regard, the compliance with and insurance of the rights and fundamental freedoms of the citizen represent not only an obligation for each democratic state, but also it has imposed the

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<sup>2</sup> Opinion Nr 18 (2015) of the Consultative Council of the European Judges on the “The position of the judiciary and its relations with other powers of the state in a modern democracy”, available at

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogg ed=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogg ed=FDC864&direct=true), accessed on 17 March 2016

<sup>3</sup> Cristi Danileț, *Principiile de la Bangalore privind conduita judiciară* (Bucharest, C.H. Beck, 2010), 3

adoption of international regulations comprising not only the fundamental principles of the judicial position, but also the guarantees necessary to protect these principles.

Given the importance of judicial office, the General Assembly of the United Nation has approved the Resolutions No 40/32 of 29 November 1985 and No 40/146 of 13 December 1985 which state the Fundamental Principles of the Freedom of Judges, adopted by the 7<sup>th</sup> Congress of the United Nations<sup>4</sup>. According to these documents, the signatory states have the obligation to take “all appropriate measures for the compliance with, protection and promotion of the independence of judges. The legislative power and the executive power must be sure the judges are independent and that their independence is not affected by anything”. The compliance with these principles, states, in section 10, for “member states the obligation to insure and promote the independence of justice, considering the principles and complying with them, within their legislation and national practice”. In the light of these Fundamental Principles, “those appointed as judges shall be integer and competent persons, having an adequate training or judicial qualification. Any method for the selection of judges shall be drafted as it shall not allow inappropriate appointments. For the selection of judges shall not be made discriminations based on race, color, gender, religion, political or of other nature opinions, ethnicity or social condition, material status, birth or statute; an exception which shall not be considered discriminatory is the condition that a candidate for the position as judge be a citizen of that state”.

The importance of the judge in a democratic society has been reflected also in the principles stated at the European level, such as the European Charter for the statute of judges<sup>5</sup> which was adopted at the

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<sup>4</sup> Resolutions No 40/32 of 29 November 1985 and No 40/146 of 13 December 1985 adopted by the 7th Congress of the United Nations on the “Basic Principles on the Independence of the Judiciary”, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>, accessed on 17 March 2016

<sup>5</sup> European Charter on the Statute of Judges, available at

Reunion organized by the Council of Europe in 1998, the purpose of these principles being the insurance of competence, independence and impartiality which every person is entitled to expect from the jurisdictions and from each judge, whose mission is to protect the individuals' rights. In this meaning, Art 2.1 states that "the election of the candidates by a court or an independent jury" shall be made "based on their capacity to freely and impartially appreciate the judiciary situations presented and to apply the law, by respecting the dignity of the person".

Another international document in this area is the Recommendation No R (94) 12 of the Committee of Ministers to Member States regarding the independence, efficiency and role of judges<sup>6</sup>, adopted by the Committee of Ministers on 13 October 1994 by which the governments of the Member States are required to adopt and implement any measure that will create "for the judges special conditions allowing them to fulfil their mission and may claim efficiency, at the same time respecting the independence and impartiality".

Because the regulations stated by the Recommendation No R (94) 12 stated only general principles, the Consultative Council of the European Judges (C.C.E.J) had to draft more opinions allowing their application. Among these international subsidiary normative acts, we mention the Opinion No 1/2001 stating the standards for the independence of the judicial power and the immovability of judges and the Opinion No 10/23 November 2007 on the Council for the Judiciary at the service of society. The importance of the magistrate's role is recognized by the Opinion No 1/2001<sup>7</sup>, Art 10 stating that the "judicial

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[https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf), accessed on 17 March 2016

<sup>6</sup> Recommendation No R (12) 94 of the Committee of Ministers to Member States regarding the independence, efficiency and role of judges, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2>, accessed on 17 March 2016

<sup>7</sup> Opinion No 1/2001 on the standards for the independence of the judicial power and the immovability of judges, available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true), accessed on 17 March 2016

independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial”.

Opinion No 7/2005 on “justice and society” of the C.C.E.J recommends that the European judicial powers and Member States define, in ensemble, programs aiming not just the information of the public regarding the justice, but also the definition of a more just idea over the role of judge in society<sup>8</sup>.

Also, Opinion No 10/23 November 2007 of the C.C.E.J states the fact that in a rule of law the existence of an independent and impartial judicial power is a structural requirement of the state<sup>9</sup>. In this respect, Art 10 states that the states through independent authorities “should promote the efficiency and quality of justice” and to “embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary”. Art 50 of the Opinion mentions that the appointment and selection of judges should be made “exclusively on a candidate’s merit and based on his/her qualifications, abilities, integrity and sense of independence, impartiality and efficiency”. Therefore, the appointment and selection criteria should be made accessible to the general public so that the civil society is able to verify if the selection was made according to them.

I. Regarding the prosecutors, their role is stated by several important international documents, among which we mention the Guidelines on the Role of Prosecutors on the prevention of crime and the treatment of offenders adopted by the 8<sup>th</sup> Congress of the United

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<sup>8</sup> Opinion No 7/2005 of the Consultative Council of the European Judges on justice and society, available at

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2005\)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2005)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true), accessed on 17 March 2016

<sup>9</sup> Opinion No 10/ 2007 of the Consultative Council of the European Judges regarding on the Council for the Judiciary at the service of society, available at

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true), accessed on 17 March 2016

Nations<sup>10</sup>, which state that the “prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime”. According to Art 1-2 of this document, the “selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, color, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status”. Moreover, “prosecutors should have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory provisions”.

On 6 November 1997, the Committee of Minister has adopted a resolution stating the requirements for the independence of the prosecutor. The third principle mentioned that the states have agreed that “to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations”.

Considering that the organization and administration of justice in each state should be inspired by principles such as equality in front of the law, presumption of innocence and the right to a fair trial in front of an independent and impartial court, Recommendation REC (2000)19 of the Committee of Ministers of the Council of Europe to Member States on the role of public prosecution in the criminal justice system<sup>11</sup> adopted on

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<sup>10</sup> Guidelines on the Role of Prosecutors, adopted by the 8th Congress of the United Nations on the prevention of crime and the treatment of offenders, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>, accessed on 15 March 2016

<sup>11</sup> Recommendation REC 19 (2000) of the Committee of Ministers of the Council of Europe to Member States on the role of public prosecution in the criminal justice system, available at

6 October 2000, states in Art 5 that the “the recruitment is carried out according to fair and impartial procedures embodying safeguards against any approach which favors the interests of specific groups, and excluding discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status”. All these criteria have the purpose to insure and to promote the efficiency, impartiality and equity of the prosecutors in criminal cases, thus insuring not only the performance of the judicial office, but also the very existence of the rule of law.

## CONCLUSIONS

Because the justice has both a “normative”, as well as an “educative” role in society, the states have the obligation to comply with the international regulations adopted in this regard. Their purpose is to insure the independence of the judicial system in an equitable and impartial manner, without considering the possible social or political pressures.

The integration of justice in society assumes the organization of an independent and efficient judicial system with the role of insuring the fair and impartial trial of litigations, thus protecting the rights and freedoms of all persons who aim to get justice.

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# ABOUT THE ORIGINS OF THE SCIENCE OF ROMAN LAW

Andreea RÎPEANU<sup>1</sup>

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## **Abstract:**

*As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – sacra publica.. The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced Codex Theodosianus. The religions was present in all aspects of social life, it was not limited to temples and feasts. There was however a clear difference between res sacrae and res publicae. In this respect, it was asserted in recent studies, that both religious practices of Romans, and the juridical ones, wouldn't be so different as previously thought, but much more dynamic, evidence of Roman specific conservatism.*

**Key-words:** conservatism, res sacrae, res publicae, religion, law, religious practices.

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## **INTRODUCTION**

For several centuries, the pontiffs have known the pomp days<sup>2</sup> and the solemn formulas that the parties in dispute were compelled to pronounce. The pomp days and formulas were revealed and displayed in forum by Gnaeus Flavius, the freedman of Appius Claudius Caecus in 301 before Christ.<sup>3</sup> The pontiffs held the monopole of law, being the sole who knew and could provide explanations related to the trial. The first priest of the state was the king, until the foundation of republic.<sup>4</sup> The Romans didn't know later either the distinction existent today between

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<sup>2</sup> Days when trials were judged.

<sup>3</sup> Hanga Vl., *Borough of seven cholines* (Bucharest, 1951), 185.

<sup>4</sup> Girard Fr., *Histoire de l'organisation judiciaire des Romains* (Paris: Arthur Rousseau, 1901), 13.

state and church, aspects of religion, of sacred, rites and practices appearing in all aspects of Roman life, including in law and criminal law.

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between *ius*, *honestum* and *fas*. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.<sup>5</sup>

The justification of punishment and mainly of capital execution is encountered, at least initially, in religion, in providing the victim to the God offended by fact and whose revenge could fall thus over the entire community.<sup>6</sup> Even the notion of *sanctio*, by which the punishment was determined for the breach of a law is obviously related to *sanctus*, *sacer* and *sacratio*.<sup>7</sup>

## LAW AND RELIGION

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – *sacra publica*.<sup>8</sup> The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced *Codex*

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<sup>5</sup> Molcuț E., Oancea D., *Roman Law* (Bucharest: Sansa, 1993), 60.

<sup>6</sup> Strachan-Davidson J. L., *Problems of the Roman criminal law* (Oxford: Clarendon Press, 1912), 1.

<sup>7</sup> Strachan-Davidson J. L., 3.

<sup>8</sup> Rüpke Jörg (coord.), *A companion to Roman religion* (New Jersey: Blackwell, 2007), 7.

*Theodosianus*.<sup>9</sup> The religions was present in all aspects of social life, it was not limited to temples and feasts.<sup>10</sup> There was however a clear difference between *res sacrae* and *res publicae*. In this respect, it was asserted in recent studies, that both religious practices of Romans, and the juridical ones, wouldn't be so different as previously thought, but much more dynamic, evidence of Roman specific conservatism. Therefore, the feasts with religious character were still organised in the town of Alba Longa, although it hadn't been for long time an important urban centre.<sup>11</sup>

For the lack of faith, it seems that there weren't juridical consequences, according to the former laws. There is however the possibility the state expressly demands a manifestation of faith, on certain occasions. In this respect, after the death of Cesar, when he was turned into a God (endowed with divine power), it was ordered to every citizen, under the death punishment, to celebrate the anniversary of birth of the dictator.<sup>12</sup> There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.<sup>13</sup> Wanting to find out the desire of law in this respect, Romulus selected Palatine and Remus the choline of Aventin. The fatidic signs appeared firstly to Remus, in the form of six eagles. Romulus was shown twice more

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<sup>9</sup> *Codex Theodosianus*, 16,10,4 decreed: in all places and all towns, the temples must be closed, and pursuant to a general warning, the possibility to sin to belong to bad ones; termination of sacrifices (if someone commits such an act to be victim of revenge); the property of the one executed to be claimed by the town; the governors from province to be punished in the same manner if they neglect the punishment of such acts.

<sup>10</sup> Jörg Rüpke (coord.) , *quoted work*, p.5.

<sup>11</sup> Plinius, *Naturalis Historia*, 3,69-70.

<sup>12</sup> Dion, 47,18.

<sup>13</sup> Livius Titus, *Ab urbe condita* (Bucharest: Minerva, 1976), 14.

eagles.<sup>14</sup> However, both Remus and Romulus were acclaimed as kings by its own camp, *this being the reason of much trouble, turning into a bloody fight, in tumble, seriously injured by his brother, Remus fell breathless.*

The second legend, presented by Titus Livius, recounts us the fact that Remus jumped over the new walls built up by Romulus, but without any bad intention. However, Romulus, taking the gesture in serious, killed him saying: *all those who dare to jump over the walls built by me to die like this.*<sup>15</sup>

The nature of these myths is symbolic for subsequent development of Roman spirituality and moral. Pursuant to such bloody sacrifice, the first offered to divinity of Rome, the people will always keep in mind a memory not rather pleasant. More than 700 de years, pursuant to the foundation of Rome (753), Horațiu will still consider it an originary sin, the consequences thereof being able to cause the perdition of Borough, determining its sons to murder each other.<sup>16</sup> Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known crimes as well: on the origin of the power of Tezeu is the suicide of Egeu.*<sup>17</sup>

It was said that the legends of founding Rome would have on origin indo-European myths, mythological inheritance which, camouflaged in the oldest history of borough, represents by itself a religious creation susceptible to reveal us the structure specific to Roman religion.<sup>18</sup>

Initially, there was in Rome, as in other states of antic world, a confusion between law (*ius*) and religion (*fas*). Consequently, the priests

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<sup>14</sup> Livius Titus, vol.I, p.14 and Plutarh, *Romulus*, III-XI.

<sup>15</sup> The foundation of a borough entailed very struct rites: in order to be able to see the will of gods a good omen space is delimited on the sky; the space of borough, on its turn, was delimited by the ground plot ploughed, symbolicaly, to become inviolable, sacred.

<sup>16</sup> Grimal Pierre, *Roman civilisation*, (Bucharest: Minerva, 1973), 16.

<sup>17</sup> Grimal Pierre, 16.

<sup>18</sup> Mircea Eliade, *History of faith and religious ideas*, (Bucharest: Scientific, 1992), 106.

were considered the maintainers and interpreters of divine will. The early legal practice was intensely maintained by pontiffs, from this college being elected as well the superior magistrates. The formula relied on a ritual practice involving accurate reproduction of some words deemed correct. The formulas were reserved to pontiffs, an elitist group of initiated people holding monopoly over this knowledge. *Pontifices* were the only one able to draft testaments, contracts and who could provide evidence in trials. Under the direction of *pontifex maximus*, *comitia curiata* determines the sacred law and pontifical college, controlled state religion and ritual training. Starting with 3<sup>rd</sup> century before Christ, the place of pontiffs is taken by a class of legal advisors providing legal consultations in private law, including, both the field of contract, and that of crime.

In a society where guarding sacred goods of borough is deemed public duty and the recognition of sacrificers was an obligation, but which extended as well the application of domestic discipline over free citizen, when state religion was interested in doing this, the accomplishment of religious obligations was primitively rigorously imposed, as well as sanctioned by criminal law. The one who, without being authorised in this respect, reveals the contents of the book of secret oracles, which may be consulted only based on a state order, risks capital punishment.<sup>19</sup> The guard of public sanctuaries was generally incumbent upon magistrates. When, exceptionally, other individuals were appointed as well, who neglected their duties, a capital crime was committed.<sup>20</sup> There is no technical term to describe the sacrileges committed against Roman religion. The expression of Tertullian, *crimen laesae romanae religionis* is accurate, but it is not used frequently. At the same time, the notion of *sacrilegium* although frequently used, is not accurate, as it designates, at least on origin, the theft from a temple.

Although, the cult of other Gods, than those of Rome or those adopted by state is not deemed a delict, certain forms of foreign religion were morally and politically disapproved. Thus, during the Republic and Empire frequently were taken measures against the Egyptian cult,

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<sup>19</sup> Val. Max., 1,1,13.

<sup>20</sup> Cicero, *Pro Rabirio*, 2,7.

perceived as being too shocking for occidentals.<sup>21</sup> The repression consists in police measures, such as: it was forbidden public exercise of such practices; the altars and chapels were removed; the foreigners were applied measures of coercion etc.<sup>22</sup> According to Septimiu Sever, the king had, besides the duty to honour the gods of old rite that of disapproving and punishing any alienation from the old rite.<sup>23</sup> Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.<sup>24</sup>

The notion of *iniuria* (injustice) of private law was applied more for the state, than for gods. The profanation of a temple or the trouble of development of a religious act has as consequence a criminal action ended with a condemnation. It is ignored the possibility of the existence of particular legal disposals in this respect. Anyway, if such disposals existed, they targeted exclusively the offence of state. Roman criminal law did not include any disposals for the offence committed against a divinity by words or writs.

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly represented a crisis situation in the relation with gods.<sup>25</sup> Therefore, the accurate signification of miracles must be deciphered by priests. The magic power of divining the future belonged only to magistrates and military heads; it consisted in the interpretation of forecasts.

The domestic cult, remained unchanged for 12 centuries of Roman history, during the entire period of paganism was led by *pater familias*.<sup>26</sup> On its turn, the public cult was under the control of state. During the royalty period, the king held the first rank in sacerdotal hierarchy, being considered *rex sacrorum* (king of sacred).<sup>27</sup> It is known the fact that in the home of King three categories of writs were practiced, dedicated to

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<sup>21</sup> Cicero, *De legibus*, 2,8,19.

<sup>22</sup> Livius Titus, 4,30; 25,1,7,5.

<sup>23</sup> Dion, 25,36.

<sup>24</sup> *Digeste*, 48,19,30.

<sup>25</sup> Eliade Mircea, vol.II, 107.

<sup>26</sup> Eliade Mircea, vol. II, 109.

<sup>27</sup> Eliade Mircea, vol. II, 111.

Jupiter, Iunonei, Ianus, Marte and Ops Consina (goddess of agrarian abundance).

It was rightfully asserted<sup>28</sup>, that rituals predominate not only in religious life of Romans, but also in politico-institutional life, marking deeply the entire mental of Roman people.

The cult of Dionis<sup>29</sup> was known in the entire Mediterranean world, including in Rome. Pursuant to the extension of Roman domination in Greece, the esoteric (secret) associations were spread in the entire peninsula, mainly in Campania.<sup>30</sup>

Consequently, in 186 before Christ was adopted a *Senatusconsult of Bacchanalibus* which had as scope the suppression of the cult of Dionis.<sup>31</sup> In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.<sup>32</sup> The certification of this law<sup>33</sup> is due to the discovery of an inscription in 1640 at Tiriolo. The Consul Spirus Postumius Albinus performed an investigation (*quaestio*) related to conspiracy (*coniuratio*) appeared related to practicing the cult of Dionis.

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<sup>28</sup> Cizec Eugen, *History of Rome* (Bucharest: Paideia, 2002), 18.

<sup>29</sup> Dionis was in Greek mythology the god of vegetation, of pomiculture, of wine, of ecstasy and of fertility, called on Romans both Bacchus or Liber. In Rome Dionis appeared in the theatre shows and it was called in sacrifices.

<sup>30</sup> Eliade Mircea, vol. II, 226.

<sup>31</sup> Eliade Mircea, vol. II, 126, uses the phrase of *nocturne orgy mysteries*.

<sup>32</sup> Walsh P.G., *Livy: His Historical Aims and Methods* (Londra: Cambridge University Press, 1967), 150 and 235.

<sup>33</sup> Pagan Victoria Emma, *Conspiracy Narratives in Roman History* (Texas: University of Texas Press, 2004), 51-53.

The supporters of the cult (around 7000) were accused of several crimes, among which: practicing ritual orgies, organisation of crimes for own enriching, forgery of documents etc. The text was analysed by several researchers, who emphasized the similarities with the persecution of Christians later on. There are some debates related to the nature of text and on the reasoning for which the practitioners of cult were punished. Thus, on the one hand, it is stated that, considering that religion was a state monopole, the particulars couldn't be allowed to organise such a cult and also, that it is manifested an opposition towards the influence of Greek culture, and on the other hand, it was asked the question whether in 186 before Christ existed indeed a criminal organisation using a bacchic cult to hide the activity. This cult was frequently associated<sup>34</sup> with orgy, crime and robbery or falsification.

When a conspiracy was discovered, the procedure consists in delegating a magistrate that leads an investigation, followed by the execution of leaders. It provides as well the neutrality of the group, as well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.<sup>35</sup> The consul took them in custody to protect them and presented the case to Senate. Although some of the supporters of the cult committed suicide, the majority were caught, judged and executed or enchained;<sup>36</sup> the same for the leaders of the cult. On their turn, the altars were destroyed.

## CONCLUSIONS

We believe that the asperity of punishments and the manner how this case was settled, must not be related to excessive intolerance of

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<sup>34</sup> According to Titus Livius there were bacchic rites not forbidden by state. However, the word *bacchic* represented mostly an insult, referring to immorality or sexual deviation.

<sup>35</sup> Livius Titus, 39,19,5.

<sup>36</sup> Livius Titus does not recount what happened further on with those enchained, however it is easy to understand. To be mentioned that Rome had no prison in the sense that we provide to the notion.

Romans opposite to religious cults, but rather to the prevention of a conspiracy. The severity and amplex of investigation, carried out within five years prove the political nature of trial. The danger was determined by the existence of a potential complot against state and not by practicing a cult, since, as Ovidiu asserts, *Rome was the most dignified place of meeting of all gods*. The foreign cults were accepted and acknowledged at Rome by formal integration in official cults. Therefore, we must consider the social, political and military context after the second Punic war, when the security of state should be protected against any form of conspiracy.

Taking advantage of this situation, the senate used the legislation to control foreign influence, mainly that of Greek culture, control manifested several times, just to suppress the religious influences. In this respect, in 173 before Christ two epicurean philosophers were exiled; and in 155 before Christ the philosopher Carneades was exiled as well, on initiative of Cato cel Bătrân.

Despite all these, some bacchic practices survived in Rome, being tolerated by state to a certain extent.

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# TOWARDS A BETTER UNDERSTANDING OF AMBIGUITY IN LAW: TYPES AND CAUSES

Adela TEODORESCU - CALOTĂ<sup>1</sup>

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## **Abstract:**

*Ambiguity is a pervasive concept; it permeates common language, much as it imbues legal language. Nevertheless, an in-depth comprehension of the concept of 'ambiguity' is absolutely necessary in law, as 'uncertainty of meaning of an expression used in a written instrument' spurs negative legal consequences. It hence becomes essential to grasp ambiguity in law, to know its manifold types and occurrences and, ultimately, to fully understand what exactly triggers its manifestation. The present paper will attempt to answer these questions by making reference to ambiguity not only on a purely linguistic level, but also by discussing the concept in relation to the farther-echoing implications of culture- and system bound multilingual legal language in contemporary European Union.*

**Key-words:** *ambiguity, legal language, typology, causes.*

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## **INTRODUCTION**

The language of law is nightmarishly fascinating. On the one hand, it calls for clarity, fluency and intelligibility, whilst disclaiming syntactic difficulties and obscure or equivocal phrases<sup>2</sup>. On the other hand, legal language cannot elude ambiguity, as requirements for precision and rigour are bound to clash with the proclivity of law for flexibility and malleability<sup>3</sup> - key survival responses to national and international socio-political and legal dynamics.

Ambiguity is a multi-faceted, multi-layered, interestingly ambiguous concept. Neither drafters nor interpreters escape it; it raises concerns when

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<sup>2</sup> For further details please see Article 8, § 4 of Law No. 24 of 2000 concerning norms of legislative technique for the elaboration of normative acts, republished, Official Gazette No. 260 (2010).

<sup>3</sup>Ion Deleanu, "Repere ale controlului de convenționalitate, ale controlului de constituționalitate și ale controlului judiciar asupra conceptelor juridice 'vagi' în materie procesual-civilă," *Romanian Review of Private Law* 5 (2014): 68.

encountered in multilingual legislation and is thus strongly discouraged<sup>4</sup>; ambiguity is but one of a long series of partially linked, yet confusingly dissimilar concepts such as indexicality, polysemy, vagueness or sense generality<sup>5</sup>; lastly, and crucially important, ambiguity in law may potentially bring about conflicts in relation to the meaning of legal concepts and phrases and consequently negatively affect the process of judicial interpretation and decision-making, the reading of cases or the process of legal translation with a view to international law. As the following sections will carefully render, ambiguity should not merely be analysed on a semantic and syntactic or structural level. Instead, ambiguity should be equally considered in relation to multilingual, supranational law and the broader socio-cultural context that has and continues to weigh heavily on legal language in terms of change and evolution.

## **LETTING DEFINITIONS ASIDE: A DISAMBIGUATION OF AMBIGUITY**

What is in fact ambiguity? The answer to this question takes precedence over any attempt to discuss the issue any further. Nonetheless, this is not a matter of simple definition, but more likely one of disambiguation because, as one author duly remarks, “paradoxically enough, the word ambiguity itself has more than one interpretation”<sup>6</sup>.

Thus, the entry on ambiguity in Black Law Dictionary advances two meanings of the word. The first relates to “doubtfulness or uncertainty of meaning or intention [...], or indistinctness of signification, esp. by reason of doubleness of interpretation”<sup>7</sup>. The meaning is further detailed in relation to statutory interpretation. Thus, if in “ordinary language this term [i.e. ambiguity] is often confined to situations in which the same word is capable of meaning

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<sup>4</sup> For further references regarding this issue, please consult EU official documents and reports related to drafting guidelines, e.g. European Parliament, Directorate General for Internal Policies, “Drafting European Union Legislation,” April, 2012, [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462442/IPOL-JURI\\_NT%282012%29462442\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462442/IPOL-JURI_NT%282012%29462442_EN.pdf); European Commission, “How to Write Clearly,” 2012, [EU – DG Translation – Translating EU texts made easier — links to resources](#) etc.

<sup>5</sup> Adam Sennet, “Ambiguity,” *The Stanford Encyclopedia of Philosophy* (2016), Edward N. Zalta (ed.), accessed April 19, 2016, <http://plato.stanford.edu/entries/ambiguity/>.

<sup>6</sup> Sanford Schane, “Ambiguity and Misunderstanding in the Law,” *Thomas Jefferson Law Review* 25.1 (2002): 167.

<sup>7</sup> Bryan A. Garner, *Black’s Law Dictionary* (U.S.: Thomson Reuters, 2014), 97.

two different things, [...] in relation to statutory interpretation, judicial usage sanctions the application of the word ‘ambiguity’ to describe any kind of doubtful meaning of words, phrases or longer statutory provisions”<sup>8</sup>. To exemplify the above mentioned, the Dictionary quotes from *Inland Revenue Commissioners v Hinchy*, a 1960 British case, which gives splendid evidence of a legal situation gone bad due to an unfortunate combination between a badly worded statute and a misinterpretation of the legislator’s intent by the House of Lords who, notwithstanding judgements made by lower courts, decided to read the statute literally and consequently reach the conclusion that the text contained no ambiguity and further “unanimously h[o]ld that the construction put upon the section by the Crown was the only one possible, however unreasonable the result might be”<sup>9</sup>. The debate revolved around Section 25(3) of the 1952 Income Tax Act according to which “a person found guilty of tax avoidance should ‘forfeit the sum £20 and treble the tax which he ought to be charged under this Act’”<sup>10</sup>. In spite of arguments brought forth by Mr. Hinchy’s lawyers, who interpreted the statute in the sense of a “£20 fine and treble the amount of tax which had been avoided [i.e. £14,25]”, and, in spite of judgements made by three lower courts who “deplor[ed] legislation which provided for such arbitrary penalty”<sup>11</sup>, the House of Lords opted for the literal rule of interpretation, thus reaching the conclusion that “the meaning of s.25(3) was that a tax avoider should pay a £20 fine and treble his whole tax bill for the year”<sup>12</sup>. The result was disastrous, both for Mr. Hinchy, who eventually had to pay around £438 and, most importantly, for other avoiders who “would have to be fined on the same basis as Hinchy had been fined” due to the rule of precedent which binds all courts under the English common law system<sup>13</sup>.

This is an example of ambiguity arisen from the poor drafting and bad wording of a statute which made leeway for conflicting interpretations and ultimately led to a misjudgement in decision-making. But, as Ewan MacIntyre rightly observes, drafters are not at fault entirely. Admittedly, Inland Revenue lawyers seized the opportunity and ingeniously took advantage of “a literal

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<sup>8</sup> Garner, *Law Dictionary*, 97.

<sup>9</sup> G. S. A. W., “The Hinchy Case,” *The Modern Law Review* 23.4 (1960): 426. *My emphasis*.

<sup>10</sup> Ewan MacIntyre, *Business Law* (Harlow: Pearson, 2008), 18. *My emphasis; this is the ambiguous phrase in debate*.

<sup>11</sup> G. S. A. W., “The Hinchy Case,” 426.

<sup>12</sup> MacIntyre, *Business Law*, 19.

<sup>13</sup> MacIntyre, *Business Law*, 19.

meaning that had not been apparent before”, thus being able to interpret the section of the law to their own and their client’s advantage<sup>14</sup>. But, interestingly enough, the House of Lords was no better interpreter either. The judges chose to give the text a literal meaning – and, we might add, did not refer to any other interpretative approach which might have shed a different light on the statute and, consequently, led to a different result – and accordingly labelled it as unambiguous. The confusion lies, therefore, in the use of the literal rule. Thus, “[w]hen the literal rule is applied the court is seeking not what Parliament meant to say when it enacted the statute, but rather the true meaning of the words which Parliament used”<sup>15</sup>.

The above given example has been taken from the English legal system of the 1960s. Nonetheless, instances of ambiguity related to ‘imprecision of legislation’ and subsequent divergences in judicial stands and interpretative approaches can be traced across various legal systems. Let us thus consider the contemporary Romanian system, more specifically, the Romanian criminal system and the entry into force of the new Criminal and Criminal Procedure Codes in 2014. Semantic deficiencies and explanatory gaps in the Code and the absence of “transitional provisions [...] on how the principle [of the most favourable law] should be applied”<sup>16</sup> have led to a clash between fundamentally opposed legal interpretations concerning the application of the above mentioned principle and to the consequent creation of blockages in practice<sup>17</sup>. The ‘doubtfulness or uncertainty’ associated with the manner in which the principle of ‘the most favourable criminal law’ (“[...] the principle by which a person should not be disadvantaged where there has been a change in the law<sup>18</sup>”) should be applied, has conducted to a fracture in judicial interpretation and to two completely different lines of thought. The first direction establishes the

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<sup>14</sup> MacIntyre, *Business Law*, 19.

<sup>15</sup> MacIntyre, *Business Law*, 19.

<sup>16</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA: Technical Report Accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Progress in Romania under the Co-operation and Verification mechanism /\* SWD/2015/0008 final \*/,” EUR-Lex, accessed April 20, 2016,

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<sup>17</sup> Laura Ștefan, “Divergențele în interpretarea legii penale mai favorabile, o șansă pentru infractori,” *Revista 22* (2014), accessed April 20, 2016, <http://www.revista22.ro/divergentele-in-interpretarea-legii-penale-mai-favorabile-o-sansa-pentru-infractori-41580.html>.

<sup>18</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

application of the law on autonomous institutions<sup>19</sup>, i.e. “the court arrives at the most favourable result by drawing on different provisions from both the old and the new codes [also known as the ‘pick and mix’ approach]”<sup>20</sup>. The second direction puts forth a different, ‘global’ approach, i.e. “the court determines whether the old or the new code is most favourable, and applies it throughout the case”<sup>21</sup>. As expected, each of the two manners of interpretation gives rise to different practical consequences. Thus, if the courts go along with the ‘pick and mix’ approach, a *lex tertia* is practically generated by judicial process. If, on the other hand, the ‘global’ approach is preferred (whereby the combination of provisions of the two codes is impossible), one of the two codes “is applied in its entirety and in adherence to the philosophy which underpins it”<sup>22</sup>. Two months after the entry into force of the new Criminal Code, the predicted clash finally occurred. Thus, on April 14<sup>th</sup> 2014, the HCCJ chose the ‘pick and mix’ approach in a ruling on a “question relating to prescription regime of penalties”<sup>23</sup>. The decision, officially published on April 30<sup>th</sup>, was applicable to all courts. On May 6<sup>th</sup>, the CCR, in reply to an exception of unconstitutionality raised by HCCJ, made a perfectly contradictory ruling on the matter, by opting for the ‘global’ approach. The decision made by CCR subsequently bound all courts, including the HCCJ, who, “later that month [...] definitely closed the issue of the most favourable law in line with the CCR’s interpretation”<sup>24</sup>.

Similarly to the previous case, poor drafting was here a source of conflict as well. The ‘errors’ and ‘omissions’ in the new codes, the Government’s delayed reaction in addressing the issues and amending the codes and the lack of guidelines concerning the application of the principle of ‘the most favourable law’ contributed to the division of “judges in all courts, including the HCCJ,

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<sup>19</sup> For further comments on the concept of ‘autonomous institution’ to which the same ‘indistinctness of significance’ applies (and which consequently relativizes interpretation) please see Simona Cîrnaru, “Aplicarea în timp a legii penale mai favorabile – potențial conflict între interpretarea unei norme legale și exigențele unui principiu constituțional,” *Juridice* (2014), accessed April 24, 2016, <http://www.juridice.ro/308649/aplicarea-in-timp-a-legii-penale-mai-favorabile-potential-conflict-intre-interpretarea-unei-norme-legale-si-exigentele-unui-principiu-constititional.html>.

<sup>20</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

<sup>21</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

<sup>22</sup> Ștefan, “Divergențele în interpretarea legii penale mai favorabile”.

<sup>23</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

<sup>24</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

risking inconsistent interpretations”<sup>25</sup>. The ‘lack of clarity and definiteness’<sup>26</sup> revolving around the principle of ‘the most favourable law’ arose not as a result of the phrase as such, but as a consequence of deficiency in transitional provisions. In other words, the legislator did not “expressively establish [...] an effective solution, which [eventually] led to the outline of two tendencies of contrary views, both in doctrine and in case law”<sup>27</sup>.

A second definition of the word ‘ambiguity’ provided for by Black’s Law Dictionary, and on which we shall not ponder much, refers to “an uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations”<sup>28</sup>. An example of this is found in *Polite v State of Florida*<sup>29</sup>, decided September 27<sup>th</sup> 2007. The ambiguity concerned resided in the language of the statute. The conflict issue in the case was “whether knowledge that a victim [was] a law enforcement officer [was] an essential element of the offense of resisting an officer with violence under section 843.01, Florida Statutes (2002)”<sup>30</sup>. The respective section of the statute in debate provided

Whoever knowingly and wilfully resists, obstructs, or opposes any officer, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084<sup>31</sup>.

The wording of the section, more specifically of the phrase “knowingly and wilfully resists, obstructs, or opposes any officer” allowed for the statute to become “subject to competing reasonable interpretations as to whether knowledge of the officer’s status [was] an essential element of resisting an

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<sup>25</sup> “COMMISSION STAFF WORKING DOCUMENT ROMANIA”, EUR-Lex.

<sup>26</sup> Himani Singh, “Language of Law – Ambiguities and Interpretation,” *American International Journal of Research in Humanities, Arts and Social Sciences* 2.2 (2013): 122.

<sup>27</sup> Gheorghe Ciobanu, “Criminal Law Reform by the New Codes,” *Annals of the “Constantin Brâncuși” University of Târgu Jiu, Letter and Science Series* 2 (2015): 70.

<sup>28</sup> Garner, *Law Dictionary*, 97.

<sup>29</sup> For a complete overview of the case, please see *Polite v State of Florida*, SC06-1401 (2007). The case can be found online at <http://caselaw.findlaw.com/fl-supreme-court/1379439.html>, accessed April 15, 2016.

<sup>30</sup> *Polite v State of Florida*, SC06-1401 (2007).

<sup>31</sup> *Polite v State of Florida*, SC06-1401 (2007). *My emphases*.

officer with violence”<sup>32</sup>. The two opposite constructions of meaning held as follows. On the one hand, the State and one court (the Third District) interpreted the statute in light of the meaning inferable from the ‘plain language of the section’ and thus reached the conclusion that “[...] ‘the legislature did not include knowledge of the victim’s status as an element of the offense’, because the adverbs knowingly and wilfully only modify the verbs ‘resists, obstructs, or opposes’ rather than the entire phrase”<sup>33</sup>. At the other side of the spectrum lay the decision made by a different court (the Fifth District), according to whom “knowledge of the officer’s status is an element of the crime of resisting an officer with violence”<sup>34</sup>.

There is only so much definitions can do. They can split the concept into smaller units, which they can further separately analyse and explain. Nonetheless, they cannot capture ambiguity in all its complexity and multifacetedness. What is then perhaps more important to understand, is that ambiguity is a complex phenomenon which must be given meaning in its entirety, such as it occurs in different stages of legal creation, in its relation to the multiplicity of actors (who we can broadly call drafters and readers) with whom it is bound to intersect and who may equally ‘use’ or ‘abuse’ it, depending on an array of objective and subjective reasons, and in view of the various disciplines that try to scientifically dissect the concept (linguistics, pragmatics, philosophy etc.).

When considered within the frame of law, ambiguity is subject to yet another strand of analysis, namely the legal and non-legal purpose(s) and interest(s) it serves. Not always is ambiguity an unintentional error in a legal text, a quite common, inevitable phenomenon as a result of either poor drafting or mistranslations (for instance, in international law). Instead, we speak here of ‘calculated’ or ‘deliberate’ ambiguity in law, whose roles and scopes will be revealed in a different section of the paper.

## **AMBIGUITY ET. AL.: CLARIFYING ‘WHAT AMBIGUITY IS NOT’**

As stated at the beginning of this paper, ambiguity should be differentiated from confusingly similar, yet essentially different phenomena, such as vagueness, polysemy or generality. These

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<sup>32</sup> Polite v State of Florida, SC06-1401 (2007).

<sup>33</sup> Polite v State of Florida, SC06-1401 (2007).

<sup>34</sup> Polite v State of Florida, SC06-1401 (2007).

phenomena should not be regarded as interchangeable (even though they are sometimes seen and used as synonyms). Instead, they should be studied separately, in relation to each one's roles, functions and scopes in a given context.

However, “distinguishing ambiguity from these related phenomena can be a difficult and tendentious affair”<sup>35</sup>. The purpose of this section is not to treat the issue of differentiation between ambiguity and other cases exhaustively, but to briefly mention and describe those “other typical cases with which ambiguity is easily conflated”<sup>36</sup>.

Vagueness is one such case, as “notoriously (and ironically) difficult”<sup>37</sup> to pin down, as is the concept of ambiguity itself. From a lexical point of view, the word ‘vague’ suggests “something that lacks clarity, that is obscure, confusing, indefinite”<sup>38</sup>. *Black's Law Dictionary* defines the word as an “uncertain breadth of meaning; unclarity resulting from abstract expression <the phrase ‘within a reasonable time’ is plagued by vagueness – what is reasonable?>”<sup>39</sup>.

Borderline cases, i.e. “cases that are neither clearly in the extension of the vague term nor clearly not in its extension”<sup>40</sup> characterise vague terms. Vagueness should always be regarded in view of the extension and intension of terms. Thus, in the case of vagueness, “the ‘intension’ of the

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<sup>35</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

<sup>36</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

<sup>37</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

<sup>38</sup> Deleanu, “Repere ale controlului de convenționalitate,” 72.

<sup>39</sup> Garner, *Law Dictionary*, 1783.

<sup>40</sup> Sennet, “Ambiguity,” accessed online April 19, 2016. For further explanations concerning ‘borderline cases’, please also see Francis Jeffrey Pelletier and István Berkeley, “Vagueness,” accessed online April 27, 2016, “[a] A borderline case is a situation in which the application of a particular expression to a (name of) a particular object does not generate an expression with a definite TRUTH-VALUE. That is, the piece of language in question neither applies to the object nor fails to apply;” Rosanna Keefe, *Theories of Vagueness* (Port Chester, NY, USA: CUP, 2000), 6; also see the entry on vagueness in Garner, *Law Dictionary*, 1783, “[vagueness is] an imprecision of meaning, common on the borderline of a term’s application. [...] the nature and cause of vagueness is probably not relevant to legal theory – only the fact (experience) of vagueness.”

term –‘the sum of attributes comprehended in the concept’<sup>41</sup>– can be precise, but the ‘extension’ – ‘the class of objects to which a sign or term refers’<sup>42</sup> – is indeterminate”<sup>43</sup>. Distinguishing between intension and extension is an important requisite for avoiding lexical vagueness in law<sup>44</sup>, even more so in the context of multilingual law and legal translations. Susan Šarčević, in *New Approach to Legal Translation*, raises, for instance, the issue of general terms which belong to distinct legal systems and cultures and which share the intension, but have different extensions<sup>45</sup>. She gives the example of the German term ‘Konkurs’ which has the same meaning as the English term ‘bankruptcy’, but which nonetheless refers to only “two types of insolvency proceedings, [namely] *Konkurs* (in the narrow sense) and *Vergleichsverfahren*. Thus it can be said that, although both *bankruptcy* and *Konkurs* happen to be hyponyms of themselves, these hyponyms are not congruent. In other words, the congruency is limited to intension.”<sup>46</sup>

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<sup>41</sup> Enrique Alcaraz Varó and Brian Hughes, *Legal Translation Explained* (Oxon, NY: Routledge, 2014), 31.

<sup>42</sup> Varó and Hughes, *Legal Translation*, 31. Examples of legal definitions of terms either by extension, or by intension are offered by Varó and Hughes, above. An example of legal definition by extension can be the following: “*container* includes any container, trailer, transportable tank, flat or pellet or any similar article used to consolidate goods”. An example of legal definition by intension can be the following: “‘*carriage*’ means the whole of the operations and services undertaken by the Carrier in respect of the goods”.

<sup>43</sup> Deleanu, “*Reperere ale controlului de convenționalitate*,” 72.

<sup>44</sup> For an ample, illustrative discussion regarding the issue of differentiation between intension and extension, please see Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law. A Critique of Contemporary Legal Nonpositivism* (Berlin, Heidelberg: Springer, 2013). The author, in his analysis of the concept of ‘validity of law’, notes that “a precise division between the analysis of the meaning of the concept of legal validity and the analysis of the extension of this concept, is of paramount importance for understanding the essence of the validity of law and for developing its adequate juristic conception” (218). Alternatively, a failure to operate a clear-cut distinction between the intension (meaning) and extension of the concept of ‘legal validity’ is likely to cause “many misunderstandings, controversies and disputes [...]” (219).

<sup>45</sup> Susan Šarčević, *New Approach to Legal Translation* (The Hague, London, Boston: Kluwer Law International, 1997), 240.

<sup>46</sup> Šarčević, *New Approach to Legal Translation*, 240.

Linguistic vagueness<sup>47</sup> differs from generality, open texture and ambiguity.

Firstly, by ‘generality’ we understand lack of details, a general term being characterised by indefiniteness and contextual neutrality<sup>48</sup>. General terms are neither vague – they do not admit borderline cases –, nor ambiguous<sup>49</sup>. In the legal field, generality may, for instance, apply to rules, in which case we understand by it “the extent to which a law at inception applies by its terms to more than one instance within any of its dimensions”<sup>50</sup>. We can, thus, refer to a statute such as “‘Park users may not take vehicles into the park’” as general, due to the fact that it “applies not just to one park guest and not merely to automobiles, [but] to all park guests and all automobiles”<sup>51</sup>.

Secondly, Friedrich Waismann defines ‘open texture’ (the German original expression is *Porosität der Begriffe*) not as vagueness, but as “the mere possibility of vagueness”<sup>52</sup>. More explicitly, we understand by ‘open texture’ the “uncertainty regarding meaning for logically possible, but realistically highly unlikely, events”<sup>53</sup>.

Thirdly, and most importantly with a view to the present article, vagueness should not be confused with ambiguity. Thus, we speak of vagueness when “the intended scope of the term is [...] unclear”<sup>54</sup>. To exemplify the notion in question, I. Deleanu exposes in his article “Reperere ale controlului de convenționalitate...” Article 6, para 1, of the

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<sup>47</sup> Vagueness can also refer to “non-linguistic items ([...] concepts, memories, objects), or semi-linguistic items ([...] statements, propositions)” in Pelletier and Berkeley, “Vagueness,” accessed online April 27, 2016.

<sup>48</sup> Deleanu, “Reperere ale controlului de convenționalitate,” 72.

<sup>49</sup> Pelletier and Berkeley, “Vagueness,” accessed online April 27, 2016.

<sup>50</sup> Robert S. Summers, “The Formal Character of Law – Statutory Rules,” in *Challenges to Law at the End of the 20<sup>th</sup> Century: Sources of Law and Legislation*, ed. Elspeth Attwoll and Paolo Comanducci (Stuttgart: Franz Steiner, 1998), 109.

<sup>51</sup> Summers, “The Formal Character of Law,” 109.

<sup>52</sup> Brian H. Bix, “Defeasibility and Open Texture,” in *The Logic of Legal Requirements: Essays on Defeasibility*, ed. Jordi F. Beltrán and Giovanni B. Ratti (Oxford: OUP, 2012), 195.

<sup>53</sup> Bix, “Defeasibility and Open Texture,” 195.

<sup>54</sup> George C. Christie, “Vagueness and Legal Language,” *Minnesota Law Review* 48 (1964): 886.

*European Convention on Human Rights*, concerning *the right to a fair trial* which, as can be seen for the words in *italics*, is replete with vague terms:

In the determination of his civil rights and obligations or of any criminal charge against him, *everyone* is entitled to a *fair and public hearing* within a *reasonable time* by an *independent and impartial tribunal established by law*. Judgment shall be *pronounced publicly* but the press and public may be excluded from all or part of the trial *in the interests of morals, public order or national security* in a *democratic society*, where the *interests of juveniles* or the protection of the *private life* of the parties so require, or to the extent *strictly necessary* in the opinion of the court in *special circumstances* where publicity would prejudice *the interests of justice*<sup>55</sup>.

We speak of ambiguity on the other hand “to refer to a situation where a general term may be at once *clearly* true of certain objects and at the same time *clearly* false of the same objects”<sup>56</sup>. For instance, in the case *Bank v Tenn. Farmers Mut. Ins. Co.*, 2007, the term ‘foreclosure’ was deemed ambiguous by the court, i.e. it “was capable of two reasonable interpretations,”<sup>57</sup> because it was unclear if it referred to ‘foreclosure proceedings’ or to ‘foreclosure sale’<sup>58</sup>.

Instances of ambiguity in drafting are commonly encountered. It is thus important to understand why ambiguity occurs, which forms it may take and how it can be resolved. Why is it important to answer these questions? Because “ambiguity in the laws can undermine their applicability and our ability to obey them”<sup>59</sup>.

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<sup>55</sup> The text in English is taken from the original version, Council of Europe, “European Convention on Human Rights,” April 26, 2016, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). However, the *emphases* are the above mentioned author’s.

<sup>56</sup> Christie, “Vagueness and Legal Language,” 886.

<sup>57</sup> *Provident Bank v Tennessee Farmers*, No. 06-5502, 2007 U.S. App. LEXIS 10671 (6<sup>th</sup> Cir. May 2, 2007).

<sup>58</sup> Ken Adams, “Sources of Uncertainty in Contract Language,” Adams on Contract Drafting, accessed April 26, 2016, <http://www.adamsdrafting.com/sources-of-uncertainty/>.

<sup>59</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

If vagueness and generality have been both cleared up and differentiated from ambiguity, it remains for polysemy to be further down expounded.

Although closely related to ambiguity and often regarded as subsumable to it<sup>60</sup>, polysemy may sometimes be understood differently. The distinction in this case separates “ambiguity in words [as] a matter of two lexical entries that correspond to the same word” from polysemy, defined as “a single lexeme that has multiple meanings”<sup>61</sup>. In respect of legal terms, we speak of two forms of polysemy, i.e. general – if the terms belong to the general, as well to the legal vocabulary, in which case their meanings can be either identical or partially different – and internal – in which case the terms have two or more meanings within the legal sphere<sup>62</sup>.

An understanding of ambiguity, as a recurrent phenomenon in law, implies knowledge of other related, yet dissimilar cases. Since we have now described and explained differences between ambiguity and vagueness, generality, open texture and polysemy (phenomena equally encountered in the legal field), we can go on to a listing and exemplification of the various types of ambiguity in law.

## **TYPES OF AMBIGUITY IN LAW**

*Black’s Law Dictionary* lists four types of ambiguity, namely ‘ambiguity (up)on the factum,’ ‘calculated or deliberate ambiguity,’ ‘latent or extrinsic ambiguity’ and ‘patent or intrinsic ambiguity.’

***Ambiguity on the factum*** is a type of ambiguity that relates to “the foundation of an instrument”<sup>63</sup>, it “must be on the face of the paper”<sup>64</sup>. In other words, “there must be some ambiguity not upon the

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<sup>60</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

<sup>61</sup> Sennet, “Ambiguity,” accessed online April 19, 2016.

<sup>62</sup> For examples and more information on the topic of polysemy of legal terms, please see Adriana Stoichițoiu-Ichim, *Semiotica Discursului Juridic* (Bucharest: University of Pitesti, 2006), 115-122.

<sup>63</sup> Garner, *Law Dictionary*, 97.

<sup>64</sup> Edwin Maddy et. al., *Digest of Cases Argued and Determined in the Arches and Prerogative Courts of Canterbury, the Consistory Court of London, and the High Court of Delegates* (London: Saunders and Benning, 1835), 209.

construction but upon the factum of the instrument, [i.e.] not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument, [or] whether the codicil was meant to republish a former or a subsequent will, [or] whether the residuary clause was fraudulently introduced without the knowledge of the testator [...]"<sup>65</sup>.

***Calculated or deliberate ambiguity***<sup>66</sup> refers to the “purposeful use of unclear language, usu. when two negotiating parties cannot agree on clear, precise language and therefore leave a decision-maker to sort out the meaning in case of a dispute”<sup>67</sup>. An example of intentionally obscure language is provided by the Policy adopted by U.S. with regard to the “use [of] nuclear weapons in retaliation for an adversary’s use of chemical or biological weapons”<sup>68</sup>. The clear aim of the Policy, also

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<sup>65</sup> Joseph Phillimore et. al., *Reports of Cases Argued and Determined in the English Ecclesiastical Courts with Tables of the Cases and Principal Matters* (Philadelphia: P. H. Niklin and T. Johnson, 1841), 453.

<sup>66</sup> The Dictionary suggests *vagueness* as the better word to be used instead of *ambiguity* in the phrase above. To read more on the functions and scopes of intentional vagueness in law, please consult Deleanu, “Repere ale controlului de convenționalitate,” 73-75 (with reference to the vague concepts and notions that necessarily populate the text of the European Convention on Human Rights and whose role is to achieve ‘harmonization,’ ‘unification,’ and ‘uniformity’ in the European plurilingual space, across which we encounter a diversity of sometimes radically different legal systems and cultures, as well as to allow the European Court to interpret the Convention in a ‘dynamic’ and ‘evolving’ manner); Doris Liebwald, “Law’s Capacity for Vagueness,” *Int J Semiot Law* 26 (2013): 400 (with reference to the need of abstract legal language “to cover future, not yet predictable circumstances,” or as indicator of lack of political consent with regard to a specific matter); Dan Claudiu Dănișor, *Drept Constituțional și Instituții Politice*, Vol. 1 (București: C. H. Beck, 2007): 640 (with reference to the unclear language of constitutions, deliberately used as a manner of ensuring their durability and adaptation to changeable philosophical and legal conceptions); Timothy Endicott, “Law is Necessarily Vague,” *Legal Theory* 7 (2001): 379-385 (arguments pro vagueness in law include the idea that precision is not always desirable in law, quite the contrary, “every precise law incurs arbitrariness in virtue of its precision”).

<sup>67</sup> Garner, *Law Dictionary*, 97.

<sup>68</sup> In Scott Sagan, “The Commitment Trap. Why the United States Should Not Use Nuclear Threats to Deter Biological and Chemical Weapons Attacks,” *International Security* 24.4 (2000), accessed April 26, 2016, <http://www3.nd.edu/~dlindley/handouts/roadmapintro.html>.

known as the “‘calculated ambiguity’ doctrine,” is to be ‘deliberately unclear about its plans’, as underscored by Secretary of Defense William Cohen: “‘We think the ambiguity involved in the issue of nuclear weapons contributes to our own security, keeping any potential adversary who might use either chemical or biological [weapons] unsure of what our response would be’”<sup>69</sup>.

*Ambiguitas latens*, or *extrinsic ambiguity* refers to a type of ambiguity that “does not readily appear in the language of a document, but instead arises from a collateral matter once the document’s terms are applied or executed”<sup>70</sup>. A notorious example of such an ambiguity in English law is given by *Raffles v Wichelhaus*, an 1864 case which involved two different vessels by the name of ‘Peerless’, one buyer who expected his purchased goods to be on the Peerless ship that was to leave Bombay in October, and one seller who placed the merchandise on a Peerless ship that was to leave the same port in December, both parties being in unawareness of each other’s intentions<sup>71</sup>. Although the language of the written agreement may have seemed to be clear, it was only subsequent to the application of the contract that the otherwise known ‘ambiguity in reference’ surfaced.

In contrast to the aforementioned type of ambiguity, *ambiguitas patens* appears “on the face of the document, arising from language itself”<sup>72</sup>. Intrinsic ambiguity, otherwise known as ‘ambiguity in sense’ corresponds to lack of clarity in as far as the meaning of words is concerned. It differentiates from the previous type of ambiguity in that intrinsic ambiguity refers to situations “where words are omitted, or contradict each other”<sup>73</sup>. Cases of intrinsic ambiguity are numerous, especially if we consider them within the context of multilingual, supranational law. To enumerate just two cases, the different official EU variants containing guidelines drawn up for the needs of legal drafters

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<sup>69</sup> Sagan, “The Commitment Trap,” accessed April 26, 2016, <http://www3.nd.edu/~dlindley/handouts/roadmapintro.html>.

<sup>70</sup> Garner, *Law Dictionary*, 97.

<sup>71</sup> Schane, “Ambiguity and Misunderstanding in the Law,” 168.

<sup>72</sup> Garner, *Law Dictionary*, 97.

<sup>73</sup> Garner, *Law Dictionary*, 97.

and translators, make available plentiful examples concerning ambiguous language and the manner in which such instances should be avoided. Thus, the “Misused English Words and Expressions in EU Publications” signed by the European Court of Auditors warns translators about potential ambiguities which may rise around the English preposition ‘of’. Thus, on the one hand, the authors of the paper advice against the use of the preposition as an ‘all purpose’ word instead of a sometimes better choice of connectors such as ‘from’, ‘by’, ‘in’, ‘on’, or ‘at’<sup>74</sup>. The misuse of the preposition in such expressions as “‘previous reports of the Court’ instead of ‘previous reports by the Court’, ‘communication of the Commission’, instead of ‘communication (letter?) from the Commission’”<sup>75</sup> may lead to alterations of meaning and consequent misunderstandings. Moreover, the use of the preposition instead of the “possessive ‘-s’” or “noun-noun compounds” (for instance, “(the reports of the Court/the Court’s reports, communications of the Commission/Commission communications”) create errors which can “lead to ambiguity even where it is not grammatically wrong; for example, in the phrase ‘the system of control of the Commission’, is the Commission being controlled (audited?) or is it doing the controlling?”<sup>76</sup>. A further notoriously ambiguous example revolves around the expression ‘third countries’ which is frequently used in EU texts (such as the Treaties and regulations) to denote countries which are not Member States<sup>77</sup>. The expression is however ambiguous and “largely

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<sup>74</sup> European Court of Auditors, Secretariat General Translation Directorate, “Misused English Words and Expressions in EU Publications” (2013): 52, accessed online April 26, 2016,

[http://ec.europa.eu/translation/english/guidelines/documents/misused\\_english\\_terminology\\_eu\\_publications\\_en.pdf](http://ec.europa.eu/translation/english/guidelines/documents/misused_english_terminology_eu_publications_en.pdf).

<sup>75</sup> European Court of Auditors, “Misused English Words,” 52.

<sup>76</sup> European Court of Auditors, “Misused English Words,” 52.

<sup>77</sup> European Court of Auditors, “Misused English Words,” 62; European Commission, Directorate-General for Translation, “English Style Guide. A Handbook for Authors and Translators in the European Commission” (2016): 89, accessed online April 26, 2016, [http://ec.europa.eu/translation/english/guidelines/documents/styleguide\\_english\\_dgt\\_en.pdf](http://ec.europa.eu/translation/english/guidelines/documents/styleguide_english_dgt_en.pdf).

incomprehensible to outsiders”<sup>78</sup> due to the fact that it is often misinterpreted to mean ‘third-world countries’<sup>79</sup>.

## **CAUSES OF AMBIGUITY IN MULTILINGUAL CONTEXTS: THE CASE OF THE EUROPEAN UNION<sup>80</sup>**

The discussion with regard to ambiguity in multilingual legal texts is ample and cannot be fully covered in the present section. Instead, several key causes that spur ambiguity in legal language in a plurilingual and multicultural legal setting such as that of the European Union will be presented below.

*Non-equivalence* of legal concepts used in different versions of official EU documents is one such cause. Legal concepts are many-faceted semantic entities which are prone to acquiring new shades of meaning each time they transgress languages, societies, cultures, legal systems. Consequently, instances tend to occur where nuances in meaning become misinterpretations, or impartial or non-equivalent translations. . Of such instances speaks Maurizio Gotti when he refers to translations of the English version of the *European Convention of Human Rights* into other official languages and renders such expressions as EN ‘fair and regular trial’/ SP ‘juicio justo y imparcial’/ FR ‘procès juste et équitable’ as unsatisfactory, and the series of adjectives EN ‘regular’/ SP ‘imparcial’/ FR ‘équitable’ as non-equivalent<sup>81</sup>. Further examples make reference to the use of ‘stilted and rather antiquated terminological equivalents’ – the English word ‘boatmen’ as an odd correspondent to the French ‘bâteliers’ in “the ‘bâteliers’ problem” – or to the delicate task of

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<sup>78</sup> European Court of Auditors, “Misused English Words,” 62.

<sup>79</sup> European Commission, “English Style Guide,” 89.

<sup>80</sup> This section and the following are based on brief references to earlier remarks concerning causes of ambiguity in multilingual legal settings to be consulted in detail in Adela Teodorescu-Calotă, “On Linguistic ‘Deficiencies’ in the European ‘Leg[al] Division’. Part I: Generalities and Observations,” *Suppliment Acta Universitatis Lucian Blaga* (2015): 448-469.

<sup>81</sup> Maurizio Gotti, “The Formulation of Legal Concepts in Arbitration Normative Texts in a Multilingual, Multicultural Context” in *Language, Culture and the Law: the Formulation of Legal Concepts across Systems and Cultures*, ed. Vijay K. Bathia et. al. (Bern: Peter Lang AG, 2008), 24.

translating information that concerns the various institutions of the Member States – should ‘Chambre des députés’ be translated into English as ‘House of Commons’ and into German as ‘Bundestag’ or should it preferably be left in the original language alongside an additional explanation: “‘Chambre des députés’ (French Parliament)”?<sup>82</sup>

*Supranational concepts*, i.e. those concepts which belong to the jargon of the European Union, also foster ambiguity. Thus, it is often so that legal concepts generated at European level do not have true corresponding equivalents, i.e. legal concepts that occupy identical positions and perform identical functions within the national legal system that has adopted them. And even in those cases where equivalents do exist, “it may be misleading to translate the generic term by the ‘correct’ specific term used at national level [...]. [U]sing a correct but nationally specific term could lead to confusion; a supranational term which has no immediate national ‘meaning might be preferable. This is because the text is about a single supranational concept, not the national equivalent (or rather: [28] slightly different national equivalents, one for each of the [28] Member States)”<sup>83</sup>. To name but a few such words or expressions, reference can be made to airy expression ‘**acquis communautaire**’– or ‘Union acquis’, as it is known after the entry into force of Lisbon Treaty, the use of the Euroenglish term ‘**transparency**’, “in the sense that the process by which decisions are taken are visible to the mass media and the public, or in the words that the press are free to report and comment”<sup>84</sup>, or to the term ‘**additionality**’ which is commonly used in Eurojargon to “denote the principle that EU payments should be additional to those from national sources”<sup>85</sup>.

The *untranslatability of essentially culture-bound terms* is a further matter of concern. In this respect, the most basic concepts in English law do not have suitable, direct equivalents in the other

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<sup>82</sup>Emma Wagner, Svend Bech, and Jesús M. Martínez, *Translating for the European Union Institutions* (Oxon: Routledge, 2002), 63.

<sup>83</sup>Emma Wagner et. al., *Translating for the European Union*, 64.

<sup>84</sup> R. H. Williams, *European Union Spatial Policy and Planning* (London: Paul Chapman Publishing Ltd., 1996), 62.

<sup>85</sup> Williams, *European Union Spatial Policy and Planning*, 62.

languages of the Union and are thus deemed discrepant in terms of meaning and interpretation:

To translate into English technical words used by lawyers in France, in Spain, or in Germany is in many cases an impossible task, and conversely there are no words in the language of the continent to express the most elementary notions of English law. The words **common law** and **equity** are the best examples thereof; we have to keep the English words [...] because no words in French or in any other language are adequate to convey the meaning of these words, clearly linked as they are to the specific history of English law alone<sup>86</sup>.

*Linguistic enlargement* and the introduction of ‘pivot’ or ‘relay’ languages in the translation system used, for instance, by the European Court of Justice – with the scope of unburdening the process of translation and diminishing the workload of translators – are sources of ambiguity as well. Thus, “the inherent problem with enlargement for the Court is a linguistic one... there is the danger that, as a result of the ‘Chinese whispers’ – [the alteration or ‘loss’ of the original meaning in the translation process<sup>87</sup>] – that will increase with pivot translation, there will be discrepancies and differences between language versions of judgements, which would then be applied differently in various Member States”<sup>88</sup>. However, if judgements were to be interpreted differently at national level across the Member States, there would be a deflection from the principle of ‘uniform application’ of EU. Linguistic compromises, be they intentional or unintentional, are not a choice in a legal system that directly affects “not only governments, but also natural and legal persons”<sup>89</sup>. If in common language misunderstandings and ambiguities can be easily negotiated and superseded, in a legal system and all the

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<sup>86</sup> David René, *English Law and French Law* (London: Stevens, 1980), 39 in Bathia et. al., *Language, Culture and the Law*, 24. My emphasis.

<sup>87</sup> Karen McAuliffe, “Enlargement at the European Court of Justice: Law, Language and Translation,” *European Law Journal* 14.6 (2008), 812, accessed May 1<sup>st</sup>, 2015, doi/10.1111/j.1468-0386.2008.00442.x.

<sup>88</sup> McAuliffe, “Enlargement at the European Court of Justice,” 812.

<sup>89</sup> Olga Łachacz and Rafał Mańko, “Multilingualism at the Court of Justice of the European Union: Theoretical and Practical Aspects,” *Studies in Logic, Grammar and Rhetoric* 34.47 (2013), 79, accessed April 25<sup>th</sup>, 2015, doi: 10.2478/slgr-2013-0024.

more in an international legal system, language is bound to produce effects if misunderstood or ambiguously formulated. One should not belittle the fact that “linguistic guarantees are a precondition of full enjoyment of the right to a fair trial. Although the right to use one’s preferred language is not recognised as a universal human right, it should be underscored that the right to a fair trial extends to linguistic guarantees with regard to proceedings”<sup>90</sup>.

**Poor drafting** is yet a further threat to an original document being translated, namely being incorrectly interpreted. In this particular case, it falls on the translator’s shoulders to assess whether an ambiguous concept or phrase is being used correctly or incorrectly in the original draft and how it should be disambiguated. Confusions will inevitably emerge. In Emma Wagner *et. al.*, reference is, for instance made to the employment in the process of writing of the phrase ‘payment delays’, when one “really meant ‘payment periods’”<sup>91</sup>. From this point forward, one witnesses a domino effect. When translating the poorly written original, the “French translator, [by making deductions from the general context of the text or addressing himself/ herself to the author, if at all known] has to decide whether the English word ‘delay’ is being used correctly by the author, and should be translated by the French ‘retard’, or if it is being wrongly used and should be translated by ‘délai’”<sup>92</sup>. Nonetheless, the French translator is not the only one who has to make a choice and take a decision. “At the same time, the French translator’s colleagues who are translating the same text into the other nine official languages will be having to take the same decisions and do the same detective work – and, one hopes, arriving at the same conclusions, although there is no guarantee that they will”<sup>93</sup>.

## CONCLUSIONS

In handling multilingual legal concepts, we may therefore come across ‘untranslatability’; odd, confusing pairs such as “safety and

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<sup>90</sup> Lachacz and Mańko, “Multilingualism at the Court of Justice,” 77.

<sup>91</sup> Emma Wagner *et. al.*, *Translating for the European Union*, 71.

<sup>92</sup> Emma Wagner *et. al.*, *Translating for the European Union*, 71.

<sup>93</sup> Emma Wagner *et. al.*, *Translating for the European Union*, 71.

security”); concepts with multiple corresponding translations and implicitly diverging meanings such is the case of the German ‘Sicherheit’ which can be translated into ‘safety’, ‘safety and security’, ‘security’, ‘safeguard’ or ‘guarantee’ and thus vary in meaning from one situation to another; and contested concepts, in which case problems reside not in translation but in the fact that these concepts are culturally bound and, as such understood and applied or interpreted differently according to the meaning invested in them by a certain legal system on the one hand, and their role, function and purpose within that legal system on the other hand (for example, ‘good faith’, ‘reasonableness’).

Language ambiguity becomes a concern if it pervades law. Nationally and even more so internationally, ambiguous concepts open to multiple translations and/ or interpretations come into conflict with the principles of ‘clarity’ and ‘accessibility’ to all readers, be they translators, interpreters, judges, parties involved, national governments or lay people. While some concepts are necessarily fluid and consequently permit certain degrees of flexibility according to circumstances, most concepts should be unequivocal so as to avoid confusion, mistranslation or interpretation.

The linguistic enlargement within the European Union has brought about workloads and implicitly disproportions in terms of available human and time resources. It is all the more important under these circumstances firstly to understand the phenomenon of ambiguity in its entirety and complexity, i.e. in relation to linguistics, but also to other socio-cultural phenomena which may influence and exacerbate ambiguity, and secondly, to limit ambiguity to a minimum and avoid it whenever possible.

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# THE EUROPEAN JURISPRUDENCE ON ADDRESSING THE PROTECTION OF HUMAN DIGNITY

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## **Abstract:**

*Taking into consideration that the international documents do not contain a definition of the human dignity, the European and international jurisprudence can help to determine the circumstances or the facts that cause damage to the human dignity. Frequently, the moral or sexual harassment situations, along with the subjecting to inhuman or degrading treatments, were considered by both the European Commission, and Court of Human Rights, as being the most severe infringements of dignity. A tremendously important section of this article is dedicated to the jurisprudence of the European Court of Human Rights (E.C.H.R.), regarding the applying of the non-discrimination principle, evidencing the contribution of this institution in the evolution of the methods that protect human rights.*

**Key-words:** *dignity, discrimination, inhuman treatments, degrading treatments, torture, human rights*

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## **INTRODUCTION**

Although a relatively new concept in law<sup>2</sup>, references to human dignity have become extremely common in last decades, especially in recent years, in political and juridical documents, in international treaties and also in resolutions adopted by different national and international organisations. The shaping and the affirmation of the human dignity concept has a long history, longer than the history of human rights, being influenced by the entire evolution of the political and juridical thinking, and by the practical applicability of the philosopher's teachings.

The lack, from the international documents, of a definition on human dignity, the ambiguities and the legal disparities that accompany

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<sup>2</sup> Bernard Edelman, „La dignité de la personne humaine, un concept nouveau”, in *La dignité de la personne humaine*, coord. Marie-Luce Pavia, Thierry Revet (Paris: Ed. Economica, 1999), 25-34.

this concept, have been able to offer the judges wide possibilities to personal appreciation, when determining the actions or the facts that can lead to the violation of the human dignity. Frequently, the cases of moral and sexual harassment, along with the subjection to inhuman and degrading treatments, have been considered the most offensive infringements of the dignity.

## **THE CONCEPT OF DIGNITY INFRINGEMENT IN THE EUROPEAN AND INTERNATIONAL JURISPRUDENCE**

Both the UNO Human Rights Council<sup>3</sup>, and the European Court of Human Rights refer to the notion of human dignity. The analysis of jurisprudence of the two international courts proves that the notions of inhuman treatments and/or degrading, are used much often than infringements or violations of the human person's dignity<sup>4</sup>.

Because the infringements against human dignity through actions/facts of discrimination are to be detailed in another section, we are firstly trying to evidence, through the international jurisprudence, the connection between the notion of torture, inhuman and degrading treatments and that of the infringement of the human dignity right. Thus, both the Commission and the European Court of Human Rights, considered that between the three notions – torture, inhuman treatments and degrading treatments, there are just differences of intensity, as concerning the suffering produced to a human being<sup>5</sup>.

According to art. 3 from the European Convention on Human Rights, “Nobody should be subjected to torture, nor the punishments, nor the inhuman or degrading treatments”. The report of the Commission as regarding the “Greek Affair” (“L’affaire grecque”)<sup>6</sup> mentions that art. 3

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<sup>3</sup> Founded through the UNO General Assembly Resolution no. 60/251.

<sup>4</sup> See Frédéric Sudre, *Droit européen et international des droits de l'homme*, (Paris: Universitaires de France, 2005); Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Aix-Marseille (Paris: PUAM, Economica, 1989).

<sup>5</sup> D. Gomien, D. Harris and Leo Zwaak, *Convention européenne des droits de l'homme et Charte sociale européenne: droit et pratique* (Editions du Conseil de l'Europe, 1996), 117.

<sup>6</sup> Petitions n° 3321/67, Danemark v. Grèce; n° 3322/67, Norvège v. Grèce; n° 3323/67, Suède v. Grèce; n° 3344/67, Pays Bas v. Grèce. See Alexandre Charles Kiss, Phédon

implies protection, on different levels, against some actions of the state, asserting that there can be treatments for which all the three qualifications can be applied – torture, inhuman treatments and degrading treatments, because any type of torture can be regarded only as inhuman and degrading treatments, and any inhuman treatment cannot be but degrading, in the same time<sup>7</sup>.

The degrading treatment was defined as being the action that produces to a person, seen through the eyes of other people, and their own, a humiliation or the placing of someone in an inferior position, or the obligation of a person to act against their will and consciousness, which attain a high level of gravity<sup>8</sup>. This type of treatments are characterised through the fact that they produce a severe humiliation, of a person, in front of other people, the person in case being constraint to act against their will or consciousness. Consequently, the offences, and especially the vexing or racist measures, such as the actions/the facts of discrimination, can be considered degrading treatments<sup>9</sup>. In numerous cases, the Commission estimated that the term “degrading”, used by art. 3, is not synonym with that of “unpleasant” or “uncomfortable”<sup>10</sup> and, moreover, the menace of being subjected to degrading treatments, does not constitute an infringement of art. 3<sup>11</sup>.

The Court also decided, having the value of principle, that, a treatment applied to a person, qualifies itself as “degrading”, when it

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Vegleris, “L’affaire grecque devant le Conseil de l’Europe et la Commission européenne des Droits de l’homme”, in *Annuaire français de droit international*, vol. 17, 1 (1971), 889-931.

<sup>7</sup>Commission Report in Greek Affaire, November 5, 1969, par. 2, vol. II, I-ère partie, 364.

<sup>8</sup> ECHR, Campbell and Cosans v. Great Britain Decision, the 25<sup>th</sup> of February 1982, Accessed 10 January, 2016, <http://www.juricaf.org/arret/CONSEILDELEUROPE-COUREUROPEENNEDESROITSDELHOMME-19830322-751176-774376>.

<sup>9</sup> Jean-Francois Renucci, *Tratat de drept european al drepturilor omului*, (București: Hamangiu, 2009), 120.

<sup>10</sup> ECHR, López Ostra v. Spain Decision, the 9<sup>th</sup> of December 1994, Accessed 12 January, 2016 <http://www.juricaf.org/arret/CONSEILDELEUROPE-COUREUROPEENNEDESROITSDELHOMME-19941209-1679890>.

<sup>11</sup> ECHR, Campbell and Cosans v. Great Britain Decision, the 25<sup>th</sup> of February 1982, pre-quoted.

creates fears, anxiety and inferiority, meant for humiliating, abasing and, eventually, defeat their physical and moral resistance<sup>12</sup>.

In order to talk about degrading treatment, there has to exist the intention to humiliate the person in cause, but, when the consequences of an act, one that even misses the a special purpose, lead to the severe humiliation of the person, the treatment can be qualified as degrading, regardless the lack of intention<sup>13</sup>.

In the trial *Tyrer v. United Kingdom*<sup>14</sup>, the European Court of Human Rights considered that the inhuman treatments produce mental and psychological suffering, of a special intensity. In the same decision, the Court also announced that the act, qualified as degrading treatment, does not imply the condition of publicity, being able to exist, even if the humiliation is experienced only by the person in cause.

The inhuman treatment, according to the definitions provided by the ECHR jurisprudence, refers to the action against a person, which causes, voluntarily, severe mental or physical suffering<sup>15</sup>. In *Ireland v. Great Britain*<sup>16</sup>, the European Court of Human Rights considered that the inhuman treatments are the action did with the intention to cause injuries to the victim, or severe physical and moral suffering, susceptible of producing serious psychological disorders. As it has been underlined by the specialised literature, the inhuman or degrading treatments are the results of concrete situations, manifesting as the causing of physical and psychological traumas, of a certain intensity, to a physical person, by the state

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<sup>12</sup> ECHR, *V. and T. v. Great Britain* Decision, the 16<sup>th</sup> of December 1999, Accessed 10 December, 2015 <http://www.afmjf.fr/Le-proces-equitable-pour-des-tres.html>.

<sup>13</sup> Radu Chiriță, *Convenția Europeană a Drepturilor Omului. Comentarii și explicații*, (București: C.H. Beck, 2008), 97.

<sup>14</sup> ECHR, *Tyrer v. United Kingdom* Decision, the 25<sup>th</sup> of April 1978, Accessed 10 January, 2016, [http://www.coe.int/t/dg3/children%5CSource%5CcaselawCourt%5CTyrer\\_fr.doc](http://www.coe.int/t/dg3/children%5CSource%5CcaselawCourt%5CTyrer_fr.doc). Also see Robert Pelloux, “L’affaire irlandaise et l’affaire Tyrer devant la Cour européenne des droits de l’Homme”, in *Annuaire français de droit international*, vol. 24, 1 (1978), 379-402.

<sup>15</sup> The report of the Commission in the Greek Affair, § 4.

<sup>16</sup> ECHR, *Ireland v. Great Britain* Decision, the 18<sup>th</sup> of January 1978, Accessed 16 January, 2016, [http://www.cvce.eu/obj/arret\\_de\\_la\\_cour\\_europeenne\\_des\\_droits\\_de\\_l\\_homme\\_irlande\\_c\\_royaume\\_uni\\_18\\_janvier\\_1978-fr-e07eaf5f-6d09-4207-8822-0add3176f8e6.html](http://www.cvce.eu/obj/arret_de_la_cour_europeenne_des_droits_de_l_homme_irlande_c_royaume_uni_18_janvier_1978-fr-e07eaf5f-6d09-4207-8822-0add3176f8e6.html).

agents or, in certain situations, by private people, in this last case the state authorities being guilty for not taking the measures, imposed by the prevention of such deeds, or to punish the people who produced the suffering endured by the victim<sup>17</sup>.

According to art. 1, section 1, of the UNO Convention<sup>18</sup>, torture represents “any action through which it is brought about to a person, intentionally, pain or other strong suffering, physical or psychical, especially with the purpose to obtain, from this person, or from a third party, information of confessions, to punish them for an action that this person or the third party committed, or is suspected for committing it, to intimidate or to exert pressure on a third party, or for any other reason based on a form of discrimination, regardless the nature, when such a pain or suffering provoked by an agent of the public authority or any other person who acts officially, or due to the instigation or with the expressed or implicit agreement of such people”. If the inhuman treatments, applied to a person deliberately, cause very serious and cruel suffering to them, they must be qualified as acts of torture, particularly if they experience a “terrible infamy”<sup>19</sup>.

Taking into account that the difference between the inhuman treatment and torture refers only to intensity, not the form and the essence, the Court defined torture as being that inhuman treatment that causes physical and mental suffering, of severe cruelty<sup>20</sup>. In the decision in the case Ireland v. Great Britain, it was mentioned that the evaluation of the degree of intensity is relative, depending on a totality of elements, such is the duration of the treatment, the physical and mental effects and, in certain cases, sex, age and the health condition of the victim, and in the trial Soering v. Great Britain, the Court also added that the severity of the

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<sup>17</sup> Corneliu Bârsan, *Convenția Europeană a Drepturilor Omului- Comentariu pe articole*. Vol. I – *Drepturi și libertăți*, (București: All Beck , 2005), 231.

<sup>18</sup> U.N.O. Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the United Nations General Assembly, on the 10<sup>th</sup> of December 1984, Accessed 12 February, 2016, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>.

<sup>19</sup> Jean- Francois Renucci, *Tratat de drept european al drepturilor omului*, 124.

<sup>20</sup> ECHR, Ireland v. Great Britain Decision, the 18<sup>th</sup> of January 1978, pre-quoted.

action depends on the totality of the causal circumstances, especially the nature and the context of the treatment, or the punishment, as a way of carrying it into effect<sup>21</sup>. It has to be mentioned that, most often, in case of torture, the cruelties are produced intentionally, with a precise purpose: either for applying a punishment, or the desire to obtain information, they have a specific purpose and a special mobile that, along with the gravity of the consequences, make the difference between torture and inhuman treatment. Therefore, we can distinguish, in case of torture, the essential elements of it: the causing, to a person, of severe physical and mental suffering; the existence of direct intention to produce such consequences; a precise purpose, either it is the obtaining of penal evidence, or the intimidation and the punishment of the person in cause.

In its turn, the International Criminal Tribunal for the former Yugoslavia, considered that: “in order to appreciate the gravity of the acts of torture, one must consider all the circumstances of the cause, the nature and the context for provoking the pain, the premeditation or the institutionalisation of ill-treatment, the robustness of the victim, the used methods and the inferior position of the victim. It is also relevant if the individual was subjected to these treatments on a longer period of time”<sup>22</sup>.

In the Decision *Selmouni v. France*<sup>23</sup>, the first case in which a state member of the European Union was condemned for torture, the European Court affirmed clearly that the notion of torture has to be subjected to an evolutive interpretation, reminding that, in fact, the Convention is “a living instrument” that must be interpreted under the circumstances of the nowadays life, given the exigencies of the present on addressing the

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<sup>21</sup> ECHR, *Soering v. Great Britain* Decision, the 7<sup>th</sup> of July 1979, Accessed 17 January, 2016, <http://www.rtdh.eu/pdf/19905.pdf>.

<sup>22</sup> Mihail Udrioiu and Ovidiu Predescu, *Protecția Europeană a Drepturilor Omului și procesul penal român –tratat*, (București: C.H. Beck , 2008), 106.

<sup>23</sup> ECHR, *Selmouni v. France* Decision, the 28<sup>th</sup> of July 1999, Accessed 10 February, 2016, [http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/NOVEMBRE\\_2011/AFFAIRE\\_SELMOUNI\\_c.\\_FRANCE.pdf](http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/NOVEMBRE_2011/AFFAIRE_SELMOUNI_c._FRANCE.pdf).

human rights, deeds that once had been qualified as inhuman and degrading, must receive now the qualification of torture<sup>24</sup>.

### **THE E.C.H.R. JURISPRUDENCE WHEN APPLYING THE PRINCIPLE OF NON-DISCRIMINATION AND THE OBSERVING OF THE HUMAN DIGNITY**

The European Convention on Human Rights provides the principle of non-discrimination in 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*”.

The European Court of Human Rights (E.C.H.R.) reflects, in its turn, the field for the applying of the non-discrimination principle. This has an existence subordinated to the clauses of the Convention that protect the rights and freedoms of the individuals. By not having an autonomous existence, art. 14 from the Convention can be referred to in causes in which it is mentioned the violation of a normative disposition, and discrimination constitutes an aggravating circumstance, not an autonomous infringement, in the distinct meaning<sup>25</sup>.

In the linguistic Belgian case<sup>26</sup>, the Court revised this opinion stating that art. 14 of E.C.H.R. can be referred to autonomously in all the situations in which it has a decisive and independent importance, in case other articles of the Convention do not define precisely the rights that they sanction, leaving it to the contracting parties to appreciate, to

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<sup>24</sup> Aisling Reidy, *L'interdiction de la torture. Un guide sur la mise en oeuvre de l'article 3 de la Convention Européenne de Droit de l'Homme*, Direction générale des droits de l'homme, Conseil de l'Europe (Strasbourg: 2003), 6 and next.

<sup>25</sup> Doina Micu, *Garantarea drepturilor omului*, (București: All Beck, 1998), 127.

<sup>26</sup> ECHR, *Affaire „relative a certains aspects du regime linguistique de l'enseignement en Belgique” c. Belgique*, the 23<sup>rd</sup> of July 1968, Accessed 17 January, 2016, [http://www.rtdh.eu/pdf/19680723\\_affaire\\_linguistique\\_belge.pdf](http://www.rtdh.eu/pdf/19680723_affaire_linguistique_belge.pdf). See also Joe Verhoeven, *Jurisprudence internationale interessant la Belgique. Cour Europeenne des Droits de l'Homme. L'arret du 23 juillet 1968 dans l'affaire relative a certains aspects du regime linguistique de l'enseignement en Belgique*, (Bruxelles: Bruylant, 170), 354-382, [http://www.rtdh.eu/pdf/19680723\\_affaire\\_linguistique\\_belge.pdf](http://www.rtdh.eu/pdf/19680723_affaire_linguistique_belge.pdf).

restrain or to accomplish the specified rights. It is also requested, besides these cumulative conditions, that the appreciation of the state to have been discriminatory.

In the “syndicalist” cases (the National Syndicate of the Belgian Police<sup>27</sup>, the Swedish Syndicate of the engine drivers<sup>28</sup>, Schmidts and Dahlström<sup>29</sup>, from 1975 and 1976) the Court, after checking if there is or not an infringement of art. 11 from E.C.H.R., on addressing the right to constitute themselves or to affiliate to syndicates, noticing that the Belgian and the Swedish states did not infringe art. 11 from the Convention, examined, under the provisions of art. 14, whether the attitude of the states was discriminatory as regarding certain syndicates. After this checking for the confirmation of non-discrimination principle observation, which had an autonomous character, the Court decided that there was no infringement<sup>30</sup>.

In the case *Abdulaziz and others v. the United Kingdom*<sup>31</sup>, the claimants asserted that the British legislation on addressing migration infringes the right to the family life (art. 6 of E.C.H.R.) and the principle of non-discrimination (art.14) because it was more difficult for the foreign men to obtain the approval of the British state to be together with their fiancées and wives, who had already had a residence in Great Britain, than for the women in a similar situation. Appreciating that “the notion of discrimination usually encompasses the cases in which an individual or a group find themselves in the position, without any

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<sup>27</sup> ECHR, *The National Syndicate of the Belgian Police v. Belgium* Decision, 27<sup>th</sup> of October 1975, Accessed 12 January, 2016, <http://www.eugrz.info/pdf/EGMR20.pdf>.

<sup>28</sup> ECHR, *the Swedish Syndicate of the engine drivers v. Sweden* Decision, the 6<sup>th</sup> of February 1976, Accessed 10 February, 2016, <http://www.juricaf.org/arret/CONSEILDELEUROPE-COUREUROPEENNEDES DROITSDELHOMME-19760206-561472>.

<sup>29</sup> ECHR, *Schmidts and Dahlström v. Sweden* Decision, 6<sup>th</sup> of February 1976, Accessed 17 January, 2016, [http://www.terralaboris.be/IMG/doc\\_AFFAIRE\\_SCHMIDT\\_ET\\_DAHLSTRA-M\\_c\\_SUEDE\\_1\\_.doc](http://www.terralaboris.be/IMG/doc_AFFAIRE_SCHMIDT_ET_DAHLSTRA-M_c_SUEDE_1_.doc).

<sup>30</sup> See R. Pelloux, “Trois affaires syndicales devant la Cour européenne des Droits de l’homme”, in *Annuaire français de droit international*, vol. 22, no. 1 (1976), 120-127.

<sup>31</sup> ECHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom* Decision, the 28<sup>th</sup> of May 1985, Accessed 10 January, 2016, <http://www.gdr-elsj.eu/wp-content/uploads/2014/03/Cour-EDH-25-mai-1985-Abdulaziz-et-a.pdf>.

particular justification, of being less well treated than another, even if in the Convention it is not provisioned a more favourable treatment”, the Court decided that Great Britain infringed art. 14, combined with art. 8 of E.C.H.R. From its decision and motivation, it can be deduced the fact that, in this case too, the Court interpreted and applied the principle of non-discrimination independently, corroborating it with the right to family life, and not the other way round.

In the case of the Asian people from the oriental Africa v. the United Kingdom<sup>32</sup>, the Court adopted a particular analysis of the situation, with the tendency to extend, beyond art. 14 of E.C.H.R., its appreciations. In fact, Great Britain refused to allow the British passport bearers, who had been expelled from Uganda, Kenya and Tanzania, to enter Great Britain and settle there. The claimants were arguing that the refusal was based on racial grounds, and it was contrary to art. 14 and 3 of the Convention. The British government admitted that the Law from 1968 (Commonwealth Immigration Act) was discriminatory, but it appealed to the fact that Great Britain had not ratified Protocol no.4, which stipulates in art. 3(2) the right to enter on the state’s territory whose nationals they are. The Commission estimated that *“discrimination based on race can be considered a degrading treatment itself, as stipulated in art. 3 of E.C.H.R., and that the imposing of a particular regime to a group of people, based on racial considerations, in certain circumstances constitutes a special form for the infringement of human dignity”*. Although the intention of the Commission was to sanction severely race discrimination, as coming from the motivation of the opinion in the Report, the applicability of art. 14 of the Convention was not at all an option, when taking the final decision. The Report of the Commission was not published, and in the public statement released by the Commission was clearly evidenced the fact that the race inspired measures can sometimes restrain the applicability of art. 3 of E.C.H.R., even if the basic principle of discrimination itself does not contain the

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<sup>32</sup> ECHR, The Asians from oriental Africa v. United Kingdom Decision, the 6<sup>th</sup> of March 1978, Accessed 12 January, 2016, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-74111&filename=001-74111.pdf>.

obstacles or the refusal of a certain right, among the ones protected by Convention<sup>33</sup>.

A frequently met attitude, in the practice of E.C.H.R. Commission and Court, is that in which the authorities from Strasbourg notice the infringement of a right from the Convention, and, nonetheless, does not consider to be useful the supplementary check to see if there was a case of discrimination, excepting the cases in which the inequality of treatment represents a fundamental right of the claimant. This doctrine was exposed by the Court in the cases X and Y v. Holland, in the decision from the 26<sup>th</sup> of March 1985: "...the examination of the cause from the point of view of art. 14 does not constitute a necessity when the Court remarks the infringement with regard to the requirements of an article, seen from the perspective of its individuality. There shall be a contrary procedure, if there is an obvious inequality of treatment, in exercising a right related to a fundamental aspect of the case"<sup>34</sup>.

In the case Darby v. Sweden<sup>35</sup>, the Court appreciated as useful the examining of infringement on the grounds of art. 9 and 4 from the Convention. In fact, the claimant sustained that the application of a Swedish law, which forced the non-resident workers to pay a church fee, while the resident could be relieved from payment, if choosing, was contrary to art. 9 and 1 from Protocol 1 and art. 14 of the Convention, referring to religion, property and discrimination. The Court considered only the infringement of the disposition from the Convention that was referring to property.

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<sup>33</sup> For details, see Roxana Radu, „Discriminări interzise și discriminări permise în materia angajării și a raporturilor juridice de muncă”, *Revista Română de Drept Privat* 5 (2008): 190-213.

<sup>34</sup>ECHR, X and Y v. Holland Decision, the 26<sup>th</sup> of March 1985, Accessed 10 January, 2016, [http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands\\_FR.asp](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands_FR.asp).

<sup>35</sup> ECHR, Darby v. Sweden Decision, Accessed 10 January, 2016, [http://host.uniroma3.it/progetti/cedir/cedir/Giur\\_doc/Corte\\_Stras/Darby\\_Suede1990.pdf](http://host.uniroma3.it/progetti/cedir/cedir/Giur_doc/Corte_Stras/Darby_Suede1990.pdf).

In the case *Rasmussen v. Denmark*<sup>36</sup>, the Court ascertained that the infringement of art. 14 and 8 of E.C.H.R. did not exist, appreciating that there is no discrimination based on gender, in the Danish law, referring to the regulation of different terms on addressing the contesting of paternity by the husband and the research of the under aged child's paternity, requested by their mother. The Court established that the decision coming from the state, thorough the dispositions of the Convention, was not infringed, due to the fact that this disposition had as an objective the defending of the child's best interest, applying it and observing the principle of proportionality.

From the comparative analysis of the solutions provided by the authorities from Strasbourg, of the justified reasons that were invoked by them, it can be deduced that art. 14 of E.C.H.R. does not forbid all the discriminations, but only the illicit ones. Consequently, which are the criteria to determine the licit and the illicit criteria? The legislative or other measures, which a state party of the Convention takes, can constitute distinct juridical treatments, among different categories of people, or groups, even if the situations are analogue and do not have an objective or reasonable justification. The Convention itself makes the distinction between the treatment applied for the nationals and the foreigners [art. 5 (1) (f), art. 16, art. 3 and art. 4 from the Protocol no. 4]. In all these situations, the role of the Commission and Court is to appreciate the objective and reasonable character of the distinction, along with establishing if the state respected the principle of proportionality in taking concrete measures that could lead to the obtaining of the legitimate and invoked purpose. The jurisprudence from Strasbourg knows such appreciations on addressing the gender, racial or other type of discrimination<sup>37</sup>. The tendency manifested by the Commission and Court in general, as concerning the manner in which it was approached the control of applying the principle on non-discrimination, was a realist one, even if, sometimes, the appreciations rather restricted the protection

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<sup>36</sup> ECHR, *Rasmussen v. Denmark* Decision, the 28<sup>th</sup> of November 1984, Accessed 2 February, 2016, [http://www.rtdh.eu/pdf/19841128\\_rasmussen\\_c\\_danemark.pdf](http://www.rtdh.eu/pdf/19841128_rasmussen_c_danemark.pdf).

<sup>37</sup> See also Radu, „Discriminări interzise și discriminări permise în materia angajării și a raporturilor juridice de muncă”, 190-213.

of the individual or the way the states were appreciated. It can be asserted that the concrete data of each case law often generated delicate problems, whose solving was not always found by adopting unanimous decisions. But it was the divergence of opinions that helped the improvement of the jurisprudence, which refers to the applying of Convention, and contributed to the evolution of the methods that protect the human rights<sup>38</sup>.

## CONCLUSION

The judges of international courts, interpreting the provisions of national rules and comparing them to those of international acts, brought their own contribution to the recognition of human dignity and the protection of it as fundamental value, considering that the dignity of every individual can be materialized only through the respect of other's dignity. From the development of this idea to the inclusion of human dignity in the category of fundamental human rights are just a few steps to go.

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# GENERAL CONSIDERATIONS REGARDING THE ADMINISTRATIVE-PATRIMONIAL LIABILITY

Liliana ZIDARU<sup>1</sup>

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## **Abstract:**

*Administrative liability is a form of legal liability that occurs when violated rules of administrative law by committing an illegal act and envisages compensation for damage caused to individuals by activity culpable state, public authorities, public officials, dignitaries and punishing those who break the law administrative.*

*In this paper we discuss one of the forms of administrative, namely, patrimonial administrative liability.*

**Key-words:** *administrative liability, legal liability, administrative law, public authorities, patrimonial administrative liability, sanction, illegal act.*

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## **INTRODUCTION**

Legal liability – an institution present in all branches of law - is a subject that interests all legal sciences , with great practical importance, because it ensures the effectiveness of the rule of law, it stimulates the attitude of compliance , establishing and maintaining social order<sup>2</sup>.

The notion of liability is very large; all human actions are likely to generate some form of liability, because the rules of conduct contain prescriptions with regulator character through which the society defends its global interests.<sup>3</sup>

We can distinguish several forms of legal liability depending on a number of factors to be considered interdependent and interfering, such as the injured social values, the type of legal rule which has been violated, the seriousness of the illegal act, the guilt of the offender, etc. Thus, in every branch of law, specific forms have emerged such as:

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<sup>2</sup> Radu I.Motica and Gheorghe Mihai, *Teoria Generală a Dreptului* (Bucureşti: All Beck, 2001), 221.

<sup>3</sup>Mircea N.Costin, *Răspunderea juridică în dreptul Republicii Socialiste România* (Cluj-Napoca: Dacia, 1974), 15.

criminal liability, civil liability, contravention liability, disciplinary liability. Sometimes, the forms of legal liability excludes themselves (can't exist on the same offense), sometimes they are compatible and can be cumulated or interfere generating specific physiognomy. For example: criminal and contravention liability excluded themselves on the same offense; criminal liability cumulates with civil liability; civil liability, with its patrimonial specificity penetrates, interferes and generates specific configurations such as patrimonial liability in labor law or administrative-patrimonial liability in administrative law; contravention liability is also present in labor law; disciplinary liability is present also in the administrative liability field as an administrative-disciplinary liability, etc.<sup>4</sup>

In principle, every branch of law knows a specific form of liability. Therefore, there are several forms of legal liability: political liability (Parliament's constitutional liability), civil liability, criminal liability, administrative liability, disciplinary liability. Every form of legal liability is characterized by specific conditions of substance and form (establishment mode, embodiments etc.).<sup>5</sup>

In legal literature, but also in various legal acts, appears mentioned various forms of legal liability, determined by different criteria: the followed purpose, the nature of the illegal act and the infringed rule, the seriousness of the offense, the character of sanctions, etc.

Thus, depending on the purpose, by triggering the liability, was made a classification of forms of legal liability, namely:

- repair liability nature, seeking annulment of the harmful consequences for the individual assets, by requiring the offender to the act of giving or doing for the benefit of the injured party;
- patrimonial liability and material liability;

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<sup>4</sup>Ion Craiovan, *Tratat de teoria generală a dreptului*, 2nd edition, revised and enlarged, (București: Universul Juridic, 2009), 435.

<sup>5</sup>Nicolae Popa, *Teoria generală a dreptului*, University course (București: All Beck, 2002), 283.

- repressive liability or sanctioning, obliging the offender to pay punitive consequences of his generating social danger attitude.<sup>6</sup>

Administrative patrimonial liability, as a form of administrative liability, is a liability of the state, of the government, for damages.<sup>7</sup>

Administrative-patrimonial liability subject is the patrimonial state or a public authority.<sup>8</sup>

The problem of patrimonial liability in administrative law lies in whether the victims can get compensations for suffered damages and under what conditions.<sup>9</sup>

Within the present doctrine, the administrative-patrimonial liability has been defined as that form of legal liability which consists in obliging the state or, where appropriate, the administrative - territorial units to repair the damages caused to individuals by an unlawful administrative act or by the unjustified refusal of the government to resolve a claim regarding a legal right or a legitimate interest.<sup>10</sup>

The interpretation of constitutional norms allows the identification of the following forms of state liability for created damages:

- patrimonial liability of the state for damages caused by judicial errors;

- patrimonial liability of the public authorities for damages caused by administrative action or failure to resolve an application within the legal term, with the possibility of entering in cause the official guilty of issuing the act;

- joint patrimonial liability of public authorities and officials for damages caused to the public domain or due to malfunctioning of public services;

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<sup>6</sup> Motica and Mihai, *Teoria generală a dreptului*: 263.

<sup>7</sup> Sanda Ghimpu and Alexandru Țiclea, *Dreptul muncii* (București: “Șansa” S.R.L., 1995), 338.

<sup>8</sup> Motica and Mihai, *Teoria generală a dreptului*: 272.

<sup>9</sup> Mihai T. Oroveanu, *Tratat de drept administrativ, 2nd edition, revised and enlarged* (București: Cerma, 1998), 235.

<sup>10</sup> Anton Trăilescu, *Drept administrativ, Tratat elementar* (București: All Beck, University Course Collection, 2002), 367.

- exclusive patrimonial liability of the public authorities for public service limits.<sup>11</sup>

The legal framework of the patrimonial-administrative liability is found in the current Constitution<sup>12</sup> and in the Law 554/2004<sup>13</sup>, amended by Law 262/2007<sup>14</sup> which consists in the fact that in the Romanian state law, are responsible for their actions, the state, the government.

The Romanian Constitution<sup>15</sup> contains some provisions such as art .21, 44, 52, 53 and 123 (5) from which is resulting the conclusion that it is recognized the fundamental right of the citizen to be compensated for the damages caused by administrative acts of public authorities.<sup>16</sup>

“Art .21:

(1) Any person may apply to the courts for protection of rights, freedoms and legitimate interests.

(2) No law may restrict the exercise of this right.

(3) The parties have the right to a fair trial and to resolve cases within a reasonable time.

(4) Administrative special jurisdictions are optional and free.”

“Art. 44:

(1)The right to property and claims against the State are guaranteed. The content and limitations of these rights are established by law.

(2) Private property is guaranteed and protected equally by the law, irrespective of its owner.

Foreigners and stateless persons may acquire ownership on lands only under the terms resulting from Romania's accession to the European Union and other international treaties to which Romania is a party, on a reciprocal basis, as provided by organic law and lawful inheritance.

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<sup>11</sup>Antonie Iorgovan, *Tratat de drept administrativ, vol.II* (București: Nemira & Co. S.R.L.), 326-327.

<sup>12</sup>Romanian Constitution, Official Gazette 767 (2003).

<sup>13</sup> Law no. 554/2004, published in Official Gazette, 1154 (2004).

<sup>14</sup> Law no.262/2007 published in Official Gazette, 510 (2007).

<sup>15</sup> Romanian Constitution, Official Gazette no. 767 (2003).

<sup>16</sup> Antonie Iorgovan, *Drept administrativ, vol. III* (București: Procardia, 1993), 459.

(3) No one may be expropriated except for reasons of public utility, established by law, with just compensation paid in advance.

(4) The nationalization or any other measures of forcible transfer of immovable public property based on the owners, social, ethnic, religious, political or other discriminatory features, are prohibited.

(5) For projects of general interest, the public authority may use the subsoil of any real estate with the obligation to indemnify the owner for damage to soil, plantations or buildings, as well as for other damages imputable to these authorities.

(6) Compensation provided under par. (3) and (5) shall be agreed with the owner or, in case of disagreement, by justice.

(7) The right of property, compels compliance burden on environment protection and good neighborliness, and other tasks that by law or custom, are charged to the owner.

(8) Legally acquired assets may not be confiscated. Legality of acquirement shall be presumed.

(9) Any goods intended for, used or resulted from crimes or offenses may be confiscated only under the terms of law. "

“Art. 52:

(1) Any person aggrieved in his legitimate right or a legitimate interest by a public authority, through an administrative act or failure of an application within the statutory period, is entitled to the acknowledgment of his right or legitimate interest, the annulment of the act and the repair of the damage.

(2) The conditions and the limits on this right shall be established by organic law.

(3) The state bears patrimonial liability for damages caused by judicial errors.

State liability is determined by law and shall not eliminate the liability of the magistrates having exercised their function with bad faith or gross negligence."

“Art. 53:

(1) The exercise of certain rights or freedoms may only be restricted by law and only if necessary, as appropriate, to: protect national security, public order, public health or morals, rights and

freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity or a disaster.

(2) Restrictions may be ordered only if it is necessary in a democratic society. The measure must be proportionate to the situation that caused it, must be applied without discrimination and without prejudice to the existence of such right or freedom."

"Art. 123 (5): The Prefect may challenge, in the administrative court, an act of the County Council, of a Local Council or mayor, if he deems it unlawful. The challenged act is suspended by law. "

Corroborating the constitutional provisions mentioned, we can conclude that the constitution enshrines the responsibility of the authors to the individual, as follows:

a) state pecuniary liability for damages caused by judicial errors, regardless of the nature of the process;

b) the right of individuals to repair the damage caused by public authorities, where appropriate, through an administrative act or through the failure limit prescribed by law of an application;

c) the right of individuals to recover claims on the state, regardless of its origin.<sup>17</sup>

Regarding administrative and patrimonial liability , Law no.554 / 2004<sup>18</sup> provides for the exercise of three forms of action<sup>19</sup>, namely an action directed solely against the defendant authority, an action directed solely against the official and co- directed action against authorities and official.

The claim simultaneously against civil authority and the official is most often used in practice as it best protects the interests of the injured party. The law allows the holder of the right of action to choose one of three forms of action. Obviously, it is up to the applicant's choice of one or other of the options above mentioned.

Administrative Litigation Law, respectively Law no. 554<sup>20</sup>, Article no. 1 establishes that: Anyone who believes that was injured in a

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<sup>17</sup> Jordan Nicola, *Drept administrativ. University Course* ( Sibiu, 2007), 541.

<sup>18</sup> Law no.554/2004, published in Official Gazette, 1154 (2004).

<sup>19</sup> Antonie Iorgovan, *Drept administrativ, vol. III*: 427.

<sup>20</sup> Law no.554/2004, Published in Official Gazette, 1154 (2004).

legitimate sense by a public authority through an administrative act or a failure within the statutory unit requests may appeal to the competent administrative court for the recognition of the right or legitimate interest and the repair of the damage it was caused. The legitimate interest can be both private and public."

The current Constitution<sup>21</sup>, as Law 554/2004 on administrative litigation devotes the resolving of these disputes by the courts of this nature: Special sections of the administrative litigation and fiscal Courts, the Courts of Appeal and the High Court of Cassation and Justice. The Administrative judge is the one who can decide on the legality of the measure and on its opportunity.<sup>22</sup>

## CONCLUSION

Social life cannot be conceived without liability; any deviation draws from itself responsibility.

The concept of responsibility means a reaction of disapproval of society towards human action or not action.

Legal liability is a legal relationship of coercion and legal liability subject is the legal sanction.

Administrative liability is a component of legal liability and it is autonomous and distinct from the civil, criminal and disciplinary liability of employees under labor law.

Administrative patrimonial liability is an autonomous liability, subjected to its own rules, different from those provided in the Civil Code, and governing the individual's liability regime.<sup>23</sup>

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<sup>21</sup> Romanian Constitution, Official Gazette no. 767 (2003).

<sup>22</sup> [www.aafdutm.ro/revista/nr-1-mai-2001](http://www.aafdutm.ro/revista/nr-1-mai-2001)

<sup>23</sup> Ilie Iovănaș, *Drept administrativ, vol II*, (Arad: Servo-Sat, 1997): 185.

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# EXERCISING THE RIGHT TO VOTE IN THE GENERAL MEETING OF A LIMITED LIABILITY COMPANY

Victor BÎRCA <sup>1</sup>

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## **Abstract:**

*In this article we refer to the importance of voting in the limited liability company, this type of company being the most common in Romania.*

*The right to vote is a subjective right, offered in a proportional way to the capital participation, the proportionality rule having a principle status within the judicial system and whose exercise must follow, in a strict manner, the best interest of the company in the general meeting.*

**Key-words:** *right to vote, the General Assembly, shareholders.*

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## **INTRODUCTION**

In the relevant literature, regarding the right to vote in the general assembly, in a general way, their most important legal aspects have been brought out.

The problem of the judicial nature of exercising the right to vote is the object of much important research, with generally contradictory approaches.

Under the imprint of the company-contract theory, the vote is initially understood as an absolute subjective right of the shareholders.

So, the right to vote is the specific instrument through which shareholders have the opportunity to be actively involved in the company management, and it is defined in the doctrine as “the prerogative enjoyed by a person referred to as an associate, to express his/her option on the issues discussed in the meeting of the general assembly, by approving or rejecting the issues debated or by expressing a choice”<sup>2</sup>.

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<sup>2</sup>Lucian Săuleanu, *Societățile Comerciale, Adunările generale ale acționarilor* (Bucharest: Hamangiu, 2008), 163.

The right to vote has been considered “an essential right, of social nature, in the absence of which the shareholder is not able to exercise the right of supervision and control of the administration of the company.”<sup>3</sup>

According to the regulations of Law 31/1990, the supreme decision making body of the limited liability company is the general meeting of shareholders, which according to the provisions of article 194 has the following main obligations:

1. to approve the yearly financial situation and determine the allocation of the net profit;
2. to appoint auditors and administrators to revoke/dismiss and give them discharge activity and decide contracting financial audit, according to legal regulations when it has no binding character.
3. to decide the pursuit of administrators and auditors for damages caused to the society nominating also the person responsible to exercise it.
4. to amend the articles of the association.

As regarding the convocation, the obligations of the administrators, in their charge falls the convocation of the general assembly at the registered office at least once a year or whenever necessary. It may require a general meeting, indicating the purpose of this convocation, an associate or a number of shareholders representing at least a fourth of the joint stock.

The decisions of the shareholders are taken in a general meeting, the convocation will be in the form prescribed in the memorandum and in the absence of special provisions, by registered mail at least 10 days before the day fixed for holding it, indicating the agenda.

The exercise of voting rights is made by power of attorney or in person. This may be suspended for an associate during the deliberations of the associate meetings regarding his contribution in nature or to the legal documents concluded between him and society.

According to the provision of article 191 paragraph (2) it refers to the fact that through the articles of the association it can be established the exercise of the voting rights by correspondence but not otherwise stated regarding the concrete procedure of the meeting.

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<sup>3</sup> Cristian Duțescu, *Drepturile acționarilor* (Bucharest: Lumina Lex, 2006), 269.

It has been appreciated in the relevant literature, that the adoption of the procedure of voting by correspondence excludes the shareholders' convening procedure, the decision on holding the meeting in this way belonging to the administrators or members holding a quarter of the share capital. By comparison with the current regulations, through the provision of Article 191 paragraph (2) we consider that the circumstances referred to its assembly to take place by correspondence.

Article 191 paragraph (2) relates to the formulation of the vote by correspondence and not to conduct the meeting in its entirety; full compliance with the assembly nor is it possible, once as the quoted author remembers authoritative, it would involve a tedious, never-ending and unmanageable process;

The convocation is predestined to ensure the participation of all, even direct, that is why you must give chance to the shareholders who wish to express their views;

As a result the convocation at the registered office according to the provision of the article 195 paragraph (1).

As regarding to the text of Law 31/1990, according to the article 192 by the absolute majority vote of the shareholders and the shares the general meeting of shareholders decide, unless the articles of incorporation provide otherwise. It was therefore double majority rule of shareholders and shares, from which associations may derogate stipulating a qualified majority or lower double majority, as the text makes no mentions, we believe that they can even derogate from the double majority rule; establishing it envisages only the majority of shares.

Also for the decisions having as objective the amendment of the articles of incorporation is necessary vote of all the members, unless the law or normative act expressly stipulate otherwise.

The legislator has established that through this provision was reinforced the character *intuitu personae* of the limited liability company that associations cannot remove.

Also the legislator understood that if the assembly is legally constituted he cannot make a valid decision due to non-required majority, the assembly convened again to decide the agenda whatever the number

of shareholders and the share capital represented by the associations present there.

Given the current formulation, it is argued, in the absence of an express provision, that the decision shall be taken by simple majority of the shareholders and shares being combated the possibility that this second convocation to take decisions by the majority of shares; aiming to agree with the latter view, once the legislator did not put their mark on the minimum threshold or double majority, as long as he used the expression “whatever the number of shareholders and the share capital represented”<sup>4</sup> coveting the unlocking of the decision-making process and making a decision.

It is particularly interesting to follow the emphasis that it is not possible to provide during first convocation the date of the second meeting, the legal provision expressly providing that “the assembly convened again,” can decide.

Of those already shown results that a different majority was established by article 202 paragraph (2) regarding the transmission of shares by persons outside the company representing at least 75% of the share capital.

In the system of corporate law have been expressed several opinions on this subject discussed more often both at national and at international level. Some great authors and practitioners in the companies’ field quoted in the paper have shared common views regarding the approached topic, so consider that:

Administrators may be appointed through the company articles of association and by absolute majority vote of shareholders representing share capital and the revocation is differentiated, depending on their appointment.

If they have been appointed by agreement of society it requires the vote of all shareholders, and the dismissal of an appointed administrator named through the articles of incorporation represents the decision of modifying the articles of incorporation, and if they were elected

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<sup>4</sup> C. Predoiu în St.D. Cărpenaru et al., *Legea societăților comerciale. Comentariu pe articole* (Bucharest: C.H. Beck, 2006), 307.

afterwards, they can be revoked by the shareholders assembly through the vote of the absolute majority of the joint stock.

Under the provisions of Law 31/1990, from another point of view and another context is considered through the interpretation of article 192 paragraph (1) and article 77 that: “There are currently two distinct rules which provide different majority requirements: the double majority rule required by article 192 and the majority rule of absolute capital required by article 77 paragraph (1) because we are interested in the majority required for the election of directors, we believe in the principle *specialia generalibus derogant*, absolute majority rule laid down by article 77 paragraph (1) LSC takes precedence, ranging in a special norm against double majority requirement, contained in a legal rule of general application for the validity of decisions of the general assembly.” The legislator opportunely intervened by giving up the rule of double majority of shareholders and shares expanding the possibilities in terms of choice, it must be made by shareholders representing the absolute majority of the share capital. It remains to be seen how it will shape the doctrine and jurisprudence on article 77 paragraph 1 of the provision, according to which it will be split between the method of appointment or by the shareholders’ decision, either by association, what is not clear, in particular how to do the revocation of administrators.

In the current regulations of the LLC, the legislator intended by the standard referral from article 197, paragraph (3), to have the application of article 77 paragraph 1, to establish a derogation from article 192.

From the point of view of theorists and practitioners, there must, under the principle invoked *specialia generalibus derogant*, to accept that the legislator sought on the administrator to establish a regime defined in terms of the provision of article 192, paragraph (2).

To have consistent application of the rule of reference, at the time of appointment of the company is exercised by the vote of all members, in all cases applying the rule established by article (77), paragraph 1, meaning the absolute majority of shares. On the other hand the starting point on which the arguments of theoreticians and practitioners find support, primarily concern the legislator’s intend that we believe is clearly expressed through the desire of establishing a derogatory regime

of requirements to vote regarding the directors. The bottom line is we cannot accept the point of view expressed in the doctrine of unanimity even once the legislature has excluded the application of article 77 paragraph (2), wanting some distance to the provisions governing the company collectively. In reality it placed the limited liability company between general partnership and joint stock company, once through article 197 paragraph (3), has accepted only a few specific provisions of the first forms of society, and by article 196 paragraph (4) excluded fully implement the provisions regarding the management of the joint stock company. It remains to be seen how they will shape in jurisprudence, on the issue questioned if the administrator must abstain from voting on revocation from office observing that there is not a law to oblige in this respect.

Starting from the *intuitu personae* character of the administrator quality in all cases we deal with revocation *ad nutum*, meaning that it can intervene at any time and independently of the will or any fault of the manager, being the exclusive prerogative of the executive decision of the company, competent to appoint or revoke the administrator.

In the chapter concerning limited liability companies the legislator, when aspired that some provisions from the joint-stock company be applicable to the limited liability companies, made express mention in this way (article 196 ruling that the provisions for joint stock companies concerning the right to appeal the decisions of the general meeting shall also apply to limited liability companies; paragraph (1) of article 199 showing that the provisions of article 160 paragraphs (1) and (2) shall apply accordingly in the case of LLCs; paragraph (1) of article 201 stating that the financial statements of LLCs will be made according to the norms for joint stock companies, paragraph (2) of article 197 referring to art.75.76.77 art.197 paragraph (1) and 79 relating to limited partnerships. The prohibition regulated by article 125 paragraph (5) does not apply in the case of a limited liability company and there is no logical legal argument leading to its application by analogy, the legislator's being unambiguous.

According to article 192 paragraph (2) of the Law no.31/1990, in companies with limited liability the decisions concerning the amendment

of articles of association will be adopted by the vote of all shareholders, unless the law or the articles of association provide otherwise.

Jurisprudence law has brought more details of the exercise of voting rights in the general assembly to limited liability companies. In the limited liability companies is governed only the shareholders assembly opposed to joint stock company.

Regarding the limited liability company, the Law No.31/1990 is limited to only provide the right of each shareholder to cast their vote in meetings of members in proportion to its participation in the share capital, without referring expressly to its ability to exercise this right by power of attorney.

According to article 191 paragraph (2) of the law, according to which “The articles of association may stipulate that voting can be done by correspondence” results that the shareholders will establish in the act of incorporation clauses on concrete ways to exercise voting rights, thus including representation<sup>5</sup>.

When the third person receives a power of attorney, which states explicitly the wording of the vote, the will of the shareholder is genuine.

Neither our interpretation, nor the others offered doctrine fully helps in the full solution and solving of the situations that address the entire spectrum of issues arising in the work of the limited liability company, in many cases does not reach an agreement, but contrary opposed to legal action by dissolution. The courts in the absence of express provisions and the grounds that members will not replace it the court does not consider plausible the actions which aspire to exercise a control of the opportunity to prevent excess majority or minority.

We consider that the legislator’s use of the expression “whatever the number of shareholders and the part of the joint stock represented” must be regarded in the way that in this hypothesis giving up the double majority rule and makes it easier to take a decision and to avoid the blockage which is imposed through the article 192 paragraph 2. Because we are talking about taking a decision which does not involve the modification, but about aspects regarding the current activity, the

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<sup>5</sup> I. Macovei and N.R. Dominte, “Implicațiile principiului libertății convențiilor în exercitarea dreptului de vot în societatea cu răspundere limitată”, *R.D.C.* 10(2006): 22.

legislator considered as priority taking a decision for the functioning of the society. The interpretation we approach is in the way that at a second meeting there will be a vote and there will be a decision taken on account of the number of votes according to article 193 paragraph 1.

The shareholders vote in their interests and carry this through the prosperity of the company; they undoubtedly take a decision that satisfies their interests. Given this reality, it was understood that a decision is in accordance with the social interest because it is adopted by the assembly of the shareholders and the shareholders adopt it because it conforms to their interest and we believe that the social interest and the interest of shareholders are obviously confused.

The overlap is not perfect, however, there are situations when the limited liability company's interest is ignored. It has been demonstrated that such a conclusion is clear if there would be no conflict of interest, when the decision is taken unanimously, all agreeing that the decision is not taken in disregard of the limited liability company's interest. This is consistent in terms of shareholders who have no way of challenging the judgment once you have such an interest, voting in its favour, but distancing us from individual members and going to the elements that define limited liability companies, we find that there is a social interest, this interest can be protected from the administrators despite the unanimity voting members, who sometimes do not have the same view.

Voting will remain a function whose exercise should follow strictly the best interests of the limited liability company in general meeting for the recognition of greater freedom in the exercise of its associates within the boundaries of good faith.

There will be attached to the minutes, the documents relating to the convocation, the written documents through which the correspondence vote was conducted and the power of attorney if there is the case, after which it will be signed by all members present there. The enforceability of the decision towards the shareholders is not conditioned to by its publication in the Official Monitor.

The decision must take the form of the document under private signature even in the situation when on the agenda was the approval of

the sale of a property and a person was designated to represent the company.

Although at one time legal practice ruled solutions which withheld the requisite judgment of the mandatory general shareholders decision approving the drawing by the company of a legal act which requires the authentic form, later through article 1 section 2 of GEO no.52/2008, article 70 was inserted in the law no.31/1990, which provides that the acts of disposition of property of a company may be concluded pursuant to the powers conferred to the legal representatives<sup>6</sup> as appropriate, by the law, the articles of incorporation or case statutory bodies need not be a special power of attorney in original for this purpose even if the available documents have to be authenticated.

## CONCLUSIONS

The conclusions and the ideas developed during the research, will be redesigned and refined in a new research because, as presented, the subject matter is not exhausted.

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<sup>6</sup> Lucian Săuleanu, *Societăți Comerciale* (Bucharest: Universul Juridic, 2012), 97-98.

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# THE LIMITS TO THE PRINCIPLE OF PARTY AUTONOMY IN ROMANIAN PRIVATE INTERNATIONAL LAW

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## **Abstract:**

*This article aims to provide a brief presentation of the instances when a Romanian court of justice is entitled to apply to a certain contract a law that is different than the one chosen by the parties to govern it. All these instances are limits to the fundamental principle of party autonomy in Private International Law.*

*Viewed as a whole, Private International Law, including the principle of party autonomy, is one of the most important tools to use for bringing about uniformity and predictability in legal relationships that span across the boundaries of the jurisdiction of one country or another. As a consequence, the limits thereof – that is, the situations where a court applies a law which is different than the one determined according to the conflict-of-laws rules and which is usually *lex fori* – constitute one of the most prominent strongholds of national legal peculiarities and usually represent either the cultural or historical heritage of the legal system of the respective court or the effort of the legislator to protect its own citizens.*

*The limits to the principle of party autonomy that represent the subject matter of this study are the following: public policy, overriding mandatory provisions, fraud, the impossibility to determine the content of a foreign law, the inexistence of a foreign element and the requirement that the rules chosen by the parties are laws, not rules of law.*

**Key-words:** *Private International Law, Party Autonomy, Public Policy, Overriding Mandatory Provisions, Fraud, Foreign element, Laws and Rules of Law.*

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## **INTRODUCTION**

Romanian judges and arbitrators often apply foreign laws in Romanian cases. This happens either because the parties themselves have chosen a foreign law to govern their dispute (this being the most salient conflict-of-laws rule in contracts – „the law applicable to the contract is

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the one chosen by the parties thereto”<sup>2</sup>), or because, absent such a choice, the relevant conflict-of-laws provision indicates such a foreign law to apply.

At a first glance this seems unnecessarily obfuscated. We dare to suppose that all law practitioners that deal with private international law asked themselves, at one time, “why isn’t it so that the judge or the arbitrator must always apply the substantive law of its country?” The reason is because the rationales that underpin the conflict-of-jurisdictions rules (i.e. the rules because of which the arbitrator or the judge acquired jurisdiction to settle the case) often diverge from the rationales that underpin the conflict-of-laws rules;<sup>3</sup> as a consequence, it is easy to see why the outcome of the application of the two types of provision also differs. The first type of provisions (i.e. the conflict-of-jurisdiction rules) envisage, on one hand, a better administration of justice<sup>4</sup> and, on the other hand, the procedural interests of the parties.<sup>5</sup> The latter type of

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<sup>2</sup> E.g. Art. 116 (1) of the Swiss PILA, Art. 3 (1) of Rome I Regulation; Art. 7 of the Japanese law on private international law, translated in English by Kent Anderson and Yasuhiro Okuda; Art. 1.210 (1) of the Russia Civil Code, available (10.04.2016) on-line at <http://www.russian-civil-code.com/PartIII/SectionVI/Subsection1/Chapter68.html>; § 187 (1) of the Restatement (2nd) on Conflict of laws” American Law Institute; Art. 2.637 of the Romanian Civil Code etc.

<sup>3</sup> Ole Lando, “Lex fori in foro proprio”, *Maastricht J. Eur. & Comp. L.* 2 (1995): 361-362.

<sup>4</sup> Pursuant to. 8 (3) of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, “*as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;*”; this text has the objective the elimination of legal costs and the economy of time. A further example, pursuant to 7 (2), “*in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*”

<sup>5</sup> For example, it is the procedural interest of the respondent to be sued in his or her own country. Likewise, this is also to the benefit of the claimant whereas it is in this forum that the claimant has more chances to find the respondent and to enforce his rights against him. Lando, “Lex fori in foro proprio”, 361.

provisions (i.e. the conflict-of-laws rules) are aimed to safeguard the substantive interest<sup>6</sup> of the parties to the dispute.<sup>7</sup>

Nevertheless, in many instances, it happens in international disputes that the judge or the arbitrator applies the very substantive provisions of his or her country. Sometimes, the reason is because the outcomes of the application of the two types of provisions mentioned above converge – e.g. *forum rei sitae* - *lex rei sitae*, *forum loci delicti* - *lex loci delicti* and so on and so forth; other times, the reason for this is because the parties themselves have chosen for this to happen. Finally, in some of the instances this happens – and this is important for the purposes of this paper– because of certain extraordinary circumstances whereby the foreign law designated by the choice-of-laws rule is rendered inapplicable. In other words, there are some limits to the application of the foreign law designated by the conflict-of-laws rules.

We stress, from the very outset, that, depending on their scope, these limits are either general or special. The general limits exclude the application of the foreign law irrespective of the conflict-of-laws rule that made it relevant in the first place. The special limits are incident either (i) only provided that the foreign law is relevant because the parties have chosen it to govern the dispute (this type of special limits can be referred to as limitations to the principle of party autonomy)<sup>8</sup>, or (ii) to the contrary, only provided that the foreign law is relevant because a choice-

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<sup>6</sup> A major interest of the parties to a contract is for them to know, with relative certainty, the content of their legal relationship and to be able to predict the outcome of possible disputes. For this end, the conflict-of-laws rules usually provide that the contract shall be governed by the law with which the contract has the tightest connection. For this same view, please also refer to Lando, “Lex fori in foro proprio”, 362.

<sup>7</sup> Even if this state of affairs has a strong theoretical underpinning, we cannot ignore the fact that it sometimes leads to unwanted results for at least two reasons. First, the justice made by the judge is of a lower quality if he or she applies an unfamiliar law. [Lando, “Lex fori in foro proprio”, 368.] Second, the determination of the content of the content of the foreign law is costly and time consuming [Lando, “Lex fori in foro proprio”, 372].

<sup>8</sup> Giesela Rühl, “Party autonomy in the private international law of contracts: transatlantic convergence and economic efficiency”, *CLPE Research Paper 4* (2007): 8 *et seq.*; William J. Woodward Jr., “Contractual choice of law: legislative choice in an era of party autonomy”, *54 S.M.U. L.Rev.* (2001): 728 *et seq.*

of-law provision (and not the will of the parties) indicated it to govern the dispute.<sup>9</sup>

In this paper we will briefly present the limits of the application of foreign laws that are incident when the contract includes a choice of law clause. We will analyze the matter both from the perspective of private international law and from the perspective of international arbitration, but the study will be limited to matters that are relevant in contracts. These limits are: public policy, overriding mandatory provisions, fraud, the impossibility to determine the content of a foreign law, the inexistence of a foreign element and the requirement that the rules chosen by the parties must be laws, not rules of law.

## **PUBLIC POLICY<sup>10</sup>**

### ***Definition***

Public policy is usually understood as a judicial<sup>11</sup> exception<sup>12</sup> to the rule that the states unilaterally<sup>13</sup> undertook the obligation to apply foreign laws or supranational laws, in certain predetermined situations. As it appears, this is a rather functional definition of public policy. It shows only what public policy is able *to do*, rather than showing what public policy *is* and it proves useless for the purposes of determining its content.

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<sup>9</sup> This is the case of Art. 2.565 of the Civil Code. Pursuant to the first paragraph of this article, the application of the law designated by the conflict-of-laws rule can be eliminated if the disputed legal relationship has small or no links to it. This is not applicable for situations regarding capacity or legal standing. Likewise, this is not applicable, pursuant to Art. 2.565 (2), when that law has been the choice of the parties.

<sup>10</sup> This section summarises the paper Vladimir Diaconiță, “Considerații despre ordinea publică de drept internațional privat român în materie contractuală”, (2016; in print): *passim*.

<sup>11</sup> Kent Murphy, “The traditional view of public policy and ordre public in private international law”, *11 Ga. J. Int’l & Comp. L.* (1981): 591.

<sup>12</sup> Nicoleta Rodica Dominte et al. “Comentariul articolului 2.564 C. civ.” in Flavius Antoniu Baias (et al.), *Noul Cod Civil, Comentariu pe articole, ediția 1, revizuită*, (București: C.H. Beck, 2012), accessed 12.03.2015, [www.legalis.ro](http://www.legalis.ro).

<sup>13</sup> Exceptionally, this comity exists because of the conclusion of certain international treaties (such as Rome I Convention) or because of the accession to certain international organisations (such as the European Union).

The analytical definitions provided by scholars,<sup>14</sup> do not provide much help either, when it comes to the purpose described above. Thus, the pioneer in the matter of overriding mandatory provisions, Phocion Francescakis, is of the opinion that the external public policy (a notion that, in its broadest sense, encompasses both overriding mandatory provisions and negative public policy) contains all the mandatory provisions that the state considers of crucial importance for the safeguarding of its political, economic and social order. To this effect, Art. 2.564 of the new Civil code provides that „*the application of the foreign law breaches Romanian public policy if the application of it leads to a result which is incompatible with the fundamental principles of Romanian law, of the law of the European Union or with the fundamental human rights*”. From this it results, first, that public policy is a set of legal provisions. Second, for those rules to be deemed of public policy, they must be of a fundamental importance; it has been stated that such rules must be intrinsically imperative.<sup>15</sup>

However, how can one determine the *fundamental* importance of a rule? Which are the ones that are *intrinsically imperative*? All the efforts of the scholars to the effect of making public policy a clearly determined concept have been doomed to fail.<sup>16</sup> For example, US case-law<sup>17</sup> and legal literature<sup>18</sup> admit that, in practice, public policy is used in a vague and imprecise manner,<sup>19</sup> but that this must be accepted as it is whereas the concept is impossible to define.<sup>20</sup> In the same vein, in a now famous remark, the English judge, Sir James Burrough observed that public policy is an unruly horse and when once you get astride it you never

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<sup>14</sup> Catherine Kessedjian, “Public order in European Law”, *1 Erasmus L. Rev.* (2007-2008): 30.

<sup>15</sup> Pierre Mayer, “Mandatory rules of law in international arbitration”, *Arb. Int’l V.2*, 4 (1986): 275.

<sup>16</sup> Gerhart Husserl, “Public policy and ordre public”, *25 Va. L. Rev.* (1938-1939): 40.

<sup>17</sup> Case “Davies v. Davies”, *36 Ch. D.* 359, 364 (1887).

<sup>18</sup> Husserl, “Public policy”, 40.

<sup>19</sup> Case “Safeway Stores v. Retail”, *Clerks Int’l Ass’n*, *41 Cal. 2d.* (1953).

<sup>20</sup> Kojo Yelapaala, “Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California”, *2 Transnat’l Law* (1989): 380.

know where it will carry you.<sup>21</sup> In the context, this judge urges for a prudent (or even reluctant!) approach when using this mysterious exception. Public policy remains, therefore, a amorphous doctrine,<sup>22</sup> that one – if lucky – can barely recognize only when one stumbles upon it. Nonetheless, one thing is certain: because it has an exceptional and well determined function – which is to dislocate the otherwise applicable foreign law, it can be reasonably inferred that it is incident on rare occasions and that it must be narrowly construed and applied by the judges and by the arbitrators.<sup>23</sup>

### ***The sources of public policy***

External public policy is entirely made of legal provisions that are part of the legal order of one state or another; this legal order of a given state encompasses, in turn, either rules that have been enacted by that very state – e.g. the Romanian civil code, the Italian Code of civil procedure, and so on – or rules that have been naturalized by that state (*ex post*, by means of ratification – e.g. the CISG– or *ex ante*, by accession to international organizations that has the attribute of rendering laws, such as, for example, the European Union – e.g. Regulation Rome I). Regardless of the source of the rules that form the legal order of the state, these rules can be considered, by that state, to be of public policy. To conclude on this topic, the source of one rule or another cannot serve as a criterion to differentiate between rules that are part of the public policy and rules that are not.

Given that public policy is always made of rules that are part of the legal order of the forum, it means that it may be seen as the footprint left by the fact that the dispute is settled in one jurisdiction or another on the substantive element of that particular dispute. To put it differently, by applying the public policy, a judge from a certain state settling a dispute governed by the laws of another state ends up rendering a decision which

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<sup>21</sup> Case “Richardson v. Mellish”, *apud*. Murphy, “The traditional view of public policy”, 592; Jeffrey W. Stempel, “Pitfalls of public policy: the case of arbitration agreements”, 22 *St. Mary's L.J.* (1990-1992): 261.

<sup>22</sup> Patrick Joseph Borchers, “Categorical exceptions to party autonomy in private international law”, 82 *Tul. L. Rev.* (2007-2008): 1653.

<sup>23</sup> Dragoş Alexandru Sitaru, *Tratat de drept internațional privat*, (Bucharest: Lumina Lex, 2001), 117.

is by default more consonant with the legal order and with the ideas of morals and justice which are particular to his or her state.<sup>24</sup> Consequently, when faced with the decision to have the dispute settled in one jurisdiction or another, the parties must take into account the procedural advantages given by each of the jurisdictions, the conflict-of-laws rules of each of the jurisdictions and – this being important for the purposes of this paper – the public policy *lato sensu* of each of the jurisdictions.

### **Conditions**

Public policy applies only provided that, when deciding the dispute, the judge deems that the outcome of the application of the foreign law is in a stark contradiction with the fundamental values of the forum. In fewer words, public policy must be assessed *in concreto* and it is relative in time and in space.<sup>25</sup>

The fact that public policy must be assessed *in concreto* means that the judge must first analyze the content of the foreign law and to observe whether the result of its application damages in a severe manner the fundamental values of his or her forum. Only afterwards – if the said outcome is found to hold true in that case – the judge may exclude the incidence of undesirable foreign law. Thus, only major differences between the legislation of the forum and the foreign law are relevant for the purposes of pleading for public policy; minor differences between the two are irrelevant for this end.<sup>26</sup>

Public policy is relative in time in the following three ways: (i) public policy does not have a fixed content; to the contrary, the content may vary together with the variation of the rules that compose public policy; (ii) public policy may vary even if the rules that it is made of remain the same; and, finally, (iii) public policy is breached only in the moment when the judge or the arbitrator settles the dispute, which means

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<sup>24</sup> Murphy, “The traditional view of public policy”, 591.

<sup>25</sup> Pierre Lalive, “Transnational (or truly international) public policy and international arbitration”, paper presented at the 8th International arbitration congress, Comparative arbitration practice and public policy in arbitration, New York, USA, May 1986, 13.

<sup>26</sup> Ion P. Filipescu et al. *Tratat de drept internațional privat*, (Bucharest: Universul Juridic, 2007): 113.

that, for instance, public policy may alter between the time when a contract governed by a foreign law is concluded and the time a dispute in relation to that contract is settled; the public policy which is relevant, in such a scenario, is the latter.

Finally, public policy is relative also in space. This doctrine does not have an international meaning for two reasons. The first is because, as mentioned, public policy is always made of rules that are part of the legal order of a certain, given, state. The second is because the hierarchy of the values that are protected by legal provisions differs, from one state to the other, and this can hold true even if the provision that form part of the legal orders of these states are similar. For example, despite the limitation period being regulated similarly in two given states, its legal status may still differ, in the sense that in one of the states the values protected by the rules on limitation are deemed major, whereas in the other state, the same values are deemed ancillary.

### ***The effects***

Public policy becomes relevant only after the conflict-of-laws rules has been applied and only provided that the substantive foreign law designated by the conflict-of-laws rules leads to an unbearable outcome. Thus, public policy has two effects: a negative one, which excludes the application of the foreign law and a positive one, which fills the void left after the first effect occurred and which entails the application of a different law instead of the one that has been deemed intolerable.

The legal basis for these effects is given by Art. 2.564 of the Civil code, which reads as follows: *„the application of the foreign law will be excluded if it breaches Romanian public policy [...]. When the application of the foreign law takes place, Romanian law will apply.”*

## **OVERRIDING MANDATORY PROVISIONS**

Overriding mandatory provisions<sup>27</sup> are general limits to the application of a foreign law and are defined in the Civil code as being *„mandatory provisions set out by Romanian law to apply to legal relationships with a foreign element”*. Those provisions apply with

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<sup>27</sup> These provisions are also called *lois de police*.

priority, the conflict-of-laws rules being rendered futile – Art. 2.566 (1) of the Civil code.

From this definition it results that the overriding mandatory provisions have the following characteristics: (i) they are substantive provisions (as opposed to conflict-of-laws provisions); (ii) they are mandatory to such an extent that they exclude the application of both the conflict-of-laws rules and the foreign law eventually designated by these conflict-of-laws rules; (iii) they apply to legal relationships that have a foreign element.

The overriding mandatory provisions are closely related to the public policy doctrine presented above. This enables them to be collectively referred to as public policy *lato sensu*. The difference between the two shows in the way that they function: the public policy entails for the judge to first apply the conflict-of-laws rules, to then determine the incident foreign law, to analyze the consequences of the application of that foreign law upon the fundamental values of the forum and, finally, the exclusion of the foreign law. Conversely, the overriding mandatory provisions do not entail the same path to be taken. Once the judge finds that a certain legal relationship falls under the ambit of such an overriding mandatory provision of the forum, he or she will apply the latter immediately. We deem that an example will best clarify this difference between the two doctrines:

It is possible that certain states consider the caps set for interest as being overriding mandatory provisions and that certain other states consider the very same caps as being of public policy *stricto sensu*. We will first refer to the first kind of states. If a contract sets forth a certain amount of interest, the judge will analyze the validity of that amount strictly against the backdrop of the overriding mandatory provision that regulates this issue in the forum. Now let us suppose that a judge coming from a state where the cap set on interest is considered as being of public policy must assess the validity of a clause setting for a certain amount of interest for a loan which is governed by a law where no such caps are fixed. In this latter case, the public policy of the forum is not breached by the mere fact that the law governing the loan does not provide for a cap for interest. The judge must first identify the amount of interest set out by

the parties. The foreign law will be excluded only in the scenario where this amount is grossly disproportionate as compared with the cap provided by the law of the forum. In other words, only a grossly larger amount of interest will trigger the incidence of public policy.<sup>28</sup>

## **FRAUD**

### ***Fraud in contracts, in general***

Scholars say that fraud is a ground for absolute nullity of a contract.<sup>29</sup> It appears when the parties enter into a contract not for its usual effects, but rather exclusively for the benefit of triggering the incidence of a more favorable legal provision that would not apply otherwise.<sup>30</sup>

This definition makes apparent that the cumulative conditions for fraud to lead to nullity are the following:<sup>31</sup> (a) the parties conclude an otherwise valid contract (i.e. the sole ground for nullity being fraud itself); (b) a certain aspect of the legal situation generated by the contract represents the trigger for the incidence of a certain favorable legal provisions; (c) the obligations generated by the contract are not performed or, if they are performed, this performance is not momentous for the parties (to put it differently, the parties are not primarily interested in the performance of the contract, but rather in the application of the favorable legal provision.

To conclude based on the above, one faces, for instance, a fraud when the parties to a contract for private scholarship<sup>32</sup> do not have the

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<sup>28</sup> E.g., in Case “Laminoirs Trefileries Cableries de Lens SA v. Southwire Company”, 484 F. Supp. 1063 (N.D. Ga. 1980), the cap set of for interests has been deemed of public policy. As a consequence, it has been held that the interest set out in a contract governed by French law (aprox. 10%), although larger than the interested allowed under the law of the forum (Georgia, USA) – i.e. aprox. 7% - is not sufficient to trigger the incidence of public policy whereas the contractually agreed upon interest in the case did not infringe upon the elementary conceptus of morals and justice from Georgia.

<sup>29</sup> Bogdan Dumitrache, “Domeniul de aplicare a cauzelor de ineficacitate a contractelor”, accessed 12.03.2016, <http://ebooks.unibuc.ro/drept/zarnescu/5-2.htm>, Section II.6.

<sup>30</sup> Dumitrache, “Domeniul de aplicare...”

<sup>31</sup> Dumitrache, “Domeniul de aplicare...”

<sup>32</sup> Law No. 376 of 28 September 2004 regarding private scholarships.

intention for the beneficiary to receive the scholarship, but rather the intention for the debtor to benefit from the fiscal advantages that this contract brings about.<sup>33</sup>

### ***Fraud in international contracts***

Fraud is a general limit to the application of foreign law. In international contracts, fraud is different, first, by the fact that the more favorable law is foreign and that the law that is defrauded is the law of the forum. Second, by the fact that the sanction is not the absolute nullity of the entire contract but, as a matter of principle, the expulsion of the foreign law. Thus, if the foreign law governs the contract because of the choice thereof by the parties, the absolute nullity mentioned above targets, chiefly,<sup>34</sup> only the choice of law clause. If the foreign law applies because of a conflict-of-laws provision, then, regardless of whether the contract is deemed null or not, the incidence of the foreign law is nonetheless excluded.

Therefore, for example, two nationals of country Y desire to benefit from the application of a certain favorable provision from country X and to exclude the incidence of an otherwise applicable unfavorable provision from country Y. The two enter into a contract to which they artificially confer a foreign element (e.g. they conclude the contract abroad). In such an event, the judge from country Y will oust the law of country X for it is applicable as a result of fraud, despite the fact that, formally speaking, the contract between the two parties is perfectly valid.<sup>35</sup>

Before closing this section, we bring the attention to a view that is often expressed with regard to fraud and which is a mistake, in our opinion. We make the preliminary remark that the parties are, as a matter of principle, free to decide which law to govern their contract. The parties, more often than not, chose the applicable law either because it is neutral (in the sense that it is not more familiar to one of the parties than to the other), or because that chosen law is modern and qualitatively

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<sup>33</sup> Section II of the Instruction for the application of Law No. 376/2004 regarding private scholarships.

<sup>34</sup> Total nullity should not be ruled out because, by default, the application of the foreign law represents the central element desired by the parties.

<sup>35</sup> Lalive, "Transnational (or truly international) public policy", 21.

superior, or because it has ample case-law that confers stability and predictability to it, or finally, simply because it is more favorable to the parties than other potentially applicable laws.<sup>36</sup> We express the opinion that if the parties have chosen the applicable law for the latter motive,<sup>37</sup> this is not sufficient to infer that the law that has been chosen is applicable as a result of fraud.<sup>38</sup> The contrary would entail that the foreign law applies as a result of fraud in most of the cases, which would be absurd. To reach the conclusion that fraud is present, it is required for one to find that the parties had no interest in the performance of the contract, but that they were particularly interested in the application of the foreign law as such.<sup>39</sup> In other words, fraud is not present if the parties had in mind, when concluding the contract, the more favorable foreign legal provision. For fraud to be deemed present the favorable foreign provision must be the single, most important reason for the parties to conclude the contract.

Because of the above, we do not concur with certain views expressed in the legal literature. For example, scholars state that there is fraud when a young couple changes the domicile because the two wish to get married but they do not meet certain requirements set out by their legislation; thus, they move to another country where that particular requirement is not present.<sup>40</sup> A further example provided in scholarly writings is the one of a sales contract pertaining to a Romanian ship concluded between two companies that change the flag of the ship for the purpose of avoiding certain fiscal duties levied otherwise on the

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<sup>36</sup> Cristiana Fountoulakis, "The Parties' Choice of 'Neutral Law' in International Sales Contracts", 7 *Eur. J.L. Reform* (2005): 304 *et seqq.*

<sup>37</sup> E.g., Sitaru, *Tratat de drept internațional privat*, 136; Dan Lupașcu, *Drept internațional privat* (Bucharest: Universul juridic, 2008), 85.

<sup>38</sup> Either by designating it through a choice of law clause or by devising a connecting factor with a foreign law.

<sup>39</sup> The High Court of Slovakia held, in *Case No. 8 Szo 17/2007 of 21 February 2008* that "fraudulent acts represent activities of persons that formally respect the law but that aim at purposes that are neither envisaged, nor permitted at law." *apud.* Alexander J. Belohlavek *Conventia de la Roma. Regulamentul Roma I* (Bucharest: C.H. Beck, 2012), 147-148.

<sup>40</sup> Macovei, Dominte, "Comentariul articolului 2564 C. civ."

parties.<sup>41</sup> We do not agree with those examples. We consider that, for fraud to be present, the young couple must not be interested in being married at all. Likewise, for the second example: the companies must not be interested in the sale of the ship at all for fraud to occur. For instance, we deem that fraud would be present had the couple wanted to be married abroad for the sole purpose of benefiting from certain facilities given by the state to the newlyweds.

Finally, the private international law sanction of fraud (i.e. the exclusion of the foreign law) applies strictly to the situations where Romanian law is defrauded, not in instances where other laws are defrauded (Art. 2.564 (1) of the Civil code). This does not exclude, however, the common sanction of fraud – i.e. the absolute nullity of the contract. Thus, if a foreign law is defrauded, the judge must declare the nullity of either the entire contract or the choice of law clause, depending on the circumstances of the case. In this latter instance, whereas Art. 2.564 (1) of the Civil code does not apply, the judge will not automatically apply Romanian law but, rather, the law determined according to the relevant conflict-of-laws rule.

## **THE IMPOSSIBILITY TO DETERMINE THE CONTENT OF THE FOREIGN LAW**

When the relevant conflict-of-laws rule point to a law that is different than the one of the forum, the following questions arise:<sup>42</sup> (i) will the foreign law be brought up in the suit *ex officio* or rather the parties must request it? (ii) is it for the parties or for the judge to determine the content of the foreign law? In fewer words, in these scenarios one must establish whether the foreign law is an element of law or an element of fact in the proceedings.<sup>43</sup>

Our opinion is that Art. 2.562 of the Civil Code dictates that the judge must regard the foreign law as an element of foreign law. The consequences are as follows: (a) being an element of *law*, the foreign law

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<sup>41</sup> Lupaşcu, *Drept internaţional privat*, 82.

<sup>42</sup> Stephen L. Sass, “Foreign Law in Civil Litigation: A Comparative Survey”, *16 Am. J. Comp. L.* (1968): 334.

<sup>43</sup> John R. Brown, “Ways to Prove Foreign Law”, *9 Mar. Law.* (1984): 183 *et seqq.*

can be brought up by the judge *ex officio*<sup>44</sup>, (b) being an element of law, it means that it is not exclusively for the parties to determine the content of the foreign law and, finally (c) because of it is a *foreign* element, the presumption that *jura novit curia* does not apply, which means that it is the common undertaking of the judge and of the parties to determine the content of that foreign law. In the exceptional circumstances where, despite of the concerted efforts of the judge and of the parties to determine the content of the foreign law, this remains a mystery, pursuant to Art. 2.562 (3) of the Civil code, the elusive law will be rendered inapplicable and Romanian law will apply in its stead.<sup>45</sup>

## **LAWS VS. RULES OF LAW**

### ***The situation in Private international law***

According to Art. 3 (1) of Rome I Regulation „*the contract is governed by the law chosen by the parties*”. From this it results that, in international contracts, the parties are free to decide their contract to be governed by the laws of any country, regardless of whether that country has a certain link to the contract or not. The parties can, for instance, decide to have their contract covered by the laws of Romania, Italy, France, Switzerland, Senegal and so on. Given this broad option granted to the parties, can they chose their contract to be governed by the UNIDROIT Principles? Or by the PECL? Or by the DCFR or CESL? Etc. To put it differently, can the parties chose their contract to be governed by rules of law, instead of laws?

But first, a few distinctions must be drawn between laws and rules of law. The concept of rules of law, in its narrow meaning, represents a set of rules of conduct which do not have the power of a law and which are issued by non-state entities.<sup>46</sup> The UNIDROIT Principles are, for instance, rules of law in the field of contracts. They do not form part of the legislation of any state. This is the difference between them and, for instance, the Romanian Civil code or the CISG. Thus, both the laws and

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<sup>44</sup> Lupaşcu, *Drept internaţional privat*, 71.

<sup>45</sup> To this effect, please refer also to Lando, “Lex fori in foro proprio”, 370.

<sup>46</sup> Jean-François Poudre et al. *Comparative law of international arbitration*, 2nd edn., (London: Sweet & Maxwell, 2007): 591.

the rules of law represent a set of rules of conduct. Laws are rendered by states, whereas the rules of law are elaborated by groups of academics and law practitioners, without being adopted, as such, by any country.

We can turn, now, to our initial question – i.e. whether, in private international law, the parties can opt for rules of law to govern their contract. The answer is negative. Art. 3 (1) of Rome I Regulation is clear in this regard: the concession made to the parties is that they can chose whatever law to govern their contract.<sup>47</sup> The parties cannot, thus, opt for rules of law.<sup>48</sup>

Therefore, if the choice of law clause designates certain rules of law, this clause is invalid and the contract will be governed by the law determined pursuant to the relevant choice-of-law rule applicable absent the choice of the parties in this regard. However, we are of the opinion that, in such an event, the rules of law chosen by the parties should not be totally disregarded. The choice of law clause should be converted in a clause of incorporation. The effects of such a clause shall be that the rules of law designated by it will not govern the contract but, rather, they will become part of it, provided that the provisions thereof do not contradict the mandatory rules of the applicable law.

### ***The situation in international arbitration***

In international arbitration, the conflict-of-laws rules differ from the ones applicable in state disputes. Thus, a state judge will look for the relevant conflict-of-laws rule in the Civil Code whereas the arbitrator will search those rules in the Code of Civil Procedure, whereas the latter contains provisions regarding arbitration (as such, the latter is the *lex arbitrii* for the arbitrations seated in Romania).

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<sup>47</sup> This limitation provided under Art. 3(1) of Rome I Regulation is heavily criticised by reputed scholars chiefly because, first, it deprives the parties from a valuable option (the UNIDROIT Principles, for example are renowned as being one of the most modern set of rules applicable to contracts) and, second, because it bars the possibility of national courts to fill the gaps of the applicable legislation with rules of law and, finally, third, because it puts into question the very purpose of the Regulation, which is uniformity. Please also refer to Friedrich K. Juenger, “The *lex mercatoria* and private international law”, *60 La. L. Rev.* (2000): 183.

<sup>48</sup> Juenger, “The *lex mercatoria* and private international law”, 183.

Art. 1.120 of the Code of Civil Procedure (NCPC), as Art. 3 (1) of Roma I Regulation, limits the power of the parties, in the sense that the latter can only chose a law, not a rule of law, to govern the dispute. Thus, pursuant to Art. 1.120 (1) NCPC, „*the tribunal will apply the law chosen by the parties*”. It is worth mentioning that, from this perspective, NCPC is not a modern, but rather a conservatory *lex arbitrii*. The latest tendencies in arbitration are to the effect of limiting the power of the parties to the lowest extent possible, which means, *inter alia*, that they are enabled to chose rules of law to govern the dispute. For example, Art. 28 (1) of UNCITRAL Model Law provides that the tribunal will decide the dispute on the rules of law chosen by the parties („[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.”). The same is provided under Art. 1.496 (1) of the French Code of Civil Procedure, Under Art. 33 (1) of the Swiss Rules of International Arbitration, under Art. 21 of the ICC Rules and so on and so forth.

Therefore, depending on the seat of the arbitration, the parties are free to have their dispute settled in accordance with the rules of law of their choice. If the seat is in Romania, a contract can be governed only by laws; if the seat is in a country with a modern *lex arbitrii*, the contract can be governed either by laws, or by rules of law.<sup>49</sup> We are of the opinion that, if the arbitration is seated in Romania, the parties can only chose laws (not rules of law) to govern the contract even in the instances where the arbitration takes place in accordance with certain arbitration rules (rules that must not be confused with the *lex arbitrii*) that permit the application of rules of law. Thus, let us take an example of an arbitration seated in Romania that take place pursuant to the UNCITRAL Rules of arbitration. According to Art. 35 of the latter, the parties can chose even rules of law to govern the dispute. However, pursuant to the provisions of the *lex arbitrii*, the parties can only designate laws to that effect. In such a scenario, the arbitrator must apply the conflict-of-laws rules encompassed in the Rules of arbitration, provided that those do not contravene the mandatory provisions of the *lex arbitrii*. Consequently,

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<sup>49</sup> Juenger, “The *lex mercatoria* and private international law”, 182.

they must not apply the rules of law, but a law designated by the *lex arbitrii*.

A further example. assuming that *lex arbitrii* contains the following conflict-of-laws rules: (1) the dispute will be decided based on the law chosen by the parties; (2) absent such a choice made by the parties, the tribunal will apply the law determined by the application of the conflict-of-laws rule that the tribunal determines to be most appropriate. In contrast, the conflict-of-laws rules encompassed in the arbitration rules are the following: (1) the dispute will be decided based on the rules of law chosen by the parties; (2) absent such a choice made by the parties, the tribunal will decide the dispute in accordance with the provisions of the law that it determines to be most appropriate. The two sets of conflict-of-laws rules differ in the following two ways: (a) the limits to the autonomy of the parties (i.e. pursuant to the *lex arbitrii*, the parties can designate only laws to govern the dispute, whereas pursuant to the provisions encompassed in the rules of arbitration the parties can opt either for a law, or for a rule of law and (b) the path the arbitrator must take in order to determine the law applicable to the dispute absent a choice made in this regard by the parties. Two questions await an answer: (A) what will happen if the parties did not agree on a choice of law provisions in their contract? and (B) what happens if the parties have chosen a rule of law?

Regarding the first question, we are of the opinion that the arbitrator must take into account the conflict-of-laws rules set out in the arbitration rules chosen by the parties (i.e., absent a choice of law, the arbitrator will determine applicable a law which he or she deems fit – *voie directe* – without there being the need to first select of conflict-of-laws rule and thereafter to determine, based on the latter, the substantive law applicable). The reason is because, based on the first conflict-of-laws rule set out in *lex arbitrii*, the parties are free to decide the law that applies to their dispute. Also based on this rule, the parties are obviously entitled to do less, which is to provide for which law must not apply to their dispute<sup>50</sup> (e.g., the parties might set forth that the dispute shall be finally settled by the law chosen by the arbitrators, provided that that law

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<sup>50</sup> Poudret, Besson, *Comparative law of international arbitration*, 577.

is not English law). In the same vein, based on the very same conflict-of-laws rule of *lex arbitrii*, the parties can dictate to the arbitrator the manner in which the applicable law is to be chosen by the latter (i.e., based on the first conflict-of-laws rule of *lex arbitrii*, deviating from the second conflict-of-laws rule of *lex arbitrii*, the parties can provide that the arbitrator must not choose a conflict-of-laws rule in order to determine the substantive law applicable to the dispute but that the arbitrator must directly determine the substantive law that he or she deems fit to apply to the dispute). This option of the parties can be brought about either by an express clause in their contract (e.g. the dispute will be settled in accordance with the law determined by the arbitrator using the *voie directe* method”), or, indirectly, by the parties’ choice of certain arbitration rules that deviate from the second conflict-of-laws rule of the *lex arbitrii*, in the sense that the arbitration rules provide for a mechanism to determine the substantive law applicable to the dispute different than the one set forth by *lex arbitrii*. This is what happens in our example above. Thus, to conclude on this topic, in the absence of the parties’ explicit choice of substantive law applicable to the dispute, the tribunal (in order to give full effect to the validly expressed will of the parties) must use the conflict-of-laws rule set out in the arbitration rules chosen by the parties.

Regarding the second question, we consider that the parties’ choice of certain rules of law (we remind that in our example, this type of choice is permitted under the rules of arbitration but not under *lex arbitrii*) is invalid. In such a scenario, the tribunal should deem void the choice of law clause, should determine the substantive law applicable to the dispute pursuant to the relevant conflict-of-laws rule, to convert the choice-of-law clause in an incorporation clause and, finally, to apply the rules of law chosen by the parties as parts of the contract, to the extent that they do not deviate from the mandatory provisions encompassed in the pertinent substantive law according to which the dispute is to be settled.

### ***The concept of „rules of law”***

We have analyzed so far the possibility of the parties to elect rules of law, such as the UNIDROIT Principles, to govern their contract. We have evaluated this possibility both under general private international

law and under the rules of international arbitration. We have mentioned, in passing, that the rules of law are nothing but a set of rules of conduct which simply do not form part the legal order of any given state, this being the difference between them and laws. However, this begs the question whether any set of rules of conduct can qualify as rules of law.? For instance, we can certainly say that the UNIDROIT Principles, the DCFR and the PECL are such rules of law. But can we say the same with regard to a set of rules coined by the parties themselves, separate from the body of the contract? The answer should be no. To grant such a liberty to the parties will be tantamount to granting them the liberty to have their contract governed by no law in arbitration. At the end of the day, there is no relevant distinction between the rules coined by the parties on a paper under the title `Contract` and the rules devised by the same parties under the title `Rules of law`. The holders of the same interests (i.e. the parties) participated to the drafting of both the contract and of the rules that are supposed to govern that contract, which is simply outrageous.

The reason why we deem that the rules devised by the parties *ad hoc* do not qualify as rules of law is the following. The state has the duty to protect the interests of the individuals, on one hand and, on the other, to reconcile those interests, when they diverge. This duty is performed, *inter alia*, by the state's sovereign power to legislate. Nevertheless, the states have unilaterally conceded – all, we dare say – that, in certain predetermined instances, a foreign law applies instead of its own.<sup>51</sup> The door to this concession has been opened when the economic, social, political etc. problems that require legislation started to get more and more similar, across the world. Therefore, given that *ratio legis* commenced to be uniform, across the globe, it is only natural to assume that the legislation, as such, started to be similar, in one state as compared to any given other. This phenomenon is called, in comparative law, the “presumption of similarity”. To put it simple, the interests

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<sup>51</sup> The foreign law does not apply as a consequence of its own authority (otherwise the sovereignty of the states will be breached) but rather on the basis provided by the conflict-of-laws rules of the forum. To this effects, see Lupașcu, *Drept internațional privat*, 68.

protected by different legal orders and the manner in which these interests are reconciled are on a path towards harmonization. This enables one legislator to trust another to such an extent that the first permits the legislation coined by the latter to apply to certain situation which otherwise would have fallen within the scope of the first legislator's power to legislate. In other words, the law of one country permits certain intrusions of a foreign law because the latter was drafted having in mind interests which are similar with the ones that were envisaged during the drafting of the first piece of legislation.

In arbitration, modern legislators made even further concessions. They granted the parties the possibility to have their contract governed not only by a foreign law, but also by rules of law which have been drafted by highly reputed scholars and practitioners that – and this is important for demonstrating our thesis – acted, when drafting the rules of law, exactly like a legislator. Thus, these scholars and practitioners had in mind, when drafting the rules of law, the protection and the reconciliation of the interests of the persons affected by the incidence of the said rules of law (as a matter of principle, these persons are the contracting parties). This state of affairs materializes, basically, in the fact that the rules of law contain mandatory provisions in the same matters for which legislators issue mandatory provisions. For example, just as the laws provide for imperative provisions in the matter of formation of contracts (e.g. provisions regarding error, misrepresentation, gross disparity etc.), so do the rules of law. Without elaborating on the details, we consider that the mandatory character of the provisions encompassed in the rules of law stems from the legal provision of the *lex arbitrii* that allow the parties to choose such rules of law to govern their contract.

To conclude on this topic, not all sets of rules of conduct qualify as rules of law and, as such, not all sets rules of conduct can be chosen by the parties to govern the dispute in the scenario where *lex arbitrii* allows for the choice of rules of law. For such a choice to be valid, the set of rules that have been elected must satisfy the rigor described above (i.e. in few words, they have to have been drafted also with the purpose of safeguarding and reconciling the conflicting interests of the parties, not

only with the purpose of supplementing the incomplete will of the parties expressed in the wording of the contract).

### **THE ABSENCE OF A FOREIGN ELEMENT**

We are in the ambit of private international law. As a consequence, the contracts that have been analyzed so far do have a foreign element in their structure. Otherwise, there would be no reason to have recourse to external public policy, overriding mandatory provisions, fraud and so on. However, there is one further clarification to be made which has a great practical consequence: is it possible for the parties to have their contract governed by a foreign law even in the instances where all other elements of that contract (i.e. all except the foreign law chosen by the parties) are purely domestic?

Our opinion is that the answer is no. Party autonomy (i.e. the right of the parties to choose the law applicable to their contract) is recognized in private international law. Without a foreign (“international”) element, there would be no theoretical underpinning to justify the application of the law of a state different than the one with which all components of the contract have a link. To accept the contrary would entail the very sovereignty of states is affected. Nearly all mandatory provisions (except those that form part of the external public policy) could be excluded by a simple choice of law made by the parties. This would lead to the utterly absurd situation in which a state will no longer be able to impose its laws to its own citizens, because the latter would simply be able to choose a different law to apply to them.

This view has been firmly expressed by the Romanian High Court of Justice in a relatively recent decision<sup>52</sup> and it also results, in our opinion from Art. 3. (3) Rome I Regulation, which reads as follows; *„where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.”* (emphasis added, VD).

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<sup>52</sup> The Romanian High Court of Justice, 2<sup>nd</sup> civil division, Decision No. 1167 of 15.03.2007.

## CONCLUSIONS

In private international law and in international arbitration, party autonomy enables the parties to freely choose the law applicable to their contracts. Nevertheless, in certain exceptional circumstances, the foreign law designated by the parties is excluded. In other words, there are limits to the application of the foreign law chosen by the parties.

These limits are the following: public policy, overriding mandatory provisions, fraud, the impossibility to determine the content of a foreign law, the inexistence of a foreign element and the requirement that the rules chosen by the parties are laws, not rules of law. This paper provided for a brief overview of those limits.

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# CURRENT ISSUES IN ESSENCE AND CONTENT KNOWLEDGE OF CIVIL LIABILITY

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**Abstract:**

*Always current legal consciousness, but with such deep roots in the structure right and not only subject to civil liability find another consecration in their current legal system is not new, since this concept was never one monotonous. Knowing the essence and content of the new statutory civil liability cannot have as a starting point, than the study of the principles and functions, as well as its two components, namely, liability in tort and contractual liability. Starting from conceptualization current concept of legal liability civil approach will be oriented analysis in the context of current legislative, a legal relationship of obligations under which a person is required to repair the damage caused to another person by his action or in the cases provided by law, the damage for which it is responsible. This study aims to identify the content of the concepts mentioned above, using content analysis through documentary research literature.*

**Key-words:** *civil liability, tort, delict, tort, contractual liability, legislative context.*

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## INTRODUCTION

The totality of the rules by which society is organized and functions, constitutes the legal framework of that social system. In human society is not allowed anyone to violate another person's rights field, causing some damage to someone else through his work or by abstaining. This elementary rule of conduct is not only circumscribed legal relations, but it is a very old precept known as a general rule of conduct, since the remotest times and the different communities and social order<sup>2</sup>. Regarding the role of social and legal framework of civil liability and its impact in the evolution of the state of humanity, to review rightly that morality was the one who influenced the first instance

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<sup>2</sup> Ion M. Anghel, Francisc Deak and Marin F.Popa, *Răspunderea civilă* (Bucureşti, 1970): 9.

phenomenon liability, so that, in turn, morals be adapted and her legal phenomenon<sup>3</sup>.

In relation to the source from which the obligation arises for damages in civil law there are two forms of liability: tort liability and contractual liability. In other words, the distinction between tort and contractual obligations which arise from its origin has been violated and whose disregard determines the unlawful nature of the action or inaction<sup>4</sup>.

New Civil Code regulations sent to European Union law. It will be incident therefore "Rome II" - Regulation (EC) No .864 / 2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations<sup>5</sup>.

"Damage" is in Regulation' optics, any resulting consequences of an unlawful act of unjust enrichment even without in business management and culpa *in contrahendo*.

Civil liability is one of the most interesting areas, not just by virtue of generality and its multitude of applications, but also because of the many fluctuations and metamorphoses undergone over time. The assertion (made on the interrogations amid epistemological foundation of civil responsibility)<sup>6</sup> check altogether, become active in the new regulatory context, the Romanian law since 2011.

Effort applicable regulatory liability, looming as a fundamental category of law<sup>7</sup> is one match, doubled and a literature and jurisprudence rich, evolving from one stage to another, something that emerges from the foundation of various forms of liability.

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<sup>3</sup> Paul Pricope, *Răspunderea civilă delictuală în reglementarea noului Cod Civil, a Codului civil din 1864 și a dreptului european* (București, 2013): 18.

<sup>4</sup> Matei B.Cantacuzino, *Elementele dreptului civil* (București, 1998): 442.

<sup>5</sup>Rules can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0040:ro:PDF>

(Webpage available on 8 februarie 2013).

<sup>6</sup> M.Lacroix, „Les fondations epistemologiques de la responsabilite civile”, in *Cahiers de droit*, vol.50, 2 (2009): 417.

<sup>7</sup> Ioan Albu and Victor Ursa, *Răspunderea civilă pentru daune moral* (Cluj- Napoca, 1979): 23.

In European law, if we refer to French law and doctrine, the definition of this concept were pursuing the same landmarks. "Feature liability is to restore, as accurate as possible, balance disrupted by injury and putting it back on the injured at the expense of responsible, where would have been if the act causing the damage not have occurred<sup>8</sup>. "

In another approach, civil acquires a size range, being equally regarded as a legal entity, meaning that all legal regulations concerning employment obligation of a person to repair the injury caused by his extra-contractual or contractual act<sup>9</sup>.

The texts of articles number 998-1000 of the Civil Code of 1865, have devoted over half a century and principles of liability, producing legal effects, both in tort and contract. What's new in current civil code? The legal framework of liability takes on a new consistency in Book V, About obligations, Title II - Sources obligations, Chapter IV "Liability" The reveal, however, that any old regulation nor the current one did not defined this concept<sup>10</sup>.

In point of the omission of the legislature to formulate a satisfactory definition compact in legal literature various formulations have crystallized the desire to capture the specificity of this form of social responsibility.

In this respect, it can specify that civil liability is a form of legal liability, which consists of a legal relationship of obligations, under which a person is indebted to repair damage caused to another by his act or, in the cases provided by law injury which is held liable<sup>11</sup>. Jurisprudence and doctrine developed on this issue and other definitions, among which and following that "liability is that legally binding

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<sup>8</sup> Rene Savatier, *Traite de la responsabilite civile en droit francais*, Tome 1, (Paris: Sirey, 1951) in Philippe le Tourneau, *Droit de la responsabilite et des contrats* 6th edition (Paris, Dalloz, 2006): 367.

<sup>9</sup>Ion Dogaru, Nicolae Popa, Dan Claudiu Dănișor and Sevastian Cercel, *Bazele dreptului civil, vol.1, Teoria generală*, (București: C.H.Beck, 2008): 958; Eugenia Carmen Verdeș, *Răspunderea juridică. Relația dintre răspunderea civilă delictuală și răspunderea penală* (București, 2011): 75.

<sup>10</sup>Mirela Paula Costache, "Rolul și valențele actuale ale principiilor și funcțiilor răspunderii civile", *Acta Universitatis George Bacovia Juridica*- Volume 2, 2(2013).

<sup>11</sup>Liviu Pop, *Teoria generală a obligațiilor* (București: Lumina Lex, 2000):160.

obligations a person called responsible is indebted to repair damage unjustly suffered by another person "<sup>12</sup>.

New Civil Code does not define civil liability. Legal definitions relate exclusively to tort and contractual liability. No previous code did not provide such a definition, so that literature Romanian outlined under the old regulation peculiarities liability in the context of legal liability, representing the ratio of obligations under which the one who damaged the other is bound to repair the damage caused victim<sup>13</sup>.

Since the beginning of the century, some French authors have seen a similarity nearly perfect between the two forms of liability, proclaiming their unity based on the same kind of fault, whether the violation of an obligation or resulting from a contract or a legal obligation<sup>14</sup>.

Moreover, in this theory, making a parallel between contractual liability and the tort shown that there is an obligation disease, both in the case of contractual liability, and if liability, namely, in the latter case, an obligation established by law, not to do. The only difference is that pre-existing obligation is violated in one case a conventional character, and the other a legal character. This difference is not considered important, even going as far as to deny the phrase "contractual liability" and to assume that responsibility is "necessarily tort liability"<sup>15</sup>.

Tort liability is subject to the general principles of the Civil Code, according to which a person who, through negligence, intentionally or negligently, causing an injury to another person may be required to repair

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<sup>12</sup>Sache Neculaescu, "Reflecții privind fundamentul răspunderii civile delictuale", *Dreptul* 11(2006): 41.

<sup>13</sup>Mircea N.Costin and Miron C.Costin, *Dicționar de drept civil*, ed a 2-a, (București: Hamangiu, 2007): 815. About the significance and meaning of civil legal responsibility, Michel Lacroix, „Contribution epistemologique a l’edifice de la responsabilite civile”, in *Studia Universitatis Babeș-Bolyai, Iurisprudentia* 1(2010).

<sup>14</sup>Marcel Planiol, *Traite elementaire de droit civil*, 6th edition, 2nd volume, ( Paris: Librairie generale de droit et de jurisprudence, 1912): 290-292; Marcel Planiol and Gilbert Ripert, *Traite pratique de droit civil francais*, (Paris: Librairie generale de droit et de jurisprudence, volume VII, 1931): 286-290.

<sup>15</sup>Ioan.M. Anghel, Francisc Deak and Marin F. Popa, *Răspunderea civilă*: 35; for development, Marcel Planiol and Gilbert Ripert, *Traite pratique de droit civil francais*: 286-290.

or remedy that damage. To recover the damage, the injured person must prove damage, fault and causation between the two.

Civil tort liability is defined as the duty of every person to respect the rules of conduct which requires law or local custom and shall not, by actions or by inactions, legal rights or interests of others. Text art.1349 paragraph (1) of the Civil Code. is largely inspired by the Civil Code of Quebec [art.1457 para. (1)]. In similar terms, the latter makes the conduct of persons compliance with the rules of conduct imposed by circumstances, a usage or law, so as not to cause injury to others<sup>16</sup>.

The varieties of tort liability are civil liability for the acts of its own (art.1357-1371 Civil Code.- for the individual; art.219-224 Civil Code. - For legal persons); vicarious liability (art.1372-1374 Civil Code.); liability for damage caused by animals or things (art.1375-1380 Civil Code). Special assumptions of liability are regulated by other laws, the Civil Code expressly referring only to defective products<sup>17</sup>.

Civil tort liability is the obligation on a person to repair the damage caused in tort or contractual, as appropriate, the damage to which is called by law to respond<sup>18</sup>. As a result, contractual or tort liability is triggered as a result of causation of damage by an illegal act outside the legal existence of any link between the author and the background person injured<sup>19</sup>.

Unlike the tort liability regulated by the Civil Code - which must be based on a form of negligence, civil liability caused by defective products is not subject to evidence of any form of negligence. According to the Law nr.240 / 2004 person suffering damage caused by a defective product must prove only loss, product defect and the causal link between them. There is no need to be proven at fault. According to the aforementioned law, the producer responsible for the damage both current and for the future, caused by defect in his product.

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<sup>16</sup> Calina Jugastru, *Prejudiciul*, (București, 2013): 1

<sup>17</sup> Calina Jugastru, *Prejudiciul*: 1.

<sup>18</sup> Liviu Pop, *Drept civil. Teoria generală a obligațiilor*, Tratat, 2nd edition (Iași, 1998): 171.

<sup>19</sup> Francisc Deak, *Curs de drept civil- Teoria generală a obligațiilor*, (București, 1960); Ioan Albu and Victor Ursa, *Răspunderea civilă pentru daune morale*: 27.

Also, the Civil Code states the general principles of civil contractual liability. This type of liability can exist only in the presence of a contract between the parties and arises when one party does not perform properly one or more of the contractual obligations.

The contractual liability contents contractual duty debtor has an obligation born of a contract to repair the damage caused by the non-enforcement of its creditor broad sense of the benefit due. By such failure broad sense of obligation was understood so late performance and non-performance or improper performance itself, whole or in part<sup>20</sup>.

It was regarded with great interest and pre liability issue, especially with the development of theories concerning pre-contract as a legal concept independently. This method of liability are applicable, according to circumstances, either the rules of contractual liability or tort liability rules or the rules of abuse of rights<sup>21</sup>.

Contractual liability can be separated according to financial or patrimonial damage, division corresponding to division of civil rights in property and non-subjective. Although very logical, this difference was not considered important until the problem arose contractual non-property damage reimbursement. Therefore it can be concluded that, although apparently unitary contractual liability presents differences and produce specific effects when it comes to property or non-property damage<sup>22</sup>.

Dominated by the fundamental idea of repairing damage between two forms of liability does not differ essentially fundamental<sup>23</sup>.

High Court of Cassation and Justice decided that the contractual liability, the contract is only proving the pre-existence of the obligation

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<sup>20</sup>Liviu Pop, *Drept.civil. Teoria generală a obligațiilor*, Tratat: 171.

<sup>21</sup>Ioan Albu, *Drept civil. Introducere în studiul obligațiilor*, (Cluj-Napoca, 1984): 238-241.

<sup>22</sup>Daniel Ghiță, *Raportul dintre răspunderea civilă și delictuală și răspunderea civilă contractuală* (<http://drept.ucv.ro/R SJ/images/articole/2009/R SJ2/A12DanielGhita.pdf>): 102.

<sup>23</sup>Constantin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor*, (București, 1994): 122; Liviu Pop, *Drept civil. Teoria generală a obligațiilor*, Tratat: 171; Ioan Albu, *Drept civil. Introducere în studiul obligațiilor*: 236; Ioan M.Anghel, Francisc Deak and Marin F.Popa, *Răspunderea civilă*: 290 and following.

to fault the borrower to not be executed, so that the object of proof under this liability is to establish guilt contractual and extent of that damage.<sup>24</sup>

To engage contractual liability is required to be a contract, namely a valid contract ended. The ability required in contractual matters, it is full legal capacity. For the contractual liability is necessary that he who has not executed contractual obligation have been given notice, in the forms provided by law, the formal notice of law operates. In the case of contractual liability, within certain limits, non-liability clauses are in principle admissible.

Civil liability in the contract, the creditor must prove only the existence of the contract and that the obligation has not been enforced. Based on this evidence, the debtor is presumed fault (art.1041 Civil Code).<sup>25</sup>

In contract, where there are several debtors, solidarity operates, except where expressly provided by law or arising from the contract (art.1041 Civil Code).

Article 1350 of the Civil Code states, the principle of contractual liability issue and settle the question of choice between proceedings under contract and misdemeanor proceedings under. "Everyone must fulfill the obligations they contracted. Where, without justification, does not fulfill this duty, it is responsible for damage caused to the other party and is obliged to repair this damage, according to the law "[art.1350 paragraph (1) and (2)]. New Civil Code does not alter the way in which this form of liability was previously defined. Civil liability is the contractual obligation of the debtor to its creditor damage caused by non-performance, defective performance or late obligations arising from the contract valid<sup>26</sup>.

Article 1519 Civil Code mentions the varieties of contractual liability: contractual responsibility for his own deed and contractual

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<sup>24</sup>February 24, 2012 Decision nr.965 of Appeal handed down by Section II -a civil High Court of Cassation and Justice covering the action for eviction and damages, (<http://www.juridice.ro/214016/iccj-conditiile-răspunderii-civile-contractuale.html>).

<sup>25</sup>Law no.287/2009 on the New Civil Code, republished in the Official Gazette 505/2011, applicable from October 1, 2011.

<sup>26</sup> Ernest Lupan, *Răspunderea civilă* (Cluj-Napoca, 2003): 274.

vicarious liability<sup>27</sup>. By comparison, the regulation of the Civil Code of 1865, gave rise to controversy, although Romanian doctrine consistently argued the need and legitimacy of contractual liability<sup>28</sup>.

For civil liability of those who caused the damage to be engaged, not enough have been an illegal act which is in causal connection with the damage caused, but it is necessary that this act is attributable to its author, that author to have had a come when he committed it, so to have acted with guilt<sup>29</sup>.

Liability aims mainly compensation for damage, but at the same time aims at who the harmful event occurred, determining a certain behavior. Duty to repair tends, of course, to eliminate the injury product but also follows that the act likely to cause harm to no longer be committed. Just this concern, to determine a certain behavior is implying or impose in our civil law, guilt need the element of liability<sup>30</sup>.

In order to talk about guilt requires a subjective connection, between the author and psychological unlawful act. In other words, it is necessary for the perpetrator to possess the faculty on the one hand, to appreciate the clear, healthy, after all, the circumstances of the offense, and on the other hand, to comply with conduct based on that assessment<sup>31</sup>. He must therefore be able to have discernment to understand the significance of his act and its consequences.

In analyzing guilt is investigated, *de facto*, the subjective side of the offense, the attitude that its author has had to act and its consequences at the time it occurred, involving the study of the existence of two

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<sup>27</sup>Alexandru Bacaci and Ovidiu Ungureanu, *Culegere de studii* (București, 2012): 225-226.

<sup>28</sup>Mihail Eliescu, *Răspunderea civilă delictuală* (București, 1972): 7; Ioan Albu, *Drept civil. Contractul și răspunderea civilă* (Cluj-Napoca, 1994): 235.

<sup>29</sup>Constantin Stătescu and Corneliu Bârsan, *Drept civil. Teoria generală a obligațiilor* (București, 2008): 205.

<sup>30</sup>Traian Ionașcu and Eugen Barash, „Răspunderea civilă delictuală, Culpa ca element necesar al răspunderii”, in *Studii și cercetări juridice*, 1(1970): 24.

<sup>31</sup>S.Kaneti, „Les grandes lignes de la responsabilite extracontractuelle en droit civil turc”, in *Revue International de droit compare*, 3( 1972): 639.

elements closely linked together: the intellect the volitional<sup>32</sup>. Will boosting representation to convert into deeds (actions and inactions) fulfilled, so aim to be realized<sup>33</sup>.

Analyzing in depth available art.1357 para 1 of the Civil Code, along with other legal texts from civil liability for the acts of its own synthesis contained in the new law, we conclude that Romanian law, civil liability for the acts of its own has four elements standalone, independent competition can arise only through them all: the wrongful act, injury, causal link between the unlawful act and the damage, the guilt of the perpetrator..

Based on the foregoing, the effect would delineate the obligations of situations that engage civil liability. Thus, the effect will mean obligations creditor's right to obtain direct enforcement of the obligation in its specific nature (voluntary or forced execution), while the equivalent execution will be the effect liability. From the moment that was not performed or was performed inadequately obligation, plan out the actual effects of obligations and civil liability enter the plane<sup>34</sup>.

Therefore contradicts the traditional view that sees the effect of civil liability obligations<sup>35</sup>. Moreover, are authors who deals in matters relating distinct effects contractual obligations civil liability, leaving the vision in this way the Civil Code<sup>36</sup>. One can go further, arguing that if the outbreak of civil liability based on failure to enforce indemnification obligation is born poor, no more talk of a proper execution when it is done by equivalent. Basically, there is a performance of the obligations, but a replacement of execution by paying damages.

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<sup>32</sup>Radu.I.Motica and Ernest Lupan, *Teoria generală a obligațiilor civile* (București, 2008): 435.

<sup>33</sup>Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice*, vol.V, (București, 2006): 181.

<sup>34</sup>Daniel Ghiță, *Raportul dintre răspunderea civilă și delictuală și răspunderea civilă contractuală*, 102.

<sup>35</sup>Ioan M.Anghel, Francisc Deak and Marin F.Popa, *Răspunderea civilă*: 293.

<sup>36</sup>Liviu Pop, *Drept.civil. Teoria generală a obligațiilor*: 332 and following.

## CONCLUSION

The separation of the two forms of liability is starting from that previously assumed breach of an obligation not a condition common to both. However, as I pointed out in short, a more detailed analysis shows that, in both forms, liability for breach of duty occurs background.<sup>37</sup>.

From the above, we believe that what characterizes the essence and content of civil liability is reflected in the realization that no illegal actions will not remain unpunished, thus contributing to the protection of subjective rights and legitimate interests of all individuals and businesses.

Doctrinal allegations implemented by law, together with analyzes of comparative law, seem to be the fruit needed for the new legislature, which considered the need to uphold the express liability, a formula that approaches what he thinks to be future.

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<sup>37</sup>Ioan M.Anghel, Francisc Deak and Marin F.Popa, *Răspunderea civilă*: 290-293.

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# THE ECONOMIC IMPOSSIBILITY OF PERFORMING THE CONTRACT: A POSSIBLE SYMPTOM OF THE EROSION OF THE PRINCIPLE OF ENFORCED PERFORMANCE

Cristian PAZIUC<sup>1</sup>

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## **Abstract:**

*The paper argues that, on the basis of the rules governing the abuse of rights and the duty of good faith in contractual matters, enforced performance of obligations to do or not to do which have an economically fungible subject matter should be excluded in cases of manifest inefficiency that may be circumscribed to the notion of economic impossibility or impracticability of performance. The notion comprises cases where it can be ascertained that the obligee is indifferent between damages and enforced performance, yet the latter is more costly for the obligor than equivalent performance.*

**Key words:** *enforced performance, economic impossibility, damages*

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## **INTRODUCTION**

Article 1527 paragraph (1) of the new civil code, in force since 1 October 2011, enshrines the obligee's possibility to "always request that the obligor be constrained to perform specifically, except for the case where such performance is impossible." Although generally considered as maintaining the legislative position towards enforced performance of contractual obligations<sup>2</sup>, this generous view regarding the scope of the remedy of enforced performance is squarely opposed to the principle illustrated – at least literally – by Article 1075 of the civil code Alexandru Ioan I (1864) (corresponding to Article 1142 C. civ. fr.), pursuant to which "*any obligation to do or not to do changes into damages in case of non-performance by the obligor.*" By itself, this

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<sup>2</sup> Liviu Pop, Ionuț-Florin Popa and Stelian- Ioan Vidu, *Tratat elementar de drept civil: Obligațiile* (București: Universul Juridic, 2012): 268.

contrast can raise legitimate questions concerning the authenticity of a picture of contractual remedies which, against the backdrop of a supposedly unchanged paradigm of the continental French-inspired system, depicts enforced performance as a preeminent and absolute remedy. “*Even if such enforced performance is extremely onerous, for the obligee as well as the obligor, even if it proves extremely unpractical for both parties and even if it appears obvious that replacing it with the remedy of damages would be more adequate, the obligee may not be denied the request for enforced performance except if it is impossible.*”<sup>3</sup> I believe that such reading of Article 1527 paragraph (1) c. civ., otherwise generalised, does not correspond to the intention of the contemporary legislator, to the internal logic of the system of remedies for the non-performance of contractual obligations – a logic which cannot be dissociated from that system’s historic evolution – and to present-day economic necessities.

In an evolution the origins of which can be traced to classical roman law, the Napoleonic civil code and, following its model, the Romanian civil code adopted in 1864 treated damages as the general contractual remedy, with enforced performance being conceived as an exceptional remedy, circumscribed to the principle of individual freedom. In spite of a change of paradigm that started in France in the second half of the 19<sup>th</sup> century and that was imported, often uncritically, in Romanian jurisprudence, the drafters of the new civil code did not, I think, aim to make the remedy of enforced performance absolute, a fact revealed by the commentaries made in the legislative process that preceded the adoption of the code.<sup>4</sup> This view is in accordance with

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<sup>3</sup> Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil: Obligațiile*: 268.

<sup>4</sup> I refer to the amendments proposed in 2008 by the Ministry of Justice, in collaboration with a commission of experts, with regard to the first form of the bill on the new civil code, adopted by the Senate on 13 September 2004. The proposed amendments, some with commentaries made by the drafters, are available on the website of the Ministry of Justice. The commentaries referred to in this paper are found in the document comprising the amendments proposed for the 5<sup>th</sup> book (“On Obligations”) of the code, designated herein by the expression “The Amendments to Project I”. The consolidated

contemporary international tendencies expressed, for example, in the UNIDROIT Principles or in the Principles of European Contract Law („PECL”), both of which were also models for the Romanian legislator. Finally, limiting the scope of enforced performance can also conform to the economic need to avoid performances which are socially undesirable because of the disproportion between the costs and the benefits generated.

In this context, this paper aims to illustrate the concept of economic impossibility or impracticability of performance as a limit to the remedy of enforced performance of contractual obligations to do and not to do having as their subject matter an economically fungible, substitutable performance, in which case, in principle, the value of the performance to the obligee and therefore the damage incurred following non-performance or deficient performance can be determined with a high degree of certainty. Because, at present, enforced performance should be understood as a manifestation of the obligee’s right to opt between remedies and not as a necessary consequence of the principle of the binding force of contracts, the recourse to enforced performance can and should be censored by judges in cases of manifest inefficiency, through the technical mediation of the institution of abuse of rights and the duty of good faith in contracts.

## I. FORMULATING THE PROBLEM

In this paper, I consider the particular situation of obligations to do and not to do having a contractual source and the subject matter of which is an economically fungible performance<sup>5</sup>, ie a performance for which

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form of the initial project, thus amended, became a new bill, finally adopted as Law no. 287/2009 regarding the civil code.

<sup>5</sup> I do not refer to the strictly legal notion of fungible performances, provided in Article 543 c. civ., but to the economic notion, which depends on the substitutability of performances (even of a different type or nature) as measured by the cross-elasticity of demand; in principle, in economic terms, if the cross-elasticity of demand is high, the performances are substitutable and are included in the same market; see Anthony Kronman, „Specific Performance”, *University of Chicago Law Review* 45 (1977-1978): 355 et. s.

there is a close substitute.<sup>6</sup> The economic fungibility of performance means that, in principle, the obligation is not strictly *intuitu personae*. The category includes, for example, the seller's obligation to deliver a good which conforms to contractual specifications, the contractor's obligation to erect a construction according to the contractual specifications, the obligation incumbent on a firm of architects to prepare the project of a new building (a project which could be made, in similar conditions, by a different entity), an engineer's obligation to repair a thing (a performance which, again, could be provided by a different person). In a famous article, Professor Anthony Kronman demonstrated that, in the case of obligations concerning fungible performances (which do not display economic "uniqueness"), damages are an adequate remedy for the obligee and desirable *ex ante* for both parties, because, in short, the existence of a market for similar performances enables a more precise determination of the value of the performance to the obligee and minimises the risk of the damages being undervalued by the court, such that damages would provide the obligee with the advantage sought, while also preserving the obligor's freedom (subject to the obligee's interest being satisfied) to engage his performance in more profitable ways.<sup>7</sup>

In Romanian law, such obligations to do and not to do are, theoretically, susceptible of enforced performance either directly, by constraining the debtor (generally for obligations to deliver goods), under Article 1527 c. civ. and Articles 893-902 c. proc. civ., or by substitution (with the performance being carried out by the obligee or through a third party, at the debtor's expense<sup>8</sup>), under Articles 1528-1529 c. civ. and 904-905 c. proc. civ. In this paper, contrary to some opinions expressed in the literature, I argue that enforced performance of such obligations,

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<sup>6</sup> In the case of obligations not to do something, the economic fungibility of the negative performance should be understood as the obligee's possibility to obtain the sought result even without the contribution of the obligor, eg by destroying a construction made in breach of a conventional right of way.

<sup>7</sup> Anthony Kronman, „Specific Performance”, 351-382. The reasoning is intimately related to the theory of efficient breach, explained by Robert Birmingham in 1970; see Robert Birmingham, „Breach of Contract, Damage Measures and Economic Efficiency”, *Rutgers Law Review* (1970): 273-292.

<sup>8</sup> See Pop, Popa and Vidu, *Tratat*: 270.

generally by substitution, should be censored by the court, on the basis of the institution of abuse of rights or, alternatively, of the duty of good faith in contracts, in situations that may be subsumed to the notion of economic impossibility or impracticability of performance, ie when: (i) damages are an adequate remedy for the protection of the obligee's interest in the performance of the obligation, such that the creditor is indifferent between damages (representing the difference in value between what was owed and what was actually performed) and enforced performance, and (ii) the cost of enforced performance (usually by substitution) for the obligor is greater than the amount of damages necessary to satisfy the obligee's interest.

## **II. ECONOMIC IMPOSSIBILITY – A LIMIT TO ENFORCED PERFORMANCE**

Contemporary literature – in France<sup>9</sup>, as well as in Québec<sup>10</sup> and in Romania<sup>11</sup> – depicts enforced performance as a contractual remedy with the value of principle, ie – from a legal standpoint – a normative rule, in relation to which all other possible remedies subsequent upon the non-performance of the obligation have an exceptional nature. This relation, sometimes describes as a genuine hierarchy of contractual remedies,<sup>12</sup> is the basis for the restrictive interpretation – in the sense of a strict physical or legal barrier – to situations where the obligee is to be refused access to this remedy. It should be noted, however, that the historic evolution of contract law in French-inspired systems does not justify this perspective. To the contrary, despite the axiomatic value attributed to enforced performance today, this was an exceptional remedy in the paradigm of the French civil code and of the Romanian civil code of 1864. Article 1142 c. civ. fr. and Article 1075 c. civ. 1864 are, in fact, clearer and less

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<sup>9</sup> See, for example, François Terré, Philippe Simler and Yves Lequette, *Droit civil. Les obligations*, (Paris: Dalloz, 2009): 1101-1102.

<sup>10</sup> See, for example, Jean-Louis Baudouin, *Les obligations*, ed. Pierre-Gabriel Jobin and Nathalie Vézina (Québec: Éditions Yvon Blais, 2013): 857-859.

<sup>11</sup> Liviu Pop, *Tratat de drept civil. Obligațiile*, vol. I (București: C.H. Beck, 2006): 495; Constantin Stătescu și Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor* (București: Hamangiu, 2008): 310, 320; Pop, Popa and Vidu, *Tratat*: 258-259.

<sup>12</sup> Pop, Popa and Vidu, *Tratat*: 258.

subtle rules than one might think on the basis of interpretations that were put forward starting from the second half of the 19<sup>th</sup> century. Apart from the historic dimension of the relationship between enforced performance and equivalent performance, there are, today, substantial economic reasons to restrict the remedy of enforced performance by excluding the remedy in cases of manifest economic efficiency. The external models of the new civil code are not indifferent to this problem, and I believe that, equally, such indifference cannot be imputed to the Romanian legislator.

**a. THE PRINCIPLE OF ENFORCED PERFORMANCE – A CREATION OF LEGAL MODERNITY**

There is a relative agreement on the conclusion that classical Roman law did not systematically provide a remedy of enforced performance, with the obligee being able to resort to an action for the pecuniary condemnation of the obligor.<sup>13</sup> The remedy of enforced performance took shape and was developed in the postclassical period, under the influence of Christian ethics, and found expression in the codification of Justinian.<sup>14</sup> In their effort to systematise Roman law, the glossators of the medieval ages created the distinction between obligations depending on their subject matter – to give, to do and not to do –, formulating the principle that, as opposed to obligations to give (which included the obligation to deliver a thing), obligations to do and not to do were not susceptible of enforced performance, as such a remedy would generate the perspective of a personal servitude, contrary to the principle *nemo praecise cogi potest ad factum*, devised in this period.<sup>15</sup> In spite of a wider acceptance of enforced performance in the practice of ecclesiastical courts, the great jurists of old French law, particularly Domat and Pothier, adopted the glossators' distinction. In his treatise on obligations – a synthesis between Roman law as received from the

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<sup>13</sup> George Vlavianos, "Specific Performance in the Civil Law: Mediating Between Inconsistent Principles Inherited from a Roman-Canonical Tradition via the French *Astreinte* and the Québec Injunction", *Revue générale de droit* 24 (1993): 518-20; Thomas D Musgrave, "Comparative Contractual Remedies", *University of Western Australia Law Review* 34 (2008-2009): 327, note 135.

<sup>14</sup> Vlavianos, "Specific Performance in the Civil Law": 520-523.

<sup>15</sup> Vlavianos, "Specific Performance in the Civil Law": 523-524.

glossators and the customs of Northern France – Pothier showed that the obligee of an obligation to give a specific thing which is in the possession of the obligor can obtain an order for the physical transfer of the thing, whereas the obligee of an obligation to do or not to do cannot constrain the obligor to perform what was undertaken, but can instead only obtain damages, except where it is possible to physically destroy what the obligor made in breach of an obligation not to do.<sup>16</sup> The solution was expressly grounded by Pothier on the principle *nemo praecise cogi potest ad factum*,<sup>17</sup> and was faithfully adopted by the drafters of the Napoleonic code.

Under Article 1142 c. civ. fr., all obligations to do or not to do “resolve” into damages in case of non-performance by the debtor. Articles 1143-1144 provide the exceptional cases in which, for obligations to do and not to do respectively, the obligee may obtain enforced performance (by substitution), through his own actions or through a third party, for example where it is possible to physically destroy the things made by the debtor in breach of the obligation not to do.<sup>18</sup> Articles 1065-1077 c. civ. 1864 were faithful adaptation of the rules provided in Articles 1142-1144 c. civ. fr.

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<sup>16</sup> Robert Joseph Pothier, *Oeuvres complètes de Pothier. Nouvelle Édition. Traité des obligations*, tome premier (Paris: Thomine et Fortic, Libraires, 1821): 133-34, paragraphs 156-158, and 157, paragraph 178. In this last paragraph, reserved to the classification of obligations depending on their subject matter, Pothier shows that:

*Il y a cette différence entre les obligations de donner et les obligations de faire, que celui qui s'est obligé de donner une chose, peut, lorsqu'il l'a en sa possession, être précisément contraint à la donner; le créancier peut, malgré lui, en être mis en possession par autorité de justice: au lieu que celui qui s'est obligé à faire quelque chose ne peut être contraint précisément à le faire: mais, faute par lui de remplir cette obligation, elle se convertit en une obligation de payer les dommages et intérêts résultants de l'inexécution; et ces dommages et intérêts consistent dans la somme d'argent à laquelle ils sont liquidés et estimés par des experts nommés par les parties ou par le juge. See also, Vlavianos, "Specific Performance in the Civil Law": 526, note 43; Musgrave, "Comparative Contractual Remedies": 331.*

<sup>17</sup> Robert Joseph Pothier, *Oeuvres complètes de Pothier. Nouvelle Édition. Traité des obligations*, tome premier: 133-34, paragraph 157.

<sup>18</sup> It is accepted, even by the authors that support the wide availability of enforced performance, that the authorisation provided by Article 1143 had as its subject matter, in the intention of the drafters of the French civil code, the physical destruction or

The domain of enforced performance – an exceptional remedy in the intention of the drafters of the French civil code – was gradually expanded, in praetorian fashion, starting from the second half of the 19<sup>th</sup> century, in an evolution that betrays the late echoes of canon law.<sup>19</sup> Article 1142 c. civ. fr. (and Article 1075 c. civ. 1864) was reinterpreted, in accordance with the new perspective on enforced performance, as referring, in an imprecise drafting, only to *intuitu personae* obligations, or even as referring not to the non-performance of the original contractual obligation, but to the subsequent failure to comply with a court order for enforced performance.<sup>20</sup> In a paradoxical evolution, the orthodox position in the civil law literature became, both in France and in Romania, that of criticising Article 1142 c. civ. fr. (Article 1075 c. civ. 1864) as exaggerating individual freedom to the detriment of contractual effectiveness.<sup>21</sup>

No doubt under the essential influence of interpretations given to Article 1075 c. civ. 1864 in the literature, the drafters of the new Romanian civil code inserted, particularly in Article 1527 c. civ., a new paradigm concerning enforced performance, transformed into a generally available remedy. Although it is claimed that this view is only a preservation of the legislative position towards the remedy of enforced

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removal – possible without the obligor’s participation – of works made in breach of the obligation not to do, with the scope of this provision being subsequently expanded in the case law; see Philippe Fouchard, “L’injonction judiciaire et l’exécution en nature: Éléments de droit français”, *Revue générale de droit* 20 (1989): 39.

<sup>19</sup> It has been shown that the probable explanation for the French judges’ tendency to stray away from the original meaning of Articles 1042-1044 c. civ. fr. is, particularly, the negative perception of the 19<sup>th</sup> century’s judicial elite as concerns the loss of a prerogative that the old French parliaments of the Ancien Régime had gained under the influence of canon law and the practice of ecclesiastical courts, ie the power to order specific performance even for obligations to do and not to do, if these had been undertaken under oath; see Vlavianos, “Specific Performance in the Civil Law”: 529.

<sup>20</sup> These reinterpretations of Article 1142 c. civ. fr. are presented, for example, in Yves-Marie Laithier, “La prétendue primauté de l’exécution en nature”, *Revue des contrats* (2005): 161 et s., <https://www.lextenso.fr/lextenso/ud/urn%3ARDCO2005161> (accessed April 8, 2016).

<sup>21</sup> See, for example, Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Drept civil. Obligatiile*, transl. Diana Danisor (Bucuresti: Wolters Kluwer, 2009): 660.

performance,<sup>22</sup> the general availability of this remedy corresponds, in reality, not to the original position expressed by the drafters of the civil code of 1864, but to the denatured reflection that the theses of Articles 1075-1077 c. civ. 1864 generated in the literature.

In this context, the historic evolution of the remedies for the breach of contractual obligations in the tradition of French-inspired systems does not justify understanding the pre-eminence of enforced performance as an inherent trait of these systems. It is certain that – whether or not this implied a departure from the theses of the civil code of 1864 – the contemporary Romanian legislator opted to recognise the general availability of enforced performance, as demonstrated especially by Article 1527 c. civ. But the particularities of the system of remedies for the breach of contractual obligations, generally taken from the old civil code, does not also justify the conclusion that the legislator meant to institute a hierarchy of remedies, with a preeminent role for enforced performance. As such, I believe that, at the level of the purposive interpretation of the provisions relevant to the field of remedies for the breach of (contractual) obligations, the idea of an assumed hierarchy of the remedies and of the pre-eminence of enforced performance is false and is not a hurdle to identifying flexible, efficient solutions as concerns the scope of enforced performance.

## **b. AN ABSOLUTE RIGHT TO ENFORCED PERFORMANCE?**

Literally, Article 1527 paragraph (1) c. civ. allows specific performance whenever it is possible. However, researching the legislative process that preceded the adoption of the new civil code and the external sources of the provisions concerning enforced performance reveals a different intention on the part of the legislator.

First, it is worth mentioning the commentaries of the drafters to the Amendments to Project I (5<sup>th</sup> Book).<sup>23</sup> With regard to Article 1197<sup>66</sup> of the modified bill (presently, Article 1527), it is mentioned that:

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<sup>22</sup> Pop, Popa and Vidu, *Tratat*: 268.

<sup>23</sup> See Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil: Obligațiile*: 268.

*“(1) Article 1197<sup>66</sup> provides the principle of enforced performance of obligations. As such, in the case of non-performance, the obligee is entitled to request the enforced performance of the obligation.*

*2) This rule always applies for monetary obligations.*

*3) It does not apply where enforced performance is impossible. The notion of impossibility considered in this article covers both the situations where the subject matter is impossible in fact or in law and the situations where performance displays a strictly personal character, and the enforced performance would involve an inadmissible breach of the obligor’s freedom.*

*4) In these cases, the possibility for the obligee to obtain a similar performance from another person must be considered.*

*5) Depending on the circumstances, courts may also find that enforced performance is impossible where it imposes on the obligor an excessive expense in relation to the value of the performance and the obligee’s possibility of making a cover transaction.*

*6) Paragraph (2) provides that the right to performance includes the right to request the fixing or the replacement of the product or service. The notion of fixing or replacement must be given a wide meaning, including any remediation of a defective performance.*

*7) See Articles 9.101 and 9.102 of the Principles of European Contract Law, Articles 7.2.2 and 7.2.3 UNIDROIT Principles and Article 1601 CCQ.*

As regards the external sources mentioned, the ones of particular interest for the examined problem are Article 7.2.2 of the UNIDROIT Principles and Article 9.101 PECL. Identical in substance, these provisions exclude the right to enforced performance in five cases: (i) where performance is impossible in fact or in law; (ii) where performance would be unreasonably burdensome or expensive; (iii) where the obligee could reasonably obtain the performance from another source; (iv) where performance is of a strictly personal nature; (v) where the obligee failed to request enforced performance within a reasonable period calculated from the date when he knew or ought to have known about the non-performance.<sup>24</sup>

Against this background, at least apparently, in view of the sources used and the intentions expressed in the legislative process, the drafters of the code did not consider an unlimited scope for the remedy of enforced performance, subject only to the physical or legal possibility to perform.

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<sup>24</sup> Such restrictions of the remedy of enforced performance, generally imposed by considerations of economic efficiency, are also the contemporary trend in France. In the very recent *Ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, projected to enter into force on 1 October 2016 (Article 9), it is provided (in the future Article 1221 C. civ. fr.) that the obligee may proceed with enforced performance except where it is impossible or there is a manifest disproportion between the cost of performance to the obligor and the obligee's interest in performance. Also, with regard to the enforcement by substitution, it is provided that the obligee may obtain performance from a different source at a reasonable cost (future Article 1222 .c civ. fr.). The text of the ordinance is available publically at the address <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id> (accessed April 8, 2016).

### **c. AN APPARENT IMPEDIMENT IN THE INTERPRETATION OF THE LIMITS OF ENFORCED PERFORMANCE**

Regardless of the legislator's intent, attempts to interpret the provisions of Article 1527 paragraph (1) c. civ. in a flexible manner, to exclude enforced performance, for example, in cases of a disproportion between the benefit generated for the obligee and the cost incurred by the obligor, fail due to an insurmountable impediment. Article 1527 paragraph (1) incorporates two provisions. The first thesis of Article 1527 paragraph (1) institutes the rule of the general applicability of enforced performance. The second thesis provides an exception: enforced performance is excluded where performance is "impossible". In these conditions, the second thesis of Article 1527 paragraph (1) is an exceptional provision and may not be extended, by analogy, beyond its expressly provided hypothesis<sup>25</sup> (Article 10 c. civ.)

Because, in situations of economic impracticability, the performance of the obligation is not literally impossible, an isolated analysis of Article 1527 c. civ. might appear to confirm the opinion that enforced performance remains a remedy that may not be denied to the obligee, regardless of how impractical or costly performance may be.<sup>26</sup> I believe, however, that this perspective is unjustified and that a systematic interpretation of the provisions of the new civil code allows, in accordance with contemporary tendencies in comparative law and the intentions of the code's drafters, for the use of enforced performance to be excluded in cases of manifest inefficiency, which may be circumscribed to the notion of economic impossibility or impracticability of performance. Because the remedy of enforced performance is not a necessary consequence of the principle of the binding force of contracts, the obligee's access to this remedy remains to be treated only as the manifestation of the exercise of a right to opt between remedies (pursuant to Article 1516 c. civ.). As such, irrespective of the external limits of the

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<sup>25</sup> Gabriel Boroi and Carla Alexandra Angheliescu, *Curs de drept civil. Partea generală* (București: Hamangiu, 2012): 14.

<sup>26</sup> See, to this effect, Pop, Popa and Vidu, *Tratat*: 268.

right to opt between remedies, it is possible to limit the exercise of the right in cases of abuse (Article 15 c. civ.) or use of the remedy of enforced performance in bad faith (Article 1170 c. civ.).

#### **d. ENFORCED PERFORMANCE – A NECESSARY CONSEQUENCE OF THE BINDING FORCE OF CONTRACTS OR THE MANIFESTATION OF A RIGHT TO OPT?**

The typical justification of the supposed pre-eminence of enforced performance in relation to the other remedies for the non-performance of the contractual obligation resides in the binding force of contracts.<sup>27</sup> The historic evolution of the remedies for breach of contract in French-inspired systems disproves this justification. Also, it should be noted that, to the extent that the main economic function for the law recognising the binding force of contracts – a function generally accepted in the economic analysis of law – is to stimulate the exchange of values by protecting parties against the opportunistic tendencies of contractual partners in deferred exchanges<sup>28</sup>, any remedies that allow the obligee to obtain the expected benefit or to terminate the contractual relationship and escape his own obligations, reverting to the precontractual position, satisfy this function and are compatible, from this perspective, with the principle of binding force. On the other hand, even if the economic reasoning behind ascribing binding force to contracts were ignored, ethical considerations do not clearly favour enforced performance either. It has been shown, in this sense, that damages (calculated according to

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<sup>27</sup> Philippe Fouchard, “L’injonction judiciaire et l’exécution en nature”: 34; Nicolas Molfessis, “Force obligatoire et exécution: un droit à l’exécution en nature”, *Revue des contrats* 8 (2005): 37 et. s., <https://www.lextenso.fr/lextenso/ud/urn%3ARDCO200537> (accesat 5 aprilie 2016); Terré, Simler and Lequette, *Droit civil: Les obligations*: 1100; Liviu Pop, *Tratat de drept civil. Obligațiile*, vol. I (București: C.H. Beck, 2006): 495; Constantin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor* (București: Hamangiu, 2008): 310, 320; Pop, Popa and Vidu, *Tratat*: 258-259.

<sup>28</sup> See, for example, Robert B Cooter and Thomas Ulen, *Law and Economics* (London: Pearson Educational Limited, 2014): 275. Richard A. Posner, *Economic Analysis of Law* (New York: Wolters Kluwer, 2014): 95-98.

the expectation measure<sup>29</sup>) are better adapted to the way in which, in usual contractual operations, which do not involve fiduciary relationships, the parties wish to limit their freedom, because this remedy is designed to provide the obligee with the benefit of the contract, while preserving, at the same time, the obligor's freedom to act as long as the obligee's interest is satisfied.<sup>30</sup>

In this context, the remedy of enforced performance should be seen not as a necessary consequence of the principle that contracts are binding, but only as one of the possible manifestations of the obligee's right to opt. This understanding corresponds to the formulation of Article 1516 c. civ., which, in principle, affords the obligee the choice of the remedy to be used in the case of non-performance. The implication of this qualification of enforced performance – as a manifestation of the exercise of the obligee's right to opt – is the applicability of the restrictions that concern the exercise of subjective rights generally and of contractual rights particularly, ie of the limits arising from the institution of abuse of rights (Article 15 c. civ.) and from the duty to act in good faith in the negotiation, conclusion and performance of a contract (Article 1170 c. civ.).

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<sup>29</sup> For the different types of interests protected by damages and, accordingly, the different types measures of damages in contract, see the famous article of the Americans Fuller and Perdue: Lon L Fuller și William R Perdue, "The Reliance Interest in Contract Damages: 1", *Yale Law Journal* 46 (1936): 52-96. For a presentation in the Romanian literature, see Ionuț-Florin Popa, „Coordonatele răspunderii contractuale. Partea I – Fundamentele răspunderii contractuale”, *Revista română de drept privat* 5 (2015): 156-59; Cristian Paziuc, „Prejudiciul previzibil în materie contractuală – o analiză economică, comparată și de drept pozitiv român”, *Revista română de drept privat* 6 (2015): 155-56, note 31.

<sup>30</sup> Daniel Markowits and Alan Schwartz, „The Expectation Remedy and the Promissory Basis of Contract”, *Suffolk University Law Review* 45 (2011-2012): 799-825.

### **e. THE ABUSE OF RIGHTS AND THE DUTY OF GOOD FAITH AS FOUNDATIONS OF THE NOTION OF ECONOMIC IMPOSSIBILITY OR IMPRACTICABILITY TO PERFORM THE OBLIGATION**

Understanding the obligee's access to the remedy of enforced performance as a manifestation of a right to opt between remedies, and not as a necessary consequence of the principle of the binding force of contracts, opens the way for a judicial moderation of the scope of this remedy. In the examined hypothesis – of obligations to do and not to do the subject matter of which consists of an economically fungible performance – the problem can be illustrated with the following example<sup>31</sup>: Primus, as client, enters into a contract with Secundus, for the building, by the latter, of a swimming pool. Under the contract, the pool must have a depth of 2.2 metres. Following a deficient performance, Secundus builds a pool only 2 metres deep. This is perfectly adequate for the purpose for which Primus contracted, as the pool may be used for swimming and recreational purposes. Is Primus entitled to proceed with enforced performance by substitution in the manner provided by Article 1528 c. civ., ie by entering into a contract with another contractor for deepening the pool (which will imply the destruction, to a considerable extent, of what was built, followed by reconstruction), with the imputation of the costs to Secundus?<sup>32</sup> I believe that the answer should be negative. Because Primus can fully satisfy the purpose for which he contracted, it is probable that the damage that he suffered, consisting of the difference between the subjective value attributed to the contracted

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<sup>31</sup> The example is inspired from the English case of *Ruxley Electronics and Construction Ltd v. Forsyth*; see Andrew Burrows, *A Casebook on Contract* (Oxford: Hart Publishing, 2011): 352-57.

<sup>32</sup> This problem that, in civil law systems, concerns enforced performance (by substitution), is equivalent to an issue which, in the common law, concerns the remedy of damages, ie the issue of knowing whether the damages (under the expectation measure) consist of the difference in value suffered by the obligee (the difference in value between what the obligee should have received and what was received in fact) or in the cost of curing performance (the cost of obtaining literal performance). See Ewan McKendrick, *Contract Law* (Basingstoke: Palgrave Macmillan, 2013): 336-38.

performance (a pool 2.2 metres deep) and the value attributed to the received performance (a pool 2 metres deep) is non-existent or trivial. On the other hand, to the extent that building a pool is a performance which does not display commercial uniqueness<sup>33</sup>, and there is a market for such performances (and/or for properties with a pool), which enables the court to accurately ascertain the difference in value between the performance owed and the one received, damages which consist of this difference – if it exists – are, in the example given, an adequate remedy for Primus, being apt to perfectly substitute enforced performance. It follows that Primus is indifferent between enforced performance (by substitution) and damages, with both generating, in economic terms, the same benefit, but the two remedies have a different impact on Secundus: in the case of enforced performance, Secundus stands to incur the high cost of the partial destruction of the works and of the reconstruction according to contractual specifications, whereas, in the case of equivalent performance, Secundus only stands to incur the difference in value between the performance owed and that which was carried out (a difference which is non-existent or, in any case, small).

In such hypothesis, use of enforced performance appears to be an abusive manner of exercising the right to opt which Article 1516 c. civ. affords to the obligee. Specifically, if it can be ascertained that, in the circumstances of the case, the obligee is indifferent between enforced performance and damages (equivalent performance), as both would generate the same benefit, insisting on the remedy which is more costly for the obligor cannot have a purpose other than to inflict harm on the obligor. In any case, such manner of exercising the right to opt appears as unreasonable. This situation thus falls within the hypothesis of abuse of rights, defined by Article 15 c. civ. as the exercising of the right "*with the purpose of harming or damaging another or in an excessive and*

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<sup>33</sup> For the notion of commercial uniqueness and the idea that damages are an adequate remedy, in principle, where there is no risk of undervaluation or overvaluation of damages because there is a market for the performance (which is not commercially unique), such that the subjective value of the performance for the obligee is most probably aligned with the market value, see Kronman, „Specific Performance”: 351-382.

*unreasonable way, contrary to good faith.*” On the other hand, such conduct (option by the obligee) can also be deemed contrary to the duty of good faith in contractual matters. As, under Article 1170 c. civ., the duty of good faith is also incumbent on the parties in the contractual performance phase, there are no good reasons why, to the extent that the law does not distinguish between the forms in which this duty manifests, it would could not also be applied to the manner in which the obligee exercises the right to opt between contractual remedies for non-performance.

I take the view that, in this situation, where it can be accurately established that the obligee’s interest can be satisfied through damages and that enforced performance is inefficient because the benefit generated for the obligee is inferior to the cost of performance for the obligor, courts may censor the obligee’s option for enforced performance, as the exclusion of this remedy is the adequate modality to compensate the damage that would be inflicted on the obligor as a result of the abuse of the right to opt between remedies or the breach of the duty of good faith in contractual matters. There are no reasons why, so long as the obligee’s interest is not endangered, courts should allow an enforced performance that is manifestly inefficient.

As a result, considering the particularity of obligations to give and not to give that have as their subject matter economically fungible performances, in the case of which it is possible to accurately determine the damages necessary to afford to the obligee the entire benefit pursued by means of the contract, the systematic interpretation of provisions concerning enforced performance, the abuse of rights and the duty of good faith in contracts enables the outlining of the notion of economic impossibility or impracticability of enforced performance, as a limitation on this remedy. The situations circumscribed to this notion are those in which enforced performance would be a manifestly inefficient remedy because it can be ascertained that, in the circumstances of the case, the obligee is indifferent between damages and enforced performance, but the latter is more costly for the obligor than equivalent performance. In these cases, the obligee’s access to enforced performance should be restricted, the applicable (adequate) remedy being that of damages.

### III. CONCLUSIONS

In the particular situation of obligations to do and not to do having as their subject matter economically fungible performances, the internal limits of the obligee's right to resort to enforced performance allow for the exclusion of this remedy in cases of manifest economic inefficiency that may be subsumed to the notion of economic impossibility or impracticability of performance. These are cases where damages (which can be determined accurately) and enforced performance generate the same benefit for the obligee, but the latter remedy causes the obligor to incur a cost that is superior to the amount of damages owed as equivalent performance.

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# THEORETICAL ASPECTS CONCERNING THE PATRIMONY LIABILITY

Tatiana STAHI<sup>1</sup>

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## **Abstract:**

*The topicality of the subject results from interest pronounced to the identification of the forms of legal liability intended to evolve with the society as well as the importance of patrimony liability as a form of legal liability, interest generated by the continuing reconfiguration of social reality, which involves the reevaluation of legal phenomenon.*

*The legal doctrine and legislation always gave particular importance to legal liability and especially to liability for violation of patrimony right. The patrimony right being the one of the most important civil right of patrimony has benefited of a special protection from the state. The identification of patrimony liability generated an interest in legal literature in recent times. The proper identification of the forms of legal liability constitutes a guarantee of legality of employment of the legal liability, contributing at the same time to the elimination of errors in the application of legal norms.*

**Keywords:** *legal liability, patrimony liability, patrimony, property, material liability.*

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## **INTRODUCTION**

In the context of the evolution of the society and of the right as of default, the scientific research of the institution of legal liability and its forms is essential due to the multilateral aspect of this legal phenomenon. The identification of the forms of legal liability and the determination of their place in the legal system of legal liability represent an important concern for legal research.

The forms of legal liability are revealed together with the evolution of society. The legal liability is not a phenomenon of stagnation, the social change and the evolution have conferred a new vector to the principles, objectives and functions of legal liability”.

Having studied the issue of legal liability forms, it is found that, at present, there is an insufficient approach of all forms of legal liability and

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especially of some specific forms of liability such as: patrimony, tax, banking and environmental liability, etc.

The legal doctrine and the legislation always gave particular importance to legal liability and especially to liability for violation of patrimony right. The patrimony right being the one of the most important civil right of patrimony has benefited of a special protection from the State. So, we can say that the right of patrimony is a patrimony law, and we can conclude that the liability for violation of the right of patrimony is one pecuniary.

The topicality of the subject results from interest pronounced to the identification of the forms of legal liability intended to evolve with the society as well as the importance of patrimony liability as a form of legal liability, interest generated by the continuing reconfiguration of social reality which involves the reevaluation of legal phenomenon.

The identification of patrimony liability has generated an interest in legal literature in recent times, the proper identification of the patrimony liability as a form of legal liability constitutes a guarantee of legality of assignment of the legal liability, contributing to the elimination of errors in the application of legal norms.

In autochthonic legal doctrine, at present, the concept of patrimony liability is not configured, at the level of the general theory of Law the specialists are limited only to the statement of this in some classifications of legal liability, or expose some arguments in favor of its existence in the special studies devoted to legal liability. Igor Trofimov argues that it should not confuse „the civil liability” with „the patrimony liability”. The patrimony liability is a responsibility which is not specific exclusively to the civil law, as an example in this sense the forfeiture of estate is, the payment of penalty, etc. <sup>2</sup>.

In Romanian doctrine<sup>3</sup> it was noted the distinction between the civil liability and the material/patrimony liability, latter being conditioned by the existence of an individual labor agreement and the

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<sup>2</sup> Igor Trofimov, *Drept Civil. Contractele civile* (Chişinău: „Elena – VI”, 2004), 47.

<sup>3</sup> Alexandru Țiclea, Alexandru Popescu, Marioara Țichindelean. *Dreptul Muncii. Curs universitar* (Bucureşti: Rosetti, 2004), 413.

creation of an injury to the employer, for which the guilty person responds with its own estate.

So as to understand the institution of patrimony liability it is important to give the definition of the term „*patrimony*”. Etymologically the term „*patrimony*” comes from the latin „*patrimonium*”. The Roman private law uses another terms to describe the same concept: *hereditatis, pecunia, peculium*<sup>4</sup>.

The effort to synthesize and to outline the notion of patrimony accrues to the analysis given by the doctrine to legal regulations and has the merit of giving of a definition with theoretical and practical value. The occupancy of the doctrine which consists in the development of a scientific definition has led to several definitions, with nuances which differ essentially nothing from each other, all starting from the definition contained in French doctrine<sup>5</sup>: *”On appelle patrimoine l’ensemble des droits et des charges d’une personne appréciables en argent, envisagé comme formant une universalité de droits”*. Marcel Planiol said that the patrimony constitutes an abstract unit, distinct from the goods and the obligations that it composes.

Summarizing above mentioned, the patrimony is a legal entity, which represents the totality or the universality of patrimony rights and obligations that belong to a person<sup>6</sup>.

In the classical doctrine the patrimony was defined as: *“the totality of rights and obligations of a person, which have or represent a pecuniary or an economic value, so can be evaluated in money”*<sup>7</sup>.

Some authors make references to the goods that may exist in the structure of the patrimony, defining it: *„the patrimony contains the totality of the rights and the obligations which have an economic value,*

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<sup>4</sup> Ioan Adam, *Drept Civil, Drepturi reale* (București: All Beck, 2002), 1.

<sup>5</sup> Marcel Planiol, G. Ripert. *Traité pratique de Droit civil français. Tome III* (Paris, 1926), 19-20.

<sup>6</sup> Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale* (București: Lumina Lex, 2001), 10.

<sup>7</sup> C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român, Vol. I*, (București: All Beck, 1996).

as well as of the goods which refer to these rights and belong to a person whose needs or tasks it is necessary to satisfy”<sup>8</sup>.

The others authors represent the patrimony as a totality of rights and obligations with economic value belonging to a subject of law”<sup>9</sup>.

In autochthon doctrine S. Baies defines the patrimony as the totality of rights and obligations with economic content belonging to a person<sup>10</sup>.

The article 284 paragraph 1 of the Civil Code of the Republic of Moldova defines the patrimony as the totality of the patrimonial rights and obligations (which can be valuable in money), regarded as a sum of active and passive values which are closely related among them, belonging to determined natural persons and legal entities. For the foregoing reasons we can say that the patrimony has some legal characters:

- a. The patrimony is a totality of rights and obligations, a legal universality;
- b. Any person has patrimony;
- c. The patrimony of a person is unique;
- d. The patrimony is inalienable.

We agree with the statement of the professor D. Baltag<sup>11</sup> that the patrimony liability is a form of legal liability with a repairing character, established for the purpose of the removal of injurious consequences, subject to pecuniary evaluation, caused to the patrimony of the injured person, by the ascertaining of an obligation to give or to make in the task of the guilty person and for the benefit of the injured person.

The doctrine analyzes the patrimony liability in limited sense and in wide sense.

In limited sense, the patrimony liability (in the legislation of Romania), the material liability (in the legislation of the Republic of

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<sup>8</sup> T. Ionașcu, S. Brădeanu, *Drepturi reale principale în R.S.R.* (București: Ed. Academiei, 1978), 13-14.

<sup>9</sup> Hamangiu et al., *Tratat de drept civil*, 522.

<sup>10</sup> Sergiu Baieș et al., *Drept Civil. Drepturile reale. Teoria generală a obligațiilor.* (Chișinău: Ed. Cartierul Juridic, 2005), 14.

<sup>11</sup> Dumitru Baltag, *Teoria generală a dreptului.* (Chișinău, 2013), 444.

Moldova and Russian Federation) is a form of legal liability met in the branch of labor law.

For example, Nicolae Romandas stated that the material liability in employment law represents one of the forms of legal liability which imposes an obligation on one of the parts of the individual labor agreement (employer or employee) to repair, according to the law, the damages caused to the other party in connection with the performance of the obligations arising out of the individual labor agreement<sup>12</sup>. The main branch where the patrimony liability had its source is the civil law, but today it would be incorrect to attribute the patrimony liability exclusively to the civil law. Today the patrimony liability is found in several branches of law such as: constitutional, administrative, banking, tax, environmental, criminal, etc.

In the administrative law, for example, the authors Maria Orlov and Stefan Belecciu<sup>13</sup> say that the administrative and patrimonial liability is a form of administrative liability. According to them: the administrative and patrimonial liability has a complex character and is to be concerned by administrative law science in a multidimensional and interdisciplinary manner<sup>14</sup>.

In the constitutional law, according to the article 53 paragraph (2) of the Constitution of the Republic of Moldova<sup>15</sup> „*The State is responsible in terms of patrimony under the law for the damages caused through errors committed in criminal proceedings by the investigating bodies and courts*”.

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<sup>12</sup> Baltag, *Teoria generală a dreptului*, 660.

<sup>13</sup> Maria Orlov, Ștefan Belecciu, *Drept administrativ*. (Chișinău: „Elena – VI”, 2005), 256.

<sup>14</sup> Maria Orlov, „Răspunderea administrativ-patrimonială o nouă formă a răspunderii în dreptul administrativ”. (Administrația publică: Aspecte practico-științifice, probleme și perspective. International scientific-practical conference, CEP USM Chișinău, 30 January 2004).

<sup>15</sup> Constitution of the Republic of Moldova adopted on 29.07.1994, with effect from 27.08.1994 published in the Official Gazette of the Republic of Moldova 12.08.1994, nr.1.

The development of these provisions is contained in the table of contents of the Civil Code of Republic of Moldova<sup>16</sup>, article 1405 paragraph (1) stating that: „the damage caused to the natural person through unlawful conviction, unlawful attraction to criminal liability, unlawful application of the preventive measure in the form of custody pending trial or in the form of written undertaking not to leave the place, by unlawful application of arrest as administrative penalty, unpaid work in the favor of community, is repaired by the State in full, independent of the guilt of responsible persons of the prosecuting agencies, of the preliminary investigation agencies, of the prosecutor’s office or of the courts”.

This moment determined that, in general, the institution of patrimony liability of the State governed by the Constitution, has to be interpreted as being civil by nature.

In this regard, the professor E. Cojocaru<sup>17</sup> argues that the legal norms contained in the article 53 paragraph (2) of the Constitution enter in the system of civil legislation and are in the sphere of civil law science research.

In addition to the recognition of the civil nature of „patrimony liability of the State”, in the specialized juridical literature we see another idea, according to which the institution in question has a mixed character, because the character and the content of judicial errors, as well as of rehabilitation acts are results of procedural criminal activity, and the character and the content of caused damage, as well as of repair procedure are regulated by civil law and civil procedure law<sup>18</sup>.

Yet for a long time, beginning from the late of XIX<sup>th</sup> century, there is controversy in the Romanian law as regard the nature of State liability,

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<sup>16</sup> Civil Code of the Republic of Moldova, adopted by Law no. 1107-XV of 06.06.2002 in the Official Gazette of the Republic, 06.22.2002, nr. 82-86/661.

<sup>17</sup> Eugenia Cojocaru, „Statul și răspunderea juridică civilă. „Statul de drept și problemele minorității naționale” (paper presented at the International tehnico-scientific Conference, Bălți, 11-12 ianuarie 2002).

<sup>18</sup> Igor Dolea, et al. *Drept procesual penal*. (Chișinău: Cartier Tipografia Centrală, 2005), 924.

in particular between the authors of administrative law and the authors of civil law<sup>19</sup>.

With regard to the patrimony liability of the State in some papers was showed that this patrimony liability is contained in the administrative liability, because it „is that part of the legal liability which engages in those cases where the State violates the rules of law which provide for the assignment of such liability, in other words commits the administrative violation”<sup>20</sup>. It has been argued that the nature of the liability depends on the nature of the violated rule of law, or if the rules of administrative law are violated, then the liability is administrative.

*In the Romanian doctrine* the different opinions of the authors of the civil law relating to State liability for disservice of the citizens were formulated, which stated that the State liability is assigned under the terms of the common law, more specifically of the delictual civil liability<sup>21</sup>.

Another civil law author, V. Gh. Tarhon<sup>22</sup> argued that the delictual civil liability, in the absence of special rules, constitutes the common law in matters of patrimony liability; that such liability of the State for the damages is caused by the finding of the illegal nature of act; operates only if the elements of civil law for the existence of patrimony liability are met; is achieved by full compensation for damage.

In the environmental law Igor Trofimov<sup>23</sup> reflects the patrimony liability of the States for environmental misconduct, as well it is studied the patrimony liability in the field of tax and financial law.

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<sup>19</sup> Elena Moraru, Tatiana Stahi „Natura juridică a răspunderii statului în doctrina și legislația românească”, *Revista Națională de Drept* 12(2015).

<sup>20</sup> V. Prisacaru. *Tratat de drept administrative roman. Partea generală*. (București: Lumina Lex, 1993), 387.

<sup>21</sup> E. Eliescu E. *Răspunderea civilă delictuală*. (București: Ed. Academiei, 1972), 318-322. R. Motică, E.Lupan. *Teoria generală a obligațiilor civile*. (București: Lumina Lex, 2005), 523.

<sup>22</sup> V. Gh. Tarhon *Răspunderea patrimonială a organelor administrației de stat și controlul jurisdicțional indirect al legalității actelor administrative*. (București: Ed. Științifică, 1967), 20-46.

<sup>23</sup> Trofimov, *Drept Civil. Contractele civile*, 47.

## CONCLUSIONS

Making a deduction, it is important to identify the characters of patrimonial civil legal liability in order to avoid its confusion with patrimony liability from others branches of law:

- it is patrimonial because means reparations;
- the basis is constituted of the responsibility of law-breaker prior to the injured person, i.e. the parties are in the same juridical condition;
- the civil legal liability does not trigger ex officio, but only at the request of the holder of injured subjective right;
- there is a correlation between the amount of the liability and the amount of the injury. This implies a limit of civil liability.

We state that the issue of legal liability has been addressed only in branches of civil, criminal, administrative and labor law. At present, due to the evolution of social relations, scientific researches both national and international have approached new forms of legal liability: the liability in the environmental law, the financial liability, the banking liability, the constitutional liability and last but not least the patrimony liability.

The starting of legal liability is a common task of the State authorities and of the private persons, while the law establishes both the reason of liability starting and its limits. In this way the patrimony liability as a form of legal liability is governed by the Labor code, the Civil code, the Code of administrative offences, the Constitution of the Republic of Moldova, etc.

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# THEORETICAL AND PRACTICAL ASPECTS ON CONCESSION INSTITUTION IN THE REPUBLIC OF MOLDOVA

Maria ORLOV<sup>1</sup>  
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## **Abstract**

*The concession is a new institution for the countries that have abandoned the socialist regime of government, including for the Republic of Moldova. Although, the legal regulations were adopted in this regard, however, the inexperience and the absence of perception of the essence of this legal institutions prevent its development, and sometimes lead to errors followed by embezzlement of public property.*

**Key-words:** *concession, task book, public services, administrative contract, public auction*

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## **INTRODUCTION**

The concession is, indeed, a modern and efficient tool of delegated administration of public services, if the state does not have sufficient tools (qualified personnel, financial and material resources) to organize them in a way that fully will satisfy the needs of society.

In Soviet period, through that has passed and the Republic of Moldova (1940-1991), the public goods and services were managed exclusively by state enterprises, so that the institution of concession was forgotten, both in terms of theory and practice. In 1995, the Law on concessions<sup>3</sup> was adopted, but it has not gained much application, from various reasons of political, economic and social nature. Among them we can mention: the lack of clarity of the regulatory framework governing

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<sup>3</sup> Law concerning the concession no. 534 of 13.07.1995. Published: 30.11.1995 in Official Monitor no. 67 art. No. 752

the concession field and that of public services; poor staff training from public administration; slow development of market economy relationships, etc. As a result, the attempts to apply the institution of concession in our country, whether have failed, or that were finished with the conclusion of some contracts containing clauses inappropriate and contrary to the followed essence and purpose, that to manage with maximum efficiency and diligence the goods and public services in the interest of all citizens.

## **1. GENERAL REGULATIONS ON CONCESSIONS**

The last decade of the last century was crucial one in the legislative activity from the Republic Moldova, and at the same time, being the first decade of training and strengthening of our country as an independent and democratic state. The whole legislation should be revised and supplemented by legislation to ensure the edification of state of law. The development of market economy relations has put in a new light the concept of public property, and arrangements for its valorification and management.

In this context, the framework law was adopted in the subject of concession, mentioned above, and subsequently have been adopted and other regulations implementing this law<sup>4</sup>. In addition, to complement the regulatory framework in this field, the legislator has adopted the Law on public-private partnership<sup>5</sup>, that has as basic objective: "*to attract private investment in order to increase efficiency and quality of services, public works and other activities of public interest and of the efficient use of public property and public money.*" Basically, it is the purpose of the

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<sup>4</sup> Decision of Government, No. 102, from 27.02.1996, *about the steps necessary to implement the Law on concessions* Published : 30.05.1996 in Official Monitor No. 32-33 art No : 221; Decision of Government, No. 1006, from 13.09.2004, *approving the Regulation on public utility service concessions*, Published : 17.09.2004 in Official Monitor No. 171 art No : 1183

<sup>5</sup> Law on Public-Private Partnership, no. 179 from 10.07.2008, Published : 02.09.2008 in Official Monitor No. 165-166 art No : 605 Effective date: 02.12.2008; Decision of Government No. 476 of 04.07.2012, *for approving the Regulation on standard procedures and general conditions for selection of the private partner*, Published : 13.07.2012 in Official Monitor No. 143-148 art No: 530

concession and public procurement, which, in their turn, are the most common categories of agreements by which the public-private partnership is realized.

However, Law no. 179/2008, in the art. 18 sets completely different contractual forms of public-private partnership fulfillment, and namely: "a) works contract/service providing; b) contract of fiduciary management; c) tenancy/lease contract; d) concession contract; e) contract of commercial company or civil society. " As we see from this list, only the concession is recognized as a means of achieving of public-private partnership, along with multiple other contracts of private law (civil, commercial), while, the public procurement and administration delegation of works or public services, are not included, although these are, by their nature, public law contracts, achieved through public-private partnership, or, where appropriate, public-public partnership. In their turn, the civil contracts (of common/private law) are not best suited for managing assets that are subject of exclusive property of the state or of the administrative-territorial units, because not contain mandatory clauses set unilaterally (task book), by which the state ensures efficient management of public assets.

As we see, nor new regulations adopted, nor changes brought to the framework law have not contributed much to the harmonization of legislation from concession field. Although, in terms of theory of law and science administration, these acts correspond to criteria and modern standards, however, our legislator has failed to harmonize and systematize them in a consistently way.

Moreover, in our legislation has not been noted that public-private partnership is achieved, as a rule, through administrative agreements. And the concession, as well as public procurement, constitute classic designs of administrative contract. As a result, there was no established which are the basic elements (characteristics) of administrative contracts, to have a clear distinction of their of civil contracts. Although, some elements (such as task books, award of contracts by public auction) are regulated separately and repetitive in many acts (laws, regulations), however, there are no link logical or legal between them. Not taking into account the fact that the term of administrative contract is mentioned

only once in our legislation, in art. 2 of the Administrative Litigation Law<sup>6</sup>. In this law, the administrative contracts are assimilated into the administrative provisions related to the disputes that may arise between the parties from the initiation of proceedings and until the full execution of such contracts. Special normative acts devoted to administrative contracts (concession, public procurement, etc.) were to take this notion to highlight them and materialize that they are made subject to public law and disputes arising are examined by courts of administrative law. Unfortunately, it happened, as with other public law institutions that were not perfect, including the institution of administrative jurisdiction.

## 2. OBJECT OF CONCESSION

With the adoption of the Law on Concessions was set up one of the basic tools through that the state or territorial administrative units, manage natural resources on the territory of the Republic of Moldova, public national and local services, movable and immovable assets of public property of the state or of the administrative-territorial units (art. 1 Law no.534 / 1995). The good operation of this tool depends largely on how is regulated *the subject and deployment procedures* of the concession, and the way in which public authorities intend to implement these regulations.

Classic object of the concession are considered *public goods, public services and public works*. The essential difference between public goods and services that can be granted is that, while in the case of property leased, the main obligation of the concessionaire consists of exploiting the property, to the concession of a public service the obligation of the concessionaire performs a double duty: "On the one hand concessionaire must respect the fundamental principles of public service: the service must operate continuously, and delays or

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<sup>6</sup> art. 2, Administrative Litigation Law, no. 793, of 10.02.2000, Published : 18.05.2000 in Official Monitor No. 57-58 art No : 375 Effective date: 18.08.2000 : „*administrative contract - contract concluded by the public authority within the prerogatives of public power, having as object the administration and use of public property, execution of works of public interest, public service provision, civil servants activity stemming from labor relations governed by their legal status*”.

postponements are not permitted. On the other hand, being acknowledged by a private the business does not remain merely a public service and the body responsible can not give up its power to organize this service, even if the organization rules are laid down in the contract<sup>7</sup>".

The distinction between concessions which have as their object the execution of public work and concessions that provides a public service is formulated by the French doctrine as follows: "the concession of public works, is also a concession of a public service, which, however, the concessionaire is engaged not only to operate this service, but to build himself, to his expense, the necessary work of its operation. Service management will have to enable it in this case to support investment and expenses to amortize the expenses for work, which will return at the end of the concession to grantor in a free way. This is why the public service concession is performed for a very long period. Railways, tramlines were achieved in this way. This currently is used for the construction and operation of highways, underground parking<sup>8</sup>".

In conclusion, we can say that the common feature of concession of goods, works or public services is the obligation of the licensee to exploit them, or to perform or provide, so as to lead to more effective services or public works, overall efficiency for the benefit of society who use these services or public works and to private service of concession holder, through the generation of revenue to enable payment of the fee by the grantor and its own profits.

## **2.1 PUBLIC PROPERTY GOODS AS THE OBJECT OF THE CONCESSION**

The legal regime of public property goods is regulated by Constitution and multiple regulations.<sup>9</sup> Under the legislation in force, the

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<sup>7</sup> Philippe Georges, *Droit public*, 10 edition. (Paris: Dalloz, 1996).

<sup>8</sup> Jean Rivero, *Droit administratif*, 9-ieme edition. (Paris: Dalloz, 1980), 459-460.

<sup>9</sup>Art. 9, 126-129 from Constitution of the Republic of Moldova from 29.07.1994, Published : 18.08.1994 in Official Monitor No. 1 Effective date: 27.08.1994 ; Law on public property of territorial-administrative units, no. 523 of 16.07.1999, Published: 11.11.1999 in Official Monitor No. 124-125 art No : 611; Law on lands of public property and their delimitation, no. 91 of 05.04.2007, Published : 25.05.2007 in Official Monitor No. 70-73 art No : 316; Law on management and deetatization of

property is divided into: *public and private*. In their turn, *public property* is composed of: goods of the *public and private field* of state or of administrative-territorial unit.<sup>10</sup> The object of the concession can be, usually, goods that are from the *public domain* and, where appropriate, and from the *private domain* of the state or territorial-administrative unit.

According to Art. 3 line (2) lit. b) of the Law on Concessions (no. 534/1995) the goods which may be subject to concession are: "*a) land and other natural resources, prospecting, exploration and exploitation thereof; b) movable and immovable property of public or private domain of the State or of territorial administrative units*".

In this context, prof. Erast Diti Tarangul stated that "the administration needs the endorsement of public service of movable and immovable property. These goods forming part of the heritage administration, constitutes the administrative field ... the administrative area is, usually, divided into two categories, namely public and private sector. Public domain includes movable and immovable property of the administration which are affected to the general interest, whether they are affected to a public service (for example: buildings, rolling stock of railways, weapons), whether they are affected to use of everyone ( roads, markets, waterfront, etc.). From the private field of administration belong the movable and immovable property of the administration, which are not directly affected to a general interest".<sup>11</sup>

Due to the lack of an own theory and practice, our legislator put accent in large part to the Romanian doctrine of interwar period in this matter. According to Art. 1 of Law on public property of administrative-territorial units, no. 523/1999 "*Heritage of administrative-territorial*

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public property, no. 121 from 04.05.2007, Published : 29.06.2007 in Official Monitor No. 90-93, art, No : 401, Effective date : 29.06.2007

<sup>10</sup> See detail in work: Orlov Maria, Belecciu Liliana, „*Certain aspects on legal regime of the public domain's property in the legislation and practice of Republic of Moldova*”.International Scientific Conference HISTORY, CULTURE, CITIZENSHIP IN THE EUROPEAN UNION, 8<sup>th</sup> edition, 8 - 9 May 2015, Pitești, România, E-book on CD-ROM with , ISSN 2360 – 1841, ISSN-L 2360 – 1841, 261-269, C.H. Beck, Bucharest, Online - site: [www.iccu.upit.ro](http://www.iccu.upit.ro).

<sup>11</sup> Erast Diti Tarangul, *Treaty of Romanian administrative law*. (Cernauti: typography "Voice of Bucovina", 1944), 355.

*units consists of assets of public and private property. Public property assets constitute all movable and immovable property, designed to meet the general interests of the community of administrative-territorial unit ...* "and, private property assets are *"that have strictly determined destination other than the satisfaction of general interest "*.

The main problem facing public authorities in this regard is the lack of a registry with clear delimitation of goods from public domain from that of private domain, especially in the administrative-territorial units. This delimitation is essential to choose the correct way of managing of property. Under the legislation in force, the public property assets of the State or territorial administrative units are *inalienable, indefeasible and elusive*. Therefore, they can be sent only in management, through administrative contracts, and can not be alienated, whereas the private property assets can be alienated, including through civil contracts, subject to certain conditions (public auction, etc. ).

## **2.2. PUBLIC WORKS AND SERVICES AS OBJECT OF CONCESSION**

Under the legislation in force, every public service in part is regulated by specific laws. A general regulation, in this respect, which defines public service notion and establishes the relevant principles and methods of their management, applicable by analogy to any national or local public service, are enshrined in law public utility services.<sup>12</sup> Although it refers to *services of water supply, heat supply, sewerage and wastewater treatment and stormwater, sanitation, greening of cities, providing of local public transport, the administration of the public and private housing*, however, that law may be applied to other public tasks than those listed (Article 3, Law no. 1402/2002). One of the basic rules is that public utility systems, including related land, being of use, interest or public utility owned, by their nature or according to law, to public domain of administrative-territorial units (article 4, Law . 1402/2002), and their management is organized and carried through direct

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<sup>12</sup> Law of public services of utilities, no. 1402, from 24.10.2002, Published: 07.02.2003 in Official Monitor No. 14-17 art No : 49

management (state or municipal enterprises) or through delegated administration through public-private partnership contract (Article 17, 19, Law no. 1402/2002 ).

According to the legislation, "*the concession is allowed in all sectors of the economy and includes all kinds of activity*" and the object of the concession, could be "*works and services of national or local public interest*" (Article 3, Law no. 534/1995). In the same context, art. 17, line (2) of Law no. 179/2008 stipulates that "*public-private partnership object can be any good, work, public service ...*".

The fact that the legislator has allowed the concession in all sectors of the economy and it may cover all types of activity, greatly has expanded the scope of concession object. In this context, we consider that, for the Republic of Moldova, which has recently established this legal institution and which has little experience in determining the types of activities that can make the concession object, this liberty of actions will produce multiple confusions and errors.

A good example in this respect is the Concession Contract of Chisinau Airport, where as object of the concession are specified "*the assets of S.E "Chisinau International Airport" and related land, except receivables and payables "*.

The real object of this contract is, in fact, *the air transport service*, whereas the assets of the state enterprise, such as building of Airport, runways, ancillary buildings and related land, are nothing than **-goods related to this public service** of national interest . Therefore, in our case, the object of the concession contract is the exclusive right to provide public service of air transport and, alternatively, the exclusive right to operate, maintain and manage the assets leased and investments on the rehabilitation of existing assets.

These errors and ambiguities in the formulation of object of the concession produces effect contrary to the purpose and objectives enshrined in law or stipulated in the concluded contract. Moreover, the errors can be so serious as to lead to misappropriation of public property goods, to the provision of services or the execution of works of poor quality in injury of consumers and the entire society.

The conditions, methods and means to perform public service, must be precisely outlined in "regulatory side" of the concession contract, namely specifications of the concession.<sup>13</sup>

In the literature of specialty is mentioned that "the object of the concession contract can only be the concession object as such, as it was outlined by the advertisement. The concrete situations are, however, very complex, especially in the case of tenders for the concession of various public services, which involves the use of public assets. In such a situation, even if held one auction for the public service, it requires the completion of two concession contracts: on the one hand, a concession contract for good public property, and on the other hand, for public service".<sup>14</sup>

In order of ideas, whether on public services, as object of the concession, our legislator is not too explicit when, in respect of classic concession of public works, it leaves more questions. In art. 3 line (1) of Law no. 534/1995 shall be retained only that the right to conduct certain types of activities may be subject to concessions and "concession is allowed in all sectors of the economy and includes all types of activity, if not unlawful".

Instead, the doctrine has defined the public work as being the totality of works performed by the public administration both on public and on private field and even on individuals property, in some cases claimed by satisfaction of general interest.

## CONCLUSIONS

In conclusion, we mention that the framework law in the field of concession contains very vague provisions on the goods, works and services that may be subject to concession contract. In this context, we support the idea of harmonizing of legislation in this chapter, especially in the detailed regulation on the basis of clear criteria of delimitation, of

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<sup>13</sup> Liliana Belecciu, *Contract of concession* (Chisinau, 2012), 81

<sup>14</sup> Antonie Iorgovan, *Treaty of administrative law*, vol. I (Bucharest: AllBeck, 2002), 234.

main categories of the concession object: public goods, public services and public works.

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# REFUGEES BETWEEN INTERNATIONAL PROTECTION AND ABANDON

Doina POPESCU-LJUNGHOLM<sup>1</sup>

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**Abstract:**

*By approached theme I proposed to analyze the phenomenon of leaving people in the home country where he was in imminent danger from the perspective of challenges unprecedented in the Member States of the European Union and UNHCR has to face, and finding new solutions and measures to protect and guarantee the rights of refugees, in conditions of maximum safety both for them and for the host country. Even if it is a legitimate right of every government to secure their own territory and prevent illegal immigration, is also essential that, given the most strict border management, access to an asylum seeker to territories not prohibited.*

**Key- words:** *refugees, protection, UNHCR, resettlement, European Union.*

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## INTRODUCTION

Geneva Convention of 1951 on the Status of Refugees<sup>2</sup> is the key legal instrument for the protection of the rights of refugees and UNHCR is the body specifically created by the UN, which protect international legal displaced persons intern. The Convention promote fundamental rights of these individuals and non-refoulement forced them into a territory where they could face persecution. UNHCR check and provide support member so that asylum seekers have access to safe territory and asylum procedures are conducted in a fair and efficient way. The UN Refugee Agency strives to ensure Cato reception conditions, such as housing and healthcare for newly arrived are in accordance with standards international. UNHCR helps asylum seekers and refugees in finding durable solutions to their plight: integration into the host society, their return to their country of origin when the conditions exist for it to be

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<sup>2</sup> M.Of. nr. 148/17 iul. 1991.

carried out safely and with dignity or - if none of these solutions is possible - resettlement in a third country.

The term asylum seeker is often confused with the term refugee. An asylum seeker is someone who says he is seeking international protection of refugees and the path of persecution or serious dangers in their own country. Each refugee is initially an asylum seeker, but each asylum seeker will be recognized eventually as a refugee. While waiting for their application to be accepted or rejected, these people are called asylum seekers. The term asylum seeker contains no presumption whatsoever - only discloses that a person has made an application for asylum. National asylum systems are meant to decide which asylum seekers qualify to receive international protection. Those deemed by appropriate procedures,<sup>3</sup> as not requiring a refugee or another form of international protection may be sent back to their countries of origine. Efficiency asylum system is essential in this process. If this system is fast, accurate and efficient, every asylum seeker who is truly refugee will receive refugee status, while those who do not need international protection will not benefit unduly from it.

Refugees fleeing conflict or persecution are in a vulnerable situation. If states do not allow them to enter their territory or send them back, this can mean a sentence of life intolerable without rights, torture, or even death.

Even if it is a legitimate right of every government to secure their own territory and prevent illegal immigration, is also essential that, given the most strict border management, access to an asylum seeker to territories not prohibited. Under international law, states have an obligation to provide protection to those in need and not allowed to return a person to a place where their lives or freedom would be threatened. This is a fundamental principle of refugee protection, non-refoulement. To ensure that each person seeking asylum have access to territory so safely and at a fair and efficient asylum procedure, UNHCR<sup>4</sup> manages border access in all regions. Large exodus of asylum seekers

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<sup>3</sup>Înaltul Comisariat ONU pentru Refugiați - Reprezentanța în România, *National legislation for refugees and migrants*, vol.I (Bucharest: C.H. Beck, 2008), 122.

<sup>4</sup> UNHCR, *The state of the worlds refugees* (Oxford: University Press, 2012), 37.

coming from the recent conflict zones have created problems UHCR, especially EU states, towards which most of them. U.E became vulnerable citizens and even they began to fear for his own safety, placing and often questions like : Are we in danger? Are we invaded ? Have we opened the gates for terrorists ?

## **JURIDICAL REGIME APPLICABLE FOR REFUGEES AND MIGRANTS**

Migration flows today are more complex and involves not only refugees, but also millions of migrants. The migrants, most economical, and they seek a better life and human traffickers have built billion business by taking advantage of their desperation. Refugees and migrants are fundamentally different: migrants choose to move in order to find a better life for themselves and their families; refugees are forced to move to save their lives or preserve their freedom. Therefore, national authorities must ensure that every refugee who travels in a mixed group of migrants and asylum seekers have access to the territory of a country and is not returned to the border as an illegal migrant.

The practice of granting asylum to people fleeing persecution in foreign countries is one of the earliest signs of civilization. References to it have been found in texts written 3,500 years ago, during the flowering of great empires in the Middle East such as the Hittites, Babylonians, Assyrians, and Egyptians. Three millennia later, refugee protection has become a core mandate of the UN Refugee Agency, created to deal with the main refugees in those waiting to return home at the end of the Second World War.

According to the Convention on Refugees of 1951, the basic document of the international protection of refugees for six decades, the refugee is that person who "after a justified fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or his political opinions, is outside the country of his nationality<sup>5</sup> and is unable or, owing to such fear, is unwilling protection of that

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<sup>5</sup> Joan M. Fitzpatrick, *Human rights protection for refugees, asylum-seekers and internally displaced persons: A guide to international mechanisms and Procedures*, (New York: Transnational Publishers, Inc., 2010), 98.

country." the refugees have no protection from their own state - which often is even persecute their own state. If other countries do not allow them to enter their territory and does not help them once they arrived there, then they can sentence him to death or to an intolerable life in the shadows, without support and without rights. The main purpose of refugee protection is to help find durable solutions to enable refugees to rebuild their lives with dignity and peace. Three UNHCR has established three benchmarks: local integration, return to their home country once the reasons refugee have ceased to exist, or resettlement in a third country where the refugee can no longer remain in the country which granted him asylum for various reasons.

### **NUMBER RECORD OF REFUGEES IN 2015**

Given that almost one million people- refugees and migrants - have crossed the Mediterranean in 2015 and the conflicts in Syria and elsewhere continued to generate a growing number of people seeking asylum, broke all records in 2015 matters of refugees, according to UNHCR report which analyzes global displacement resulting from conflict and persecution that warns of the danger states for each of the three main types of travel - refugees asylum seekers and people displaced within their country.

„The total number of global refugees, who a year earlier was 19.5 million , exceeded in 2015 the threshold of 20 million (20.2 million ) for the first time since 1992. Asylum applications rose meantime up to 78 percent (993600) compared to the same period in 2014 (with 558,000 requests) and the number of IDPs rose by around 2 million figure reaching an estimated 34 million.,<sup>6</sup>.

2015 was the year that were registered for the first time, a global forced displacement of over 60 million, or 1 in every 122 people was forced to flee. António Guterres, UN High Commissioner for Refugees said:" Currently, forced displacement leaves a deep mark our times. It affects the lives of millions of our fellow man - impacting people forced to seek refuge but also those who provide them shelter and protection. There has never been a greater need for tolerance, compassion and

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<sup>6</sup> International Journal of Refugee Law, New York, 2016.

solidarity with people who have lost everything". The number of new refugees has also increased dramatically: about 839 000 people in only six months, equivalent to an average rate of almost 4,600 who are forced to leave their countries every day. The war in Syria remains the largest single generator of new refugees both global and mass displacement, internal and external, continues. However, the report notes that the underlying trend would remain one of increasing global relocation even if the war in Syria would be excluded from measurements.

A consequence of the higher number of refugees who are stranded in exile is increasing pressure on the countries that host them: no management of this pressure increased resentment, resulting politicization of refugees, attitude frequent violence of refugees from different countries of the EU have caused negative reactions from train them and positions contrary to international documents. Even if they were also risks and incidents, 2015 was noticed by a generous human extraordinary: an absolute basis and taking into account refugees who fall under UNHCR's mandate (Palestinians are under the mandate of our organization sister UNRWA) Turkey is the largest host country in the world with 2 million refugees on its territory, which is why the leaders of EU countries negotiations was willing to support this country in assisting refugees. Also, Lebanon hosts more refugees reported the size of its population, than any other country, with a rate of 1 to 209 inhabitants fled. Ethiopia and highest paying reported the size of its economy, with 469 refugees for each dollar of GDP (per capita at PPP) as shown in the UNHCR report. Germany was the country that received the largest number new applications for asylum - 159,000 the second largest recipient country was the Russian Federation with 100,000 applications, more people fleeing conflict in Ukraine.

## **REFUGEES SITUATION SINCE THE BEGINNING OF 2016**

Although winter, more than 120,000 refugees and migrants arrived in Europe by ship in the first months weeks of 2016 more than in the first four months of 2015, as an announced UN refugee agency, UNHCR (UN High Commissioner for refugees) and 400 people lost their lives trying to cross the Mediterranean. And yet more than 2,000 people a day continue

to risk their lives and their children's lives trying to reach Europe. " Most of those who arrived in January 2016, nearly 58 percent were women and children; one in three people who arrived in Greece were children compared with only 1 of 10 in September 2015 , "he told a press conference in Geneva on March 4, 2016 . Most asylum seekers complain that they were forced to leave their homeland because of the conflict in Syria.

The situation led to unprecedented UNHCR -EU joint efforts to reduce hazardous sea arrivals, access to asylum under safety including relocation and humanitarian - intake as a fundamental right that must be protected and respected with finding ways to travel to normal Europe and other destinations refugees to enable them to get to safety without having to put life into the hands of traffickers and make dangerous sea crossings, enhance the reception capacities at entry points in Europe, so as to allow accommodation in a humane and effective assistance, registration and screening from the point of view of safety of people arriving every day.

This necessary to identify persons requesting protection, those to be relocated to other EU countries and those which do not qualify for refugee protection and effective mechanisms to be applied and dignified repatriation. Since the beginning of 2016 border control measures were tightened in many European countries. Despite repeated calls by UNHCR to expand legal channels to allow refugees and asylum seekers access to asylum, many EU member states actually reduce the available legal remedies, considering and their right to protect their own citizens and interests national.

Some countries are planning to adopt similar legislation or even more restrictive in a time when European countries should improve and to secure accessibility to family reunification and to combat such illegal trafficking, such as Hungary and Poland ads successive recent national measures to try to look more attractive than neighbouring countries do nothing but highlight the pressing need for a comprehensive European side, problems can not simply be passed from one country to another. The excess is not good for anyone.

Nobody can ignore the reality, sometimes dramatically, certain European countries due to significant arrivals of asylum seekers, refugees

and migrants. Clearly states have a sovereign right to manage their borders; however, this must be done in accordance with national laws, the European Union and international. The possible impact of measures and practices harmful individual rights and life should be considered refugees. Some countries might even establish policies for seizing money and valuables from applicants in order to reduce social assistance costs. Such measures are themselves extremely expensive and have the effect of favouring fear and discrimination. The countries receiving the largest number of refugees, including Germany and Sweden, in urgent need of legal mechanisms and social eliminate fear and xenophobia and to restore common European principles of dignity, solidarity and human rights which was founded European Union.

## **LEGAL MEASURES REQUIRED TO ADDRESS THE SITUATION OF REFUGEES IN EUROPE**

Warnings that Europe is running out of time to solve the current situation of the refugees is no longer a novelty , therefore was outlined a detailed plan, six points ahead of the EU leaders and Turkey in Brussels. Filippo Grandi, the High Commissioner for Refugees<sup>7</sup>, called for strong leadership and vision to address what he called it "both a crisis of European solidarity and a refugee crisis." Collective failure to put in implement measures agreed by EU Member States in the past escalated the current crisis.

The plan addressed to EU Member States, by UNHCR for refugees management and stabilization include:

1. Fully implement what it calls "hot spot" and resettlement of asylum seekers in Greece and Italy and at the same time, the return of persons who do not qualify for refugee protection, including under existing readmission agreements.
2. Increase support for Greece to manage the humanitarian emergency, including refugee status determination, resettlement and return or readmission.
3. Ensure compliance with all laws and EU directives on asylum between Member States.

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<sup>7</sup> [www.unhcr.org](http://www.unhcr.org)

4. The existence of multiple paths safe, legal, available for refugees to travel to Europe under the programs administered - for example humanitarian intake, sponsorships private, family reunification , scholarships for students and labour mobility programs - so that refugees not to resort to smugglers and traffickers to find safety .

5. The protection of individuals against physical risks, including protection systems unaccompanied and separated children, prevention and combating of sexual violence and gender, improving search and rescue operations at sea, saving lives by combating trafficking human beings and the fight against xenophobia and racism aimed at refugees and migrants.

6. Develop systems at European level of responsibility for asylum seekers, including the establishment of registration centres in the main countries of destination and the establishment of a distribution of asylum applications in a fair way between EU Member States.

## **CONCLUSIONS**

Is in the interests of immigrants fleeing war zones can expect conflict ended in near native country. Consequently, the EU should start to finance refugee camps in Turkey, Jordan and Lebanon, and to build new ones there. Proposals UNHCR clearly shows that the fair sharing of responsibility is essential to reaching a managed and orderly, and that EU Member States should establish a system percent of asylum seekers that each Member State should it take.

The international community, so outraged today, closed his eyes during the chronicity of humanitarian disaster. Until the Arab world conflicts were born this new and virulent European crisis. West supports today consequences of diplomatic impotence, indifference and unwillingness humanitarian military. Now, Europe is doomed to action against the causes of evil which affects it directly. Europe paralyzed for several years before the crisis as a surround is forced to react under the pressure of emotion aroused by the dramatic images of exodus from the East and under the pressure of urgency that involve assault, became unmanageable, hundreds of thousands of refugees and migrants.

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# HUMAN RESOURCES MANAGEMENT IN EUROPEAN ADMINISTRATIONS

Cătălin BUCUR<sup>1</sup>

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## **Abstract:**

*To improve the performances of the public administration means the identification of better standards of efficiency and effectiveness in the application of the law. It means the delegation of responsibilities to public managers, accompanied by appropriate mechanisms of control. In such cases, the quality of public managers becomes of maximum importance. Moreover, when the state policies are more and more complex and exposed to international cooperation, as in the case of the EU Member States, the need for public managers with real perspectives and with the ability to coordinate their work in the relations with national and international institutions becomes more acute.*

**Key- words:** *human resources, management, European administrations, to improve*

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## **INTRODUCTION**

EU Member States have a long time ago acknowledged the fact that the managerial standards and the performances of the public managers are criteria for the success of both the general performances in the public administration, as well as for its reformation.

To improve the performances of the public administration means the identification of better standards of efficiency and effectiveness in the application of the law. It means the delegation of responsibilities to public managers, accompanied by appropriate mechanisms of control.

In such cases, the quality of public managers becomes of maximum importance. Moreover, when the state policies are more and more complex and exposed to international cooperation, as in the case of the EU Member States, the need for public managers with real perspectives and with the ability to coordinate their work in the relations with national and international institutions becomes more acute<sup>2</sup>.

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<sup>2</sup> Cătălin Bucur, *Știința administrației* (Craiova: Sitech, 2014), 88.

France, with the *system of career* and *the corpuses* defining it, has groups of officials, called seniors. Individual persons of each *corpus* are assisted and directed from the center in the process of developing their own career, through training and mobility. That state has a body of workers competent who select the person for a certain position.

Other states have established similar criteria. Holland, with its administration in which responsibilities are clearly divided, develops a so-called Senior Public Service, in which is emphasized the *professional development of managers and which improves the capacities for coordination*<sup>3</sup>.

Though this type of service does not yet exist in the EU Member States from Central and Eastern Europe, Hungary, Lithuania and Poland have tried, within the reformation, to propose the introduction of special policies and managerial mechanisms for the highest governmental officials.

In the previous administrative systems from the Central and Eastern Europe there was not a clear understanding of the profession in the central administration. Each position in the central administration was created as a specialty of the institution, which limited the future of the career in other institutions, in the absence of clear professional criteria in neither case. The mobility between institutions was not encouraged and was very rare. On the other hand, the fact that the inter-institutional policies were subordinated to the national policy generated the inutility of the existence of generalists or managers with perspectives wider than their technical area of activity. This type of permanent managerial position was and still is in most Central and Eastern European states the prerogative of the political class. Managers without a political support, though in most cases competent specialist are rarely entrusted with the management or leadership of the administrative activity.

The reformation of the public service in Central and Eastern European states aims for training of professionals, of public managers within these services. It assumes measures to be taken in different areas:

- Training managers;

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<sup>3</sup> Andre Molitor, *Les sciences sociales dans l'enseignement superior* (Paris: Administration publique, 1958), 68.

- Introducing rules to define the tasks, responsibilities and rights for the employees stated by a legislation specific to the public service;
- Improving the management of the personnel and its standards;
- The establishment of an administrative context in which officials and public managers to be able to complete their tasks in a professional, impartial, transparent and comfortable way.

The administrative context is determined by several factors, among which the most important ones are:

a) *The quality of the Law on autonomy* – the Law on autonomy establishes a framework necessary for the adoption of decisions in a certain area (for instance, the regional urban planning or environmental issues). In other words, this law represents an instrument for the officials and a source of information and predictability for the public.

b) *The quality of the Code of administrative procedure* – this law establishes the procedures specific for the decisional process, for the coordination and balance of powers, the relation between the officials and public, the communication between them and the authorization of any of these parties to be heard or to submit an appeal.

c) *The quality of the mechanisms for responsibility, financial and administrative control* – all of them must comply with the principle of transparency and to insure the control of the financial and administrative decisions.

In the same time, these factors insure the legal values and principles which have a decisive contribution in the formation of the attitude and behavior of the public managers and of others civil servants operating in the administrative context. These legal principles are essential in the decisional and behavioral process, reducing the arbitrary actions in the administrative area<sup>4</sup>.

Finally, these legal principles contribute to the substantiating of a professional public administration. The professionalization of the public administration is more complex than the implementation of certain provisions for public services and the introduction of management standards for the personnel.

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<sup>4</sup> Ioan Alexandru, *Administrația publică* (Bucharest: SNSPA, 2003), 80.

If the administrative context in which the officials must work in a real manner is not improved, then they shall have to adopt arbitrary decisions, shall suffer from an insufficient communication with the public, shall not be able to coordinate their relations with other institutions, even if are trained properly and chosen by merits<sup>5</sup>.

An issue inherited from the former administrative structures from the Central and Eastern European states is the lack of coordination and of common management standards for the personnel in the public administration. This fragmentation must be eliminated, and the management of the personnel must be harmonized so that it will insure an acceptable level in the administrative legislation, in compliance with the standards required by the public service.

To achieve this, the public service must be seen as a common managerial position in the public administration. This common position shall insure the compliance with the legal administrative principles and basic conditions, such as the recruitment and promotion based on merits, fare salaries, equal responsibilities and rights, non-discriminatory work conditions for the entire administrative system.

In some western European states, such as France, Portugal and Spain, there is a Ministry of public administration or of public position which is entrusted with the general aspects of the public management. Generally, it prepares drafts for laws for the public service, organizing and monitoring the recruitment, management of human resources, negotiations with the unions from administration representing the Government, as well as the activities of general or specific training for certain institutions, such as the schools or institutions of public administration.

In other states, such as Austria, Germany, Ireland or Holland, the Ministry of Finance or the Ministry of Internal Affairs coordinates the activity of the public sector.

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<sup>5</sup> Corneliu Manda et al., *Știința administrației, Curs universitar* (Bucharest: Universul Juridic, 2008), 47.

In Italy and Sweden was established a special agency managing the negotiations with the unions from the public service in the name of the Government and of local administration.

## CONCLUSIONS

As a conclusion, the authority responsible for the management of the public service would be:

- *An unit which shall adopt decisions for the Prime-Minister or for the Council of Ministers;*
- *A special ministry;*
- *An independent institution subordinated to the Cabinet of the Priime-Minister.*

Regardless of its form, it is important that this central authority be invested with enough power to manage the public administration of a state.

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# BRIEF ANALYSIS OF THE FUNCTIONS OF CIVIL LIABILITY IN THE ENVIRONMENTAL LAW

Ramona DUMINICĂ<sup>1</sup>  
Andra-Nicoleta PURAN<sup>2</sup>

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## **Abstract:**

*At this moment, the civil liability in the environmental law represents an institution with an increasingly higher applicability, considering the multiplication and diversity of the sources of pollution of the environment, of the multiplication of the prejudices brought to it and of the increase of their gravity determined by the worsening of the global crisis. Starting from the actual conceptualization of the notion of civil liability in the environmental law, the current study aims the analysis of the functions of this type of liability, namely the preventive-educational and reparative functions, seen from the perspective of the environmental legislation.*

**Key-words:** *environmental law, civil liability, preventive-educational function, reparative function.*

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## **INTRODUCTION**

If traditionally the tort liability is based on the idea of guilt revealing the subjective attitude of the perpetrator towards the illicit action and its consequences, in the environmental law we have an exception from this rule. In this meaning, are relevant the provisions of Art 95 of the G.E.O No 195/2005 on environmental protection<sup>3</sup> according to which the liability for the prejudice caused to the environment has an objective feature, independent of the guilt and only as exception, the liability may be subjective for the prejudices caused to the protected species and natural habitats. Therefore, regarding the ground of the civil liability for the

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<sup>3</sup> Official Gazette of Romania, No. 1196 of 30.12.2005.

ecological prejudice, the rule of the common law becomes an exception, and the exception becomes the rule.

Art 95 of the G.E.O No 195/2005 is amended by G.E.O No 68/2007 on the environmental responsibility related to the prevention and repairing of environmental damage<sup>4</sup>. Starting from Art 1 of this normative act according to which the environmental liability is based on the principle “polluter pays” for the prevention and repairing the environmental damage, we consider that the civil liability in the environmental area fulfils two main functions: preventive-educational and reparative.

The objective substantiation of the tort liability has generated a new interpretation of its functions. Thus, in literature<sup>5</sup> it has been shown that the economic role of the civil liability has increased, and the reparative function has gained autonomy, while the educative function has gradually been reduced. This new orientation considers the fact that the objective of invoking the civil liability is represented by the reparation of the damage caused and the restoration of the previous situation and, only secondarily, the sanctioning of the person responsible in order to prevent similar future actions. Therefore, the idea of invoking the liability, in the absence of the responsible person’s guilt, has brought to debate the issue of the primordially of the reparative function to the detriment of the educative function, breaking the balance between them.

## **PREVENTIVE FUNCTION**

Generally, the preventive-educational function has an essential role in the diminution of the cases generating prejudices by influencing the people’s conscience, instilling in them the need to act with extreme care so as not to cause damage to others<sup>6</sup>.

Moreover, this function proves its existence in the environmental law because, on the one hand is a lot easier to prevent than repair and, on the other hand, if the prejudice was already caused it can never be

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<sup>4</sup> Official Gazette of Romania, No. 446 of 29.06.2007.

<sup>5</sup> Lacrima R. Boilă, *Răspunderea civilă delictuală obiectivă* (Bucharest: C.H. Beck, 2008), 511.

<sup>6</sup> Ernest Lupan, *Tratat de dreptul protecției mediului* (Bucharest: C.H. Beck, 2009), 5.

completely repaired considering the particularities of the environment, being affected its very “life”<sup>7</sup>.

The preventive function results from Art 1 of the G.E.O No 68/2007 on environmental liability and, generally, is reflected by the majority of the norms in the area of environment protection which states obligations having as purpose the prevention of a prejudice caused to the environment. Also, Directive No 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage<sup>8</sup> has as objective, as mentioned by its title, the prevention of the environmental damage.

Thus, according to Art 10 of the G.E.O No 68/2007 on environmental liability, in case of an imminent threat with an environmental prejudice, the operator has the obligation to inform the County Agency for Environmental Protection and the County Commissioner of the National Environmental Guard regarding the following aspects: the identity information of the operator; time and place of the imminent threat; environmental elements to be endangered; the measures initiated for the prevention of the prejudice, as well as any other information considered as relevant by the operator.

Applying the principle of precaution in decision-making process, the preventive measures must be proportional with the imminent threat and to lead to the avoidance of the prejudice. In case if the imminent threat continues to exist despite the preventive measures adopted, the operator has the obligation to inform within 6 hours from the moment when he ascertained the inefficiency of the adopted measures, the County Agency for environmental protection and the County Commissioner of the National Environmental Guard regarding the measures taken for the prevention of the prejudice, the evolution of the situation after the application of the preventive measures, as well as any other supplementary measures taken for the prevention of the worsening of the situation.

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<sup>7</sup> Monica E. Oțel, *Răspunderea internațională în domeniul mediului* (Bucharest: Universul Juridic, 2009), 33.

<sup>8</sup> Official Journal of the European Union (OJEU) No L 143/30 April 2004.

At any moment, according to Art 11 of the G.E.O No 68/2007, the County Agency for the environmental protection may request the operator to provide information about any imminent threat causing an environmental prejudice or about any suspicious case of imminent threat, to request the operator to take the appropriate measures; to instruct the operator about the preventive measures necessary to be taken or to take the appropriate measures.

As already mentioned by the literature<sup>9</sup>, the preventive measures must not be mistaken with the prevention measures. While the measures for prevention have as main object the adoption and implementation of certain techniques and instruments designed to regulate the economic activities with the purpose of preventing a prejudice, the prevention measures refer to any measures taken as response to an event, an action or an omission which has generated an imminent threat with a prejudice for the environment, with the purpose of preventing or diminishing the prejudice. Concluding, the preventive measures are different than the measures for prevention for that, in their case, we are already in the presence of the diminution of their consequences. For the preventive measures we refer to the measures taken for regulating the activity with a significant meaning<sup>10</sup>.

Not least, we mention that the prevention has the rank of principle in the environmental law. The principle of the preventive action<sup>11</sup> is stated by Art 3 Let c) of the G.E.O No 195/2005 and is based on the idea that the prevention involves costs smaller than the remedy of the ecological damages especially that, in most cases, they have an irreversible feature. Beyond its regulation by the framework-normative act, the principle is directly or indirectly mentioned by most national, communitarian and international normative acts which have as object the environmental protection.

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<sup>9</sup> Doina Anghel, *Răspunderea juridică privitoare la protecția mediului* (Bucharest: Universul Juridic, 2010), 158.

<sup>10</sup> Anghel, *Răspunderea juridică privitoare la protecția mediului*, 158.

<sup>11</sup> Ramona Duminiță and Andreea Tabacu, "The principle of preventing pollution and ecological damages", *Proceedings of the International Conference European Union's History, Culture and Citizenship* (Bucharest: C.H. Beck, 2015), 302-308.

Considering that the legal provisions only mention it without clarifying its content, the literature<sup>12</sup> has emphasized that the principle of prevention requires two categories of actions: those for the removal of the pollution causes, most often by the ecologic refurbishment of the production processes and the limitation or total elimination of the negative consequences over the environmental factors.

Practically, the application of this principle requires the regulation of certain obligations with a preventive feature for natural and legal persons unfolding dangerous activities for the environment, as well as the initiation of certain activities having as purpose the avoidance of noxious effects for the environment. As an example, we mention the obligation to request and receive the environmental permit/ integrated environmental permit for the performance of the existent activities, as well as the initiation of new activities with a possible significant impact over the environment, the measures regarding the prevention and the integrated control of the pollution and the list of the activities subjected to the procedure of receiving the integrated environmental permit, being established by law<sup>13</sup>.

Therefore, the prevention reveals, mainly, the prophylactic protection of the environment and operates in two stages. In the first stage, the principle is found in all legislative actions regarding this area, the reason of the norms of the environmental protection law consisting in the very preventive activity, and for the second stage an important role is assigned to the authorities for environmental protection leading the procedure of regulation and issuing regulative acts, according to the law<sup>14</sup>.

## **THE REPARATIVE FUNCTION**

The reparative function does not represent just a function of the civil liability in this area, but the very reason of existence of the branch

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<sup>12</sup> Mircea Duțu and Andrei Duțu, *Dreptul mediului* (Bucharest: C.H. Beck, 2014), 114.

<sup>13</sup> Ramona Duminiță, *Introducere în dreptul mediului* (Bucharest: University Press, 2015), 55.

<sup>14</sup> Lupan, *Tratat de dreptul protecției mediului*, 80.

of the environmental law<sup>15</sup>, aspect resulted from the foundation of the civil liability on the principle “the polluter pays”. In doctrine<sup>16</sup>, the principle “the polluter pays” is considered to have a complex content and is usually given two meanings. *Lato sensu*, it expresses the imputing in the burden of the polluter of the social cost of the pollution generated by him, which assumes the cover of all the pollution’s consequences caused for assets and persons, as well as of those caused to the environment. *Stricto sensu*, the principle refers to the obligation for the polluter to cover only the costs of the anti-pollution measures and of cleaning.

In the European legislation, the principle is stated by Art 191 Para 2 of the TFEU and the Directive No 2004/35/EC on environmental liability, and in the international law, it was mentioned for the first time in 1972 by the Organization for Economic Co-operation and Development (OECD).

Nationally, the principle is stated by Art 3 Let e), Art 95 of the G.E.O No 195/2005, as well as by Art 1 of the G.E.O No 68/2007 on the environmental liability.

From the above mentioned provisions it results that we are in the presence of a special type of liability governed by two rules: the liability for the prejudice caused to the environment has an objective feature, the “polluter”, namely the person prejudicing the environment shall answer regardless if his action is by guilt or not, and in the case of a plurality of perpetrators, the liability shall have a jointly feature. As an exception, according to Art 95 Para 2, the liability may also be subjective for the prejudices caused to protected species and natural habitats.

According to Art 12 of the G.E.O No 68/2007 on the environmental liability if a prejudice was caused to the environment, the operator has the obligation to inform, within maximum 2 hours since the generation of the prejudice, the County Agency for Environmental Protection and the County Commissioner of the National Environmental Guard regarding: the identification of the operator; time and place of the environmental prejudice; the features of the environmental prejudice the causes which generated the prejudice; environmental elements affected;

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<sup>15</sup> Anghel, *Răspunderea juridică privitoare la protecția mediului*, 118.

<sup>16</sup> Duțu and Duțu, *Dreptul mediului*, 117.

the measures initiated for the prevention of the expansion or aggravation of the environmental prejudice, as well as any other information considered relevant by the operator.

Furthermore, the operator is obliged to act immediately in order to control, isolate, eliminate or manage the pollutants and/or any other factors contaminated, for the limitation or prevention of the expansion of the environmental prejudice and of the negative effects on human health or the aggravation of the services, as well as to adopt the reparative measures necessary in this meaning. The reparative measures must be proportional with the prejudice generated and, by applying the principle of precaution in decision-making, to result in the removal of the prejudice's effects.

The manager of the County Agency for environmental protection has the possibility that at every moment to perform the following attributions: to request the operator to provide supplementary measures about any prejudice caused and the measures taken; to act, to request the operator to act or to instruct the operator in order to control, isolate, to immediately eliminate or, on the contrary, to manage those pollutants and/or other factors contaminated, for the purpose of limiting or preventing the expansion of the environmental prejudice; to request the operator to take the appropriate reparative measures; to indicate for the operator or to instruct him about the reparative measures which needs to be taken; to take the appropriate necessary measures, as expressly stated by Art 15 of the G.E.O No 68/2007 on the environmental liability.

The identification of the possible reparative measure by the operators is made according to Annex No 2 of the G.E.O No 68/2007 and shall be transmitted to the County Agency for environmental protection for approval, within 15 days from the occurrence of the prejudice, except the case in which he already took the reparative measures according to legal provisions. The County Agency for environmental protection shall decide regarding the reparative measures to be implemented after consulting with the operator.

Also, the County Agency for environmental protection has the obligation, according to Art 15 of the G.E.O No 68/2007, to request, in written, an opinion regarding these measures to any natural or legal

person affected or who might be affected by an environmental prejudice, as well as the opinion of those on whose land the reparative measures shall be implemented. The opinions shall be sent within 15 days from the registration of the request, and the County Agency for environmental protection is obliged to take them into account. Within 5 days from the receipt of these opinions, the manager of the County Agency shall issue a decision regarding the reparative measures and/or the prioritization for the reparation of the environmental prejudices.

According to Art 19 of the Emergency Ordinance, if more environmental prejudices occurred and the County Agency for environmental protection cannot insure, in the same time, the adoption of reparatory measures, it has the right to decide which of the prejudices must be repaired with priority, considering, among others, both the nature, dimension and gravity of the prejudices caused, as well as the possibility for natural regeneration, paying attention to the risks for human health represented by the prejudice.

## **CONCLUSIONS**

Therefore, considering that the civil liability in environmental law is, usually, objective and only by exception, subjective, it gets to the inexistence of a punitive feature of this type of liability. Thus, the “civil liability is not just a sanctioning reaction of the culpability of the person, but a legal mean for obliging him to prevent the prejudice from occurring. The idea of prevention is completed by that of precaution, in adapting the behavior in order to avoid the occurrence of prejudices incommensurable for the environment”<sup>17</sup>. The sanctioning feature is maintained for the liability of prejudices caused to species and natural habitats, as well as for any imminent threat with such prejudice caused by any professional activity, other than the ones stated by Annex 3 of the G.E.O No 68/2007, in which the guilt is mentioned as one of its fundaments.

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<sup>17</sup> Boilă, *Răspunderea civilă delictuală obiectivă*, 511.

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# CONSIDERATIONS REGARDING THE PROCEDURE OF INSOLVENCY FOR NATURAL PERSONS

Florina MITROFAN<sup>1</sup>

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**Abstract:**

*The present study aims to emphasize the means of regulation of the legal institution referring the insolvency of natural persons, surprising the particularities regarding the principle and purpose of the Law No 151/2015, of the area of application, as well as the forms of the procedure of insolvency.*

*Also, there will be analyzed the provisions concerning the authorities applying the procedure, special *datio in solutum* (giving-in-payment) as mean of extinguishing the obligation and the legal effects generated by this procedure.*

**Key-words:** *procedure, insolvency, debtor, natural person, administrator, liquidator, repayment schedule*

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## INTRODUCTION

The procedure of insolvency for natural persons is stated by the Law No 151/2015<sup>2</sup>, which in Art 1 states its purpose, as being the establishment of a collective procedure for the recovery of the financial situation of the debtor – natural person, of good faith, covering in a larger measure his passive and discharging his of debts, according to the law.

Article 1 of the above mentioned law, states the purpose of the procedure, applicable only for the debtor natural person of good faith, while Art. 2 refers to the principles grounding the provisions of the Law on insolvency for natural persons, thus:

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<sup>2</sup> Published in the Official Gazette of Romania, Part I, No 464/18 June 2015 (according to the single article of the Government Emergency Ordinance No 61/2015, the entrance into force stated by Art 95, Para 1 shall be prorogated until 31 December 2016).

- Offering the possibility for the good faith debtors to recover their financial situation, by using a reimbursement plan;
- Easing the amicable negotiation/renegotiation of the debts and the conclusion of an agreement between the creditor and debtor regarding the reimbursement plan;
- Supporting the exit from insolvency of the debtor, including by discharging him of duties;
- Maximization, by a collective procedure, of the degree of claims recovery and the degree of valorization of the assets;
- Insuring, within the collective procedure, of equal treatment for creditors and of equal treatment for creditors of the same rank;
- Recognizing the existing rights of the creditors and compliance with the priority of the claims, being based on a set of rules clearly determined and uniformly applicable;
- Insurance of certain efficient procedures of insolvency, including through appropriate mechanisms of communication and performance of the procedure in a reasonable term, in an objective and impartial manner, with minimum costs for creditors, debtors, public authorities and institutions, as well as for any other entities involved;
- Insuring a high degree of transparency and predictability during the procedure, complying with the human rights and protection of the personal data.

The provisions of the normative act are completed with the provisions of the Civil Code and the Code of Civil Procedure.

Regarding the area of application of the law, Art 4 states that the procedures stated by the current law shall be applicable for the debtor natural person, whose obligations do not result from the exploitation of an enterprise, in the meaning of Art 3 of the Civil Code<sup>3</sup>, which states that:

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<sup>3</sup> According to Art 8 Para 1 of the Law No 71/2011 for the application of the Civil Code, the “notion of *professional* stated by Art 3 of the Civil Code shall include the categories of merchant, entrepreneur, economic operator, as well as any other persons authorized to conduct economic or professional activities, such as these notions are mentioned by the law at the date of the entrance into force of the Civil Code”.

a) Has the domicile, residence or usual residence<sup>4</sup> of at least 6 months prior to the submission of the request in Romania;

b) Is in insolvency, in the meaning of Art 3 Pct. 12<sup>5</sup>, and there is no reasonable probability to become again, in a period of maximum 12 months, able to perform his obligations as have been contracted, with the maintenance of a reasonable standard of living for himself and for the persons in his maintenance<sup>6</sup>;

c) The total amount of his outstanding obligations is at least equal with the threshold-value<sup>7</sup>.

Art 4 Para 3 states that the person can no longer benefit from any of the forms of insolvency the debtor who has been subjected to this procedure, concluded with the clearance of the residual debts, with at least 5 years prior to the submission of a new request for opening the insolvency procedure.

Art 4 Para 4 states the situations for inapplicability of the insolvency, for the debtor. Regarding the forms of the insolvency, these are:

- The procedure of insolvency based on a reimbursement plan;
- The judicial insolvency procedure through the liquidation of the

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<sup>4</sup> According to Art 4 Para 2 of the Law No 151/2015, “the debtor has a *common residence* in Romania, in the meaning of Art 1 Let a), if he constantly lives in Romania, even if he has not fulfilled the legal formalities for registration, if he owns assets and/or receives incomes”.

<sup>5</sup> Insolvency has been defined as that condition of the debtor’s patrimony which is characterized by insufficiency of the funds available for claims to be paid, as they become due. The debtor’s insolvency is presumed when he, after 90 days from the due date, has not paid his debt towards one or more of his creditors. The presumption is relative.

<sup>6</sup> The reasonable probability shall be appreciated by considering the total amount of the obligations related to the incomes received or expected to be received in relation to the degree of professional training and expertise of the debtor, as well as to the traceable assets owed by him.

<sup>7</sup> According to Art 3 Pct. 24 of the Law No 151/2015, “*threshold value* represents the minimum amount of the due debts of the debtor, necessary for the introduction of the request for the initiation of the insolvency procedure based on a reimbursement plan or of the judicial procedure of insolvency through liquidation of the assets; it represents 15 minimum economy wages”.

assets;

- The simplified insolvency procedure.

Based on the form of the insolvency, the procedure shall be initiated differently, thus:

a) The debtor in insolvency, in the meaning of Art 3 Pct. 12, shall be able to submit an application to open the procedure of insolvency based on a reimbursement plan to the commission for insolvency;

b) If the debtor considers that his financial situation is irremediably compromised and a reimbursement plan cannot be drafted and applied, he shall be able to directly request the competent court to open the procedure for insolvency through the liquidation of the assets;

c) The debtor fulfilling the conditions stated by Art 65<sup>8</sup> shall submit at the commission for insolvency an application for the simplified insolvency procedure, according to Art 66.

From the above mentioned, we conclude that the insolvency procedure, regardless of its form, is initiated only at the request of the debtor. What is different, depending on the form of the procedure, is the authority who shall receive the application of the debtor, thus:

- For the insolvency based on a reimbursement plan, the debtor (found in insolvency) shall submit the request at the commission for insolvency;

- For the judicial insolvency procedure through the liquidation of the assets, the debtor shall submit the application for the opening of the judicial procedure of insolvency through the liquidation of assets directly to the competent court;

- For the simplified procedure of insolvency, the debtor shall submit the application to the commission of insolvency.

So, the debtor shall directly notify the competent court only in the

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<sup>8</sup> Art 65 refers to the conditions that the debtor must fulfil to beneficiate from the simplified procedure of insolvency, being applicable for the debtor who fulfils the conditions stated by Art 4 Para 1 Let a)-b) and Art 3 Pct. 12, is not found in the situations mentioned by Art 4 Para 3-4 and cumulatively fulfils the following requirements: a) the total amount of his claims is of maximum 10 minimum economy wages; b) does not have assets or incomes which can be foreclosed; c) is above the standard age for retirement or has totally or partially lost at least half of his working capacity.

case of the judicial procedure of insolvency through the liquidation of assets, for the other two situations stated by Art 5 Let a) and c) he shall submit it to the commission of insolvency.

The organs applying the procedure are stated by Art 7 as being: the commission of insolvency and the administrator of the procedure; the courts and the liquidator, each of them with attributions stated by the law.

From the wording of Art 7 Para 1 it is noticed their grouping in two by two of these organs, this grouping not being random, the more so as the administrator of the procedure shall manage it based on a reimbursement plan under the control of the commission for insolvency, and the liquidator shall manage the judicial procedure of insolvency through the liquidation of the assets under the control of the court.

Another element for the differentiation refers to the means of establishing the administrator of the procedure or the liquidator, in the meaning that while the administrator of the procedure is appointed by the commission for insolvency, the liquidator shall be appointed by the court.

Regarding the courts, as organs applying the judicial procedure of insolvency, Art 10 states the competent court, as being the first instance court in whose circumscription the debtor had his domicile, residence or common residence for at least 6 months prior to the moment of the notification of the court and the types of actions/requests or appeals which can be solved by it.

What is interesting under the aspect of date in relation to which is determined the competent court, is the date of its notification (based on it calculating the prior 6 months), any subsequent modification of the domicile, residence or common residence not modifying the competent court legally invested.

The legislator has expressly stated the procedure for solving the applications, appeals or actions based on the provisions of the Law on individual's insolvency establishing that they shall be trialed according to the Code of Civil Procedure regarding the first instance trials, for all these applications not being possible the application of Art 200 of the C.P.C referring to the regularization. The term for submitting the counterstatement is of maximum 15 days from communication, the answer to the counterstatement is not mandatory, the judge establishing

by resolution within 5 days from the submission of the counterstatement, the first term for hearing.

Regarding the summoning shall be applicable the provisions of the Code of Civil Procedure, except the cases in which the summoning shall be made through the Bulletin of the Insolvency Procedures.

Regarding the legal stamp duty, the law states both the situations excepting from its payment, as well as the amount of the stamp duty in the case in which the action or, where appropriate, the appeal submitted does not fit within the situations stated by the law (the case of the requests submitted by the commission for insolvency, by the administrator of the procedure and the liquidator, as well as the request for the initiation of the insolvency procedure according to the Law No 151/2015).

For any other actions, requests submitted by the parties, except the request for the initiation of the insolvency shall be taxed with a legal stamp duty of 100 RON and the appeal with half of the tax paid in first instance.

The decisions issued by the judges are subjected to appeal in tribunal, the decisions of the latter one being definitive.

Regarding the distribution of the first request, action or appeal, the law states that it shall be random, in a computerized system, to the panels specialized in individual's insolvency, and the distribution of a new request, action or appeal regarding the insolvency referring to the same debtor shall be made to the judge entrusted with the first request, action or appeal that was randomly received.

Concerning the appeal, the law states that the decisions issued by first instance courts are subjected to the appeal at the tribunal, its decisions being definitive.

Art 10 Para 8 of the law states the competence to solve the appeals, in the meaning that they should be trialed by panels specialized or from the special section for insolvency of the tribunal, if it has been created or by the civil section solving the cases for insolvency stated by Law No 85/2014 on insolvency prevention and insolvency procedures.

Regarding the casefile of the appeal, the normative act states that for all appeals submitted against the same decision shall be created a

single casefile, the panel to whom was randomly distributed the first appeal shall solve all the subsequent appeals against the same decision or against the successive decisions issued in the procedure of insolvency referring to the same casefile.

The Law No 151/2015 distinguishes between the *administrative procedure* based on a reimbursement plan stated by Title III and the *judicial procedure* through the liquidation of the debtor's assets, stated by Chapter V.

For the administrative procedure, the law states the owners of the request for insolvency based on a reimbursement plan which is submitted to the commission for insolvency, namely: the debtor, spouses or the fiancé or the paramour with whom the person cohabitates, if they have assets in co-propriety or are the co-debtors of the same obligation.

Referring to the judicial procedure, through the liquidation of the assets, owners of the request for liquidation shall be:

-The debtor in insolvency, if:

- a) His financial situation is irremediably compromised;
- b) If the request for insolvency based on a reimbursement plan has been rejected by the commission for insolvency with the proposal for opening the procedure through the liquidation of the assets;
- c) If no reimbursement plan has been approved or, where appropriate, confirmed by the court;
- d) If the reimbursement plan cannot be fulfilled for reasons imputable to him;

- Any of the creditors, if the reimbursement plan cannot be fulfilled for reasons imputable to the debtor;

- At the request of all the creditors, stated according to Art 43 Para 6, if the plan has not been concluded for reasons imputable to the debtor.

The law states the measures which may be ordered, regarding the debtor, from the approval of the reimbursement plan, namely the rightful suspension of all the foreclosure measures for the performance of the claims upon the debtor's patrimony, suspension operating as it follows:

- Until the decision which solved the request for information (data) has remained definitive;

- Until the conclusion, for reasons imputable to the debtor, of the

insolvency based on a reimbursement plan;

- Until the conclusion of the insolvency through the liquidation of the assets, if all the creditors agree for the initiation of this procedure, according to Art 43 Para 6.

It is also stated that the prescription of the creditors' right to request the foreclosure of their claims against the debtor shall be suspended, and from the date when the table of claims has remained definitive until the date when the decision which solved the discharge of duties has remained definitive, the prescription shall be suspended *de jure*, referring to the debtor, the interests, penalties, late-payment additions, as well as any other accessories to the obligation of payment, except the claims which beneficiate of preferential clauses whose interests or other accessories are calculated according to the documents from which results the claim within the limit of the asset encumbered by preferential clauses, shall be also suspended *de jure*.

In matters concerning the suspension *de jure*, the law states that it does not operate regarding the foreclosure measures pointed against co-debtors and/or third party guarantors.

If the reimbursement plan is not confirmed, the suspension of the interests, penalties, late-payment additions, as well as any other accessories of the obligation to pay do not operate, and the prescription of the creditors' right to request the foreclosure of the claims against the debtor shall continue from the date when the decision rejecting the plan has remained definitive.

The creditor owner of a claim beneficiating of a preferential clause may request the competent court, with the summoning of the debtor, the following measures:

- Ending the suspension stated by Art 34 regarding his claim
- The immediate valorization, outside the insolvency procedure, of the asset which has upon it a preferential clause, if:
  - The value of the object as guarantee is completely covered by the total value of the claim guaranteed by this object;
  - There is no appropriate protection of the claim guaranteed in relation to the object of the guarantee, because of the diminution of the value of the guarantee's object or the existence of a real danger that it

shall suffer a considerable diminution or of the lack of an insurance for the guarantee's object against the risk of extinction or deterioration;

- The object of the preferential clause is not important for the fulfilment of the reimbursement plan.

The valorization of the asset on which there is a preferential clause shall be established by an evaluation performed by an evaluator, on the creditor's expense.

The creditor cannot request the above measures be taken in the situation in which the object of the guarantee is the immobile asset – family house, which was not marked in the reimbursement plan for valorization.

## **CONCLUSIONS**

In conclusion, considering law regulation related to procedure of insolvency for individuals, the legislator intended to institute a collective procedure in order to recover the financial situation for the debtor as an individual, but only in cases and conditions express and limitative provided by law.

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# BRIEF CONSIDERATIONS ABOUT ELECTIONS LAW IN ROMANIA

Marius VĂCĂRELU<sup>1</sup>

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**Abstract:**

*Any analyze of the Romanian legislation adopted on electoral domain after 1990 will discover a less coherent type of regulation, where political interest was above the social one, the law principles and logic. Thus, we can consider that laws were adopted with a temporary purpose, and any new parliamentary elections are just an occasion to change something on legal framework. In this topic, we consider being necessary a short analysis of Romanian electoral laws, being sure that the next years will bring some changes, too.*

**Key-words:** *Elections, temporary regulations, principles, changes, political interest, analysis*

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## INTRODUCTION

Any analyze of the Romanian legislation adopted on electoral domain after 1990 will discover a less coherent type of regulation, where political interest was above the social one, the law principles and logic. Thus, we can consider that laws were adopted with a temporary purpose, and any new parliamentary elections are just an occasion to change something on legal framework.

As a main consequence, in all social investigations the parties and the parliaments had less than 15% of citizens' trust, with a minimum of less than 10% for the last 4 years. If the main institutions of the democracy has such a bad position on society, for sure that's because their behavior is considered as the worst possible. This is very important to underline, because those two institutions are on the latest positions as social trust.

In the same time, we should study election's law because this branch of law is the only one possible to correct something of the

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selection of new politicians, and – for sure, to prevent any kind of abuse during the Election Day. Modern times should have strong citizens, connected to the main ideas of reform and competition for their state, and not prisoners of some groups.

Unfortunately, the last years were for the Romanian public law a moment of bad regulations, when one of the worst procedures was accepted and implemented by legal measures, without any opposition in parliament. It is abnormal to see just the citizens being the only ones who fight for their right, and not the parties who "represent them".

**I.** New democracies face the crucial challenge of constructing and maintaining strong and stable political institutions. As political parties are key components of representative systems of government, the emergence of regimes in Central and Eastern Europe after the fall of communism coincided with the (re)appearance of a multi-party system in which independent and competitive actors had the opportunity to run in elections and form governments.

Representative rule based on democratic elections and political parties with voting rights for all grown-ups have been around for about 100 years. Longest in North America and Northern Europe, more recent in the rest of the world.

The historical cornerstone of representative democracy is consent.

In contrast to ancient Athenian decision-making or to modern forms of direct democracy, citizens are not supposed to take a very active part in how the representative polity conducts its business – apart from at election times. The inventors of representative democracy in the late 1700s – James Madison in the USA, Edmund Burke in England, Charles-Louis de Montesquieu in France – did not envisage representative rule as a kind of approximation to direct democracy<sup>1</sup>.

Athenian democracy was not their ideal. Quite to the contrary, they perceived their invention as something qualitatively new. Division of labour, leadership, and efficiency were their guiding principles. Voter participation was essential but relegated to election times when people

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<sup>1</sup> Shaun Bowler and Todd Donovan, *The Limits of Electoral Reform*, (Oxford: Oxford University Press, 2013), 8.

were supposed to give or not to give their consent to the rule. Madison's and the others' idea was that elected representatives should lead and that people should approve or disapprove come election time. Representation from above, not from below, was the idea.

Despite the fact that big ideals was known at the beginning of 1990's, the practice was considerable different. In fact, the main principles of the normal election were respected, but their appliance had serious damage. If we should analyze the contradictions between expectations, regulations and appliance, the result will disappoint us.

**II.** Electoral arrangements are frequently the subject of heated debate. When a new democracy begins plans for its initial election, some of the most contentious moments occur well before a party system has formed, before campaigns have been conducted, and before the first vote has been cast. Even in established democracies, decisions about how elections are conducted are often revisited.

Electoral arrangements involve many decisions ranging from the large scale to the mundane: If single-member district, first past the post is chosen as an election system, what criteria are to be used to draw district boundaries? Who will draw district lines? Who has final say over approving the maps? How often will districts be redrawn? If proportional representation is used, what threshold for representation? In any system, how will campaigns be regulated? Where will polling places be located? Will voters be allowed to vote only in person, or by other means? How will voter rolls be managed? What identification will be required in order to vote? How long can representatives stay in office? What checks do voters have over elected officials? Answers to any of these questions can – at least at the margins – help shape who wins and who loses the election or, at least, how they win and lose<sup>1</sup>.

Examples of electoral reforms and reform movements aimed at changing electoral rules suggest that at least some people think that the answers to such questions do indeed matter. In fact, we remember the

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<sup>1</sup> Marc Guinjoan, *Parties, Elections and Electoral Contests*, (London: Ashgate Press, 2014), 11.

great aphorism of Joseph Stalin: "is not important who they vote, the key is who accounts them".

**III.** Our national law on elections was a good one, at the beginning, analyzing the regulations. The practice was bad, but some people helped the society to understand the meaning of a correct vote.

However, on those years a bad phenomenon was possible in the society: the ascension of local politicians, who wanted to secure their positions. For this, they need a special kind of law, able to offer them the power from the beginning. Their wish was finally accepted, when the Parliament and the President of Romania made the steps for implementing this decision.

In 2008 it was adopted the law who allowed to the president of county councils to be elected by the people, and not by the other member of the councils – in only one tour of vote. In 2012 the mayors benefit from the same possibility, to be voted in just a single tour. For sure, those dispositions violated the representative criteria. A lot of critics were presented on the public area, but Romanian politicians remain on the same positions. In this paradigm, it is almost impossible to create new successful leaders, because just a strong party can support them.

**IV.** Finally, in 2015 it was adopted a new law, no. 288 – published by The Official Journal of Romania no. 843 from the 12th of November 2015 – who accepted the vote by correspondence.

The text of this law is not very efficient for the Romanian democracy, because is just the elections for parliaments. However, the connections between Romanian citizens who live abroad are not kept just once for four years, and also their relations are not mediated just by the national authorities, but mainly by local authorities, because their main investments are on the native city or village.

Very strange, but the correspondence vote is not accepted for the election of the President of Romania, despite the fact this institution has the same national position, as Parliament does.

In the same time, the procedures for correspondence vote are quite complicate and it deserves a lot of time and some important cost for the

Romanian state. These difficulties create a strong impression that the Romanian politicians of today hate the contact with the democracy principles and they want just to secure their position for longer life.

V. At a most basic level of definition, democracy can be regarded as having five essential characteristics<sup>1</sup>:

- a) Regular, free and fair elections, involving competition between more than one party;
- b) The rule of law, under which all citizens are subject to a common jurisdiction, with no discrimination;
- c) Freedom to speak, assemble and publish, and for opposition to the government of the day to organise without fear of intimidation.
- d) Government accountability to the public and responsiveness to public concerns
- e) The existence of a civil society sector which is free from control by either the state or the market.

To assure in a better way this essential right for the democracy, we consider that is necessary to introduce as soon as possible the electronic vote, because is much useful for every citizen to express his wish for the local and national representatives.

The electronic elections should help the trust relation from the Romanian state and its citizens, and it will offer the possibility to strength also the social connections inside the local communities, because money are not enough for quality human relations.

Internet today represents the cheapest instrument for work and communications. Younger generation uses it very often, and this represent a better argument for introducing electronic vote – it helps the young citizens to discover the advantages of social participation on "fortress works". The oldest members of national community started also to use internet, so – we can discover that every year more citizens with voting age had the possibility to vote on electronic way.

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<sup>1</sup> Stephen Coleman and Jay G. Blumer, *The internet and democratic citizenship*, (Cambridge: Cambridge University Press, 2009), 16.

**VI.** The right to vote is something very personal and it must remain personal. On this paradigm, it is compulsory to assure the secret of vote.

What we should implement to secure such kind of vote?

First, it should be created a special electronic register with all Romanian citizens inside. This register should be connected to every voting section, and every person should be indexed in the register, despite the fact he is not voting with electronic instruments.

This register is useful to prevent every double-voting, because in the moment when somebody will try to vote again (physically or by electronic instruments), the National register will offer a signal and the second vote will be cancelled.

It is true, it is possible to be the first one the electronic vote and the second one the physical one. On this situation, we consider that the main vote is the physical one, because there are more elements to be verified by all the member of election office of the section.

The electronic vote should be done referring to the National Identity Code and an Elections card, on a similar procedure used to pay on banking accounts. It is not complicate to be created such a system and the benefits for the democracy will be visible.

## **CONCLUSION**

The last 12 years represented an involution on Romanian politics: many politicians become "drunk by power", with a strong disrespect for the rule of law and the democratic principles.

In this situation, the only one solution is to change the election legal framework, offering larger possibilities to the Romanian citizens to vote, despite the distance between their legal housing and their effective place of living and working.

On this case, we propose to implement the electronic vote to all level of elections. Because the modern times will bring more internet and not less, is better to adapt our legal system to reality and not to let the reality going too fast in front of us – this possible disproportion is just another negative political behavior, as many others in the latest years.

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# CRIMES PROVIDED BY GOVERNMENT EMERGENCY ORDINANCE NO.190/2000 REGARDING THE TREATMENT OF PRECIOUS METALS AND PRECIOUS STONES IN ROMANIA

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## **Abstract:**

*The regime of precious metals and precious stones in Romania was governed by a series of legal paradoxes. The first paradox was represented by the application of the provisions of the State Council Decree no. 244/1978 on the regime of precious metals and precious stones, until date 31 December 2002, although its provisions were in flagrant contradiction with the new economic and social relations in the field and, therefore, fallen into disuse. The provisions the criminal nature of the Decree no. 244/1978 were applied by the legal bodies, even after their express repeal by the provisions of art. 29 lit. a) of the Government Emergency Ordinance no. 190/2000 regarding the regime of precious metals and precious stones in Romania, republished, with subsequent additions and amendments, starting with 16 December 2000.*

*From the 39 articles of the initial Government Emergency Ordinance no. 190/2000, as a result of its approval through the Law no 261/2002 that remained unchanged and non-abrogated only three articles, which they should be repealed , because it regulates the tasks of the National Bank of Romania, which is the subject of regulatory normative acts, The National Bank considers that the "authorization of commercial banks" concerning the operations with precious metals and precious stones, that it is currently assigned by law, constitutes a violation of the principle of free movement of services established by the Treaty of the functioning of the European Union and developed by Directive 2006/123 / EC from the European Parliament and of the Council of 12 December 2006 regarding the services on the internal market.*

*However, in this situation, according to the rules of legislative technique is required the repeal of Government Emergency Ordinance no. 190/2000 and adopting a new normative act in the field. In our opinion, the national legislation in the field of precious metals and precious stones has restricted the access on the national market to service providers from the European Union on the grounds of the legislative vacuum, so that, from the date that Romania has the quality of member state, no operator from the regime of precious metals and precious stones, from another member state was not*

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*authorized to carry out operations on the national territory. This violates the right of establishment and provision of services in a cross-border regime.*

**Key- words:** *precious metals, precious stones, the market of service providers, cross-border*

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## **INTRODUCTION**

By rigorously analysing the legislation in the field, we consider that the regime of the precious metals and precious stones in Romania was governed by a series of legal paradoxes.

The first paradox was represented by the application of the provisions of the State Council Decree no. 244/1978 regarding the regime of precious metals and stones<sup>2</sup>, until the date of December, 31<sup>st</sup>, 2002, although its provisions were in flagrant contradiction with the new economic and social relations in the field and, by consequence, into disuse.

The criminal nature provisions of the Decree no. 244/1978 were applied by the legal bodies even after their express abolishment by the provisions of art. 29 lit. a) of the Government Emergency Ordinance no. 190/2000 regarding the regime of precious metals and precious stones in Romania<sup>3</sup>, as republished and subsequently amended and supplemented, starting with the 16<sup>th</sup> of December, 2000<sup>4</sup>.

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<sup>2</sup> Published in the Official Bulletin no. 63 of the 15<sup>th</sup> of July 1978.

<sup>3</sup>The Government Emergency Ordinance no. 190/2000 was published in the Official Gazette of Romania, Part I, no.572 of the 16<sup>th</sup> of November 2000, was republished in the Official Gazette of Romania, Part I, no.77 of the 29<sup>th</sup> of January 2004 and was subsequently amended and supplemented by Law no. 591/2004, published in the Official Gazette of Romania, Part I, no. 1224 of the 20<sup>th</sup> of December, 2004, Law no. 458/2006, published in the Official Gazette of Romania, Part I, no.1004 of the 18<sup>th</sup> of December, 2006 and Law no. 82/2007, published in the Official Gazette of Romania, Part I, no. 235 of the 4<sup>th</sup> of April, 2007. Prior the republication, the same legal document had been amended and supplemented by the Law for its approval, no. 261/2002, published in the Official Gazette of Romania, Part I, no.313 of the 13<sup>th</sup> of May, 2002, by the Government Ordinance no. 24/2003 for perfecting the legal frame regarding the regime of precious metals in Romania, published in the Official Gazette of Romania, Part I, no. 64 of the 2<sup>nd</sup> of February, 2003 and Law no.362/2003 regarding the approval of the Government Ordinance no. 24/2003 for perfecting the legal frame regarding the

By the Government Emergency Ordinance no. 67/2002, the deadline for coming into force of the Government Ordinance no. 190/2000, legal document which had already been into force since the 16<sup>th</sup> of December, 2000, was adjourned, given that the only possible legislative action was to suspend the application of this law.

A new law institution<sup>5</sup>, “final and irrevocable legal actions” was introduced by Law no. 591/2004 for amending and supplementing the Government Emergency Ordinance no. 190/2000

Of those 39 initial articles of the Government Emergency Ordinance no. 190/2000, only 3 articles remained unmodified and not abolished as consequence of its approval by Law no. 261/2002, that are to be abolished because they regulates the attributions of the National Bank of Romania, which are object of regulation of other legal documents and because the National Bank appreciates that “the

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regime of precious metals in Romania, published in the Official Gazette of Romania, Part I, no.676 of the 26<sup>th</sup> of September 2003.

As regards to the application of the Government Emergency Ordinance no. 190/2000, the Government Emergency Ordinance no. 295/2000 regarding the suspension of the application or the abolishment of some ordinances and Government emergency ordinances in order to correlate some regulations adopted by ordinances and Government emergency ordinances with the Government Programme accepted by the Parliament in the meeting of 28.12.2000, published in the Official Gazette of Romania, Part I, no. 707 of the 30<sup>th</sup> of December, 2000, approved by Law no. 109/2001, published in the Official Gazette of Romania, Part I, no. 157 of the 29<sup>th</sup> of March, 2001 and the Government Emergency Ordinance no. 67/13<sup>th</sup> of June, 2002, published in the Official Gazette of Romania, Part I, no. 416 of the 14<sup>th</sup> of June, 2002.

<sup>4</sup> See, as example, the Decision no. 269 of the 19<sup>th</sup> of December, 2000 of the Constitutional Court, regarding the exception of unconstitutionally of the provisions of art. 50 paragraph 1 lit. c) of the State Council Decree no. 244/1978 regarding the regime of the precious metals and precious stones, published in the Official Gazette of Romania, Part I, no. 80 of the 15<sup>th</sup> of February, 2001.

Also see art. 64 paragraph (3) sentence I of Law no.24/2000 regarding the norms of legal technique for the elaboration of normative documents, as republished in the Official Gazette of Romania, Part I, no. 260 of the 21<sup>st</sup> of April, 2010, which provided that “the abolishment of a provision or of a normative document has definitive character”.

<sup>5</sup> In our opinion, the phrase „final and irrevocable legal actions” is not legally correct, considering that only the court decisions could be final and irrevocable and not the summons.

authorization of the commercial banks” for some operations with precious metals and precious stones, for which is currently qualified, in compliance with the law, represents a violation of the principle of free circulation of services institute by the Treaty of functioning of the European Union and developed by the Directive 2006/123/EC of the European Parliament and of the Council of the 12 December 2006 regarding the services inside the domestic market.

The national legislation in the field of precious metals and precious stones restricts the access of services providers of other member states of the European Union to the national market, because of legal vacuum, therefore, since Romania has had the quality of member state, no operator of precious metals and precious stones of other member state has been authorised to carry out operations on the national territory. Therefore, the right of establishment and the right of providing services in cross-border regime have been violated.

We understand, however, in this study, to pay more attention to the paradoxes of the criminal nature rules of the Government Emergency Ordinance no. 190/2000. Before that we consider useful to make some clarifications.

Practically, the Government Emergency Ordinance no. 190/2000 institutes two mandatory regimes, a regime of authorization of the operations with precious metals and precious stones and a regime of marking the objects and jewellerys made of precious metals.

Art. 17 of the Government Emergency Ordinance no. 190/2000 sets out facts considered offences/crimes, and for a facile and exact analyse of the text we understand to write it down:

„(1) Forgery in any way of the title mark, of own guarantee marks and of trademarks of certification represents an offence and is punishable under the law by imprisonment between 6 months and 5 years.

(2) Using false title marks, false own guarantee marks and false marks of certification or using some unregistered marks represent an offence and are punishable under the law by imprisonment between 3 months and 3 years.”

The title mark<sup>6</sup>, in compliance with art. 2 point 9 of the ordinance represents “the conventional sign, which is different depending on the title of the precious metal, that is graved on the jewellerys and the objects made of precious metal”.

The own guarantee mark<sup>7</sup> represents, in compliance with art.2 point 8, “the individual sign established and registered to the National Authority for the Consumers’ Protection which is graved on the jewellerys and objects made of precious metals by the domestic producer, the importer or the retailer”.

In compliance with art. 2 point 10, the mark of certification<sup>8</sup> is defined as “the conventional sign which is graved on jewellerys and objects made of precious metals by the National Authority for the Consumers’ Protection, in case the domestic producer, the importer

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<sup>6</sup> The title mark is expressed in thousandths, in Arabic figures, in compliance with the legal titles of Romania, established by art. 31 paragraph (1) of the Methodological norms approved by Government Decision 1344/2003, published in the Official Gazette of Romania, Part I, no. 838 of the 25<sup>th</sup> of November, 2003 and which are: for gold: 375; 500; 585; 750; 833; 900; 916 and fine gold 999; for silver: 750; 800; 875; 916; 925 and for fine silver 999; for platinum: 950 and for palladium: 950.

<sup>7</sup> The own guarantee mark was defined by art. 3 of the Order no. 37 of the 20<sup>th</sup> of February, 2004 of the president of the National Authority for the Consumers’ Protection for approval of the models of the marks used by the manufacturers, producers, importers, exporters and, where appropriate, sellers of objects and jewellerys of precious metals and their alloys, published in the Official Gazette of Romania, Part I no. 195 of the 5<sup>th</sup> of March, 2004, as a symbol in alphanumeric system, where letters represent the county and Bucharest, where the authorised natural or legal person has its domicile or, as appropriate, the register office, and the figures represent the order number of registration of the mark at the National Authority for Consumers’ Protection. For gold, the own guarantee mark is framed in an ellipse, for silver in a rectangle, and for platinum in a rhomboid.

<sup>8</sup> The marks of certification are expressed by traditional symbols - tower fortress for silver, aurochs head for gold, aquila head for platinum, head wolf for palladium individualised by framing or figures, in compliance with the provisions of the Order of the president of the National Authority for Consumers’ Protection no. 264 of the 13<sup>th</sup> of August, 2008, published in the Official Gazette of Romania, Part I, no. 264 of the 22<sup>nd</sup> of August, 2008.

and/or the retailer are not authorised or do not want to place the own guarantee mark, upon their request”.

Actually, marks are symbols that individualise the asset and, in addition, may lead to the identification of the person who established its “quality” and certified it by graving the mark.

In other words, the mark represents a complex of symbols and, for the initiated, constitutes a kind of label which provides a series of information about the analysed object: the precious metal it made of, the title, namely the content of the precious metal fine expressed in thousandths<sup>9</sup>, the producer or, as appropriate, the importer, the person who established the chemical and physical properties and who applied the mark.

The mark is usually manually graved, on the top of the stamp, a rod made of an alloy of hard metals, with a length of approximately 10 cm, sharp to one end, as a pencil, that is placed where the mark has to be applied. With a little hammer and a relative reduced force, it is hit the other end of the stamp and the mark is printed this way, by pressure, on the object subject of marking.

Etymologically, the notion of precious metals comes out of the darkness of the millennia and is kept even today because a certain category of metals have certain physical and chemical properties, to which add their relative rarity and the difficulty of their producing techniques, that make them really valuable, therefore “precious” and not the least because of some big prices “embedded” in small volumes.

Precisely their value, especially the intrinsic, but also the extrinsic one, determined the states<sup>10</sup> to take special protection measures for the protection of the operations with precious metals, including those of criminal nature.

Therefore, the forgery of any legal mark of Romania, as they were defined above, represents a crime.

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<sup>9</sup> See the definition of “title” set out by art. 2 point 3 of the Government Emergency Ordinance no. 190/2000.

<sup>10</sup>Each state established its own regime for precious metals. With all the desire and with all the successes in the field of integration, not even in the European Union it was not succeeded the promotion of a unitary regulation in the field.

In the amended form of the Government Emergency Ordinance no. 190/2000 of Law no. 261/2002, the criminal nature norms were regulated by art. 25 that became art. 17 after the abolishment of some texts and the republication of the legal document. The text in subject had the following content: “The forgery of individual marks<sup>11</sup>, their use, as well as the use of some unregistered marks represent crimes and are punishable in compliance with the Criminal Code, as well as with the confiscation of the respective good stock”

Therefore, that last quoted text referred to the provisions of the Criminal Code as regards to punishment of the facts considered crimes.

Leaving unnoticed “the stutters” of terminology and accepting that, however, the legal document would have referred to the own guarantee mark, it should be noted that art. 25 referred to the facts that were unforeseen as crimes by the Criminal Code.

Analysing the provisions of the Criminal Code, the reference could be done only for the provisions of the articles of the Title VI – Forgery crimes, Chapters I and II, regarding the falsification of coins, stamps and other values, respective the falsification of the authentication or marking instruments, which do not include facts of falsification of marks as the ones placed on objects and jewellerys made of precious metals<sup>12</sup>.

Therefore, “The Government Emergency Ordinance no. 190/2000 regarding the regime of precious metals and precious stones contained inapplicable criminal nature norms because they were not correlated with the provisions of the Criminal Code”.

“Using” false marks has also been considered a crime in compliance with art. 25.

The text has also incriminated “the use of unregistered marks”, issue on which we shall return to.

Considering that the marks placed on objects and jewellerys made of precious metals represent values that deserve to be defended by using

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<sup>11</sup> Undefined notion in the basic legal document or in the amendment. It has also been used the notion of own guarantee mark defined as “individual sign...”.

<sup>12</sup>See art 310, 311, 313, 314, 316, 317, 318, 319 of the Criminal Code and D. Dumba, The regime of precious metals and precious stones in Romania, 2<sup>nd</sup> Edition, Bucharest, 2008, p. 38 – 42.

criminal law means, that are also applicable, the incriminated text was modified by art. I point 21 of Law no. 458/2006<sup>13</sup>, having the form that is still into force.

Although we are in front of some preincriminated facts, the new Criminal Code approved by Law no. 286/2009 omitted taking the facts referred to as crimes by the Government Emergency Ordinance no. 190/2000, thus disregarding the principle of codification established by art. 17 of Law no. 24/2000 regarding the norms of legal technique for the elaboration of legal documents<sup>14</sup>.

The incrimination of the fact of using some unregistered marks, set out by Law no. 261/2002 for the approval of the amended and supplemented Government Emergency Ordinance no. 190/2000 involves a series of discussion:

- The legal norm has not registered amendments or completions and is still into force.

- Considering that title marks are not registered at the National Authority for the Consumers' Protection<sup>15</sup>, and the marks of certification are registered at the same authority by using an uncontrollable, internal procedure, only the own guarantee marks present criminal interest, namely those marks used by the producers, the importers and the sellers of objects and jewelleries made of precious metals, who are authorised in this respect. And because they enriched and not too many of them have been held criminally liable for offenses of common law, a special offence has been invented.

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<sup>13</sup> Published in the Official Gazette of Romania, Part I, no. 1004 of the 18<sup>th</sup> of December, 2006.

<sup>14</sup> For details, see D. Dumba, Regulation limits of Law no. 286/2009 regarding the Criminal Code in the field of crimes of forgery, in the Law Magazine no. 1/2010, p. 61 – 65.

<sup>15</sup> See art. 2 paragraph (2) of Order no. 37/2004 of the president of the National Authority for the Consumers' Protection. Although the order was abolished by art. 9 of Order 214/2011, subject of our criticism, this last quoted legal document does not contain a provision in this respect. Even so, practically, title marks are not registered at the National Authority for the Consumers' Protection not even after coming into force of the provisions of the Order no. 214/2011, which omitted to dispose, one way or another, by the new order.

- In our opinion, the distinction made by art. 17 of the Government Emergency Ordinance no. 190/2000 between “false marks” and “unregistered marks” is not justified. By using the phrase “unregistered mark”, the law sanctions those facts of using some marks, other than those established, assigned and registered by a public authority, so false, too.

- It is obvious that the provisions of art. 17 paragraph (1) gives the same legal value to “title marks”, “own guarantee marks” and to “marks of certification”, which are protected by the same criminal law means.

In compliance with art. 48 paragraph (1) of Law no. 24/2000 regarding the norms of legal technique “in case from a primary legal provision<sup>16</sup> of an article result, organically, several legal assumptions, these will be presented in separate paragraphs, ensuring for the article a logical succession of ideas and a coherency of the regulation”, and in compliance with paragraph (2) of the same article “the paragraph, as a subdivision of the article, is usually represented by a single sentence or phrase, which regulates a legal hypothesis that is specific for the whole article.

So, even the paragraph (2) of art. 17 assigns the same legal value of those three categories of marks. It is not by chance that paragraph (1) and paragraph (2) of art. 17 sanction with the same punishments the “forgery”, respective “the use” of any of those false marks.

Therefore, by lack of an exception or a contrary disposition, the use of an unregistered title mark has to be sanctioned with the same punishment, namely “imprisonment from 3 months to 3 years”, laid down by art. 17 paragraph (2) of the Ordinance.

On the other hand, in compliance with the provisions of art. 1 paragraph (1) of the Order of the president of the National Authority for the Consumers’ Protection no. 101/2004, subsequently amended and supplemented<sup>17</sup>, for the approval of the conditions in order to authorise

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<sup>16</sup> The expositive part or, as appropriate, paragraph (1) of an article.

<sup>17</sup> Published in the Official Gazette of Romania, Part I, no. 426 of the 12<sup>th</sup> of May, 2004, amended and supplemented by Order no. 313/2006 published in the Official Gazette of Romania, Part I, no. 987 of the 7<sup>th</sup> of December, 2006.

the operation of marking with the own guarantee mark “the objects and jewellerys of precious metals and their alloys can be commercialised only if they were marked with the own guarantee mark of the domestic producer or of the importer authorised in this respect by the National Authority for the Consumers’ Protection, together with the title mark”, placed by the same domestic producer or belonging to the authorised importer.

Under these circumstances, the approximate 700 – 800 persons who place the (unregistered) title mark, near the (registered) own guarantee mark and after the abolishment of the Order no. 37/2004 of the president of the National Authority for the Consumers’ Protection are the authors of using some unregistered marks, fact laid down and punished by art. 17 paragraph (2) of the Government Emergency Ordinance no. 190/2000, in continued form.

Therefore, in such a situation we are in the presence of an inappropriate participation, set out by the art. 31 paragraph (2) of the Criminal Code<sup>18</sup>, considering that the National Authority for the Consumers’ Protection did not institute a procedure for the registration of the title marks, but did not expressly except the registration of these marks.

- The Government Emergency Ordinance no. 190/2000, as it was approved by the law, omits to define the notion of “unregistered mark” and it only disposes, by paragraph (3) of art. 12, that “the analysing and marking procedures will be established by the methodological norms of application the present emergency ordinance, approved by Government Decision”. So, the legislature understood to entrust the Government with assuming the responsibilities for the approval of the marking procedures and not another public authority.

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<sup>18</sup> In compliance with art. 31 paragraph (2) of the Criminal Code “determining, facilitating or helping in any way, intentionally (author’s note indirect), to doing a fact provided by the criminal law, by a person who commits that fact without guilt, are sanctioned with the punishment set out by the law for that specific crime”.

But, in fact, such procedures are approved by order<sup>19</sup> of the president of the National Authority for the Consumers' Protection, with flagrant violation of the provisions of art. 4 paragraph (3) of Law no. 24/2000 regarding the norms of legal technique, providing that "legal documents given in the execution of the laws, ordinances or of the Government decisions are issued under the limits and in compliance with the norms which ordered them".

- By Order of the president of the National Authority for the Consumers' Protection no. 214/2011 it was deformed the meaning of the notion "registration of marks", which was given by art. 3 of the Order of the president of the National Authority for the Consumers' Protection no. 37/2004, meaning that the figures contained by the own guarantee mark "represent the **order number of registration**<sup>20</sup> of the mark to the National Authority for the Consumers' Protection". In this context, we consider that the National Authority for the Consumers' Protection was obliged to register ex officio, in compliance with an own procedure, the own guarantee marks where the figures represent "the order number of registration" and is logically that it has already done it, because, otherwise, it would have been chaos in the field.

By art. 6 paragraph (2) of the Order of the president of the National Authority for the Consumers' Protection no. 214/2001, it has been given a new and inadequate meaning to the notion of registration of marks. Therefore, in compliance with this text "the registration is carried out by fingerprinting, photographing, registration of the own guarantee marks in their evidence register and by releasing a certificate of registration, whose model is provided in annex no. 4, certificate which also contains information regarding the disfigurement of the own guarantee marks", even though in art. 2 paragraph (1) disposes that the figures of the content of the own guarantee mark represent "the order number of the

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<sup>19</sup>Also see Order of the president of the National Authority for the Consumers' Protection no. 214/2011 regarding the models of own guarantee marks and the procedure of their establishment and registration at the National Authority for the Consumers' Protection, published in the Official Gazette of Romania, Part I, no. 818 of the 19<sup>th</sup> of November, 2011.

<sup>20</sup> In compliance with the Explicative dictionary of the Romanian language, "to register" just means "to write down in a register".

mark, established<sup>21</sup> by the National Authority for the Consumers' Protection".

In this context, not fingerprinting and not photographing the mark and also the lack of the certificate whose model is stipulated in the annex represent forms of the crime regarding "the use of some unregistered marks", set out and punished by art. 17 of the Government Emergency Ordinance no. 190/2000.

We have the conviction that the legislature had in mind the classic notion of "registration"<sup>22</sup>, without having the representation that other authority, with general attributions of regulation in its field of activity, will proceed to changing its meaning, by adding to the law, with the violation of the principle of the legal documents hierarchy.

Accepting absurdly the new definition given to registration, the provisions of the Order of the president of the National Authority for Consumers' Protection no. 214/2011 cannot be applied retroactively.

Starting from the extended definition of the notion of registration, the criminal prosecution bodies<sup>23</sup> were invested with more petitions for committing the crime set out and punished by art. 17 of the Government Emergency Ordinance no. 190/2000, under the form of using some unregistered marks because these were not fingerprinted and not photographed.

In compliance with art. 15 of the Criminal Code, the crime/offence "is the fact **provided by the criminal law**, committed with guilt, unjustified and chargeable to the person who committed it". It is beyond any discussion that an order of the president of the National Authority for the Consumers' Protection cannot be a "criminal law". Therefore, not fingerprinting and not photographing cannot be considered crimes based on such a legal document. The National Authority for the Consumers'

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<sup>21</sup> When it is established it is also recorded in a register. Because of this, it is illogical the re-registration of the same number, in other register (?!), based on a new application (?!), grounded on art. 6 paragraph (4) lit. b) of the same legal document, at the same public authority.

<sup>22</sup> This should be the reason because it was not defined.

<sup>23</sup> Considering that the criminal prosecution has secret character, we are unable to comment the criminal prosecuting acts carried out in such causes.

Protection does not have the quality to pronounce itself about the social danger of a fact, in order for this to be incriminated as crime.

- Because the provisions of the Order of the president of the National Authority for the Consumers' Protection no. 214/2011 were partially considered illegal, C.D.G., as an entrepreneurs' organisation, applied for its annulment, by the action which represents the object of the file no. 4564/2/2012 of the Court of Appeal of Bucharest, Section VIII administrative and fiscal claims.

In compliance with art. 61 of Law no. 62/2011 on the social dialogue<sup>24</sup>, "entrepreneurs' organisations represent, sustain and defend the interests of their members in relation with the public authorities, with the unions and the other legal and natural persons, related with their object and purpose of activity, nationally and internationally, in compliance with their own statutes and in agreement with the provisions of the present law", both as right and as obligation.

At the hearing on 12.03.2013, by the verdict pronounced for the case that is not under appeal, the trial was suspended, based on art. 155 paragraph (2) of the Civil Procedure Code, on the grounds that after the postponement, the parties did not insist on pleading the case under the principle of availability, on which, in this case, is a big question mark, but on which we abstain from any comments.

Therefore, the Order of the president of the National Authority for Consumers' Protection no. 214/2011 is into force in the form published in the Official Gazette and produces legal effects and, why not, in these circumstances, even offenders.

## CONCLUSION

### **Lex ferenda:**

One of the missions of the law theoretician is to identify the disruptions of the regulation of the legal system and to find and suggest practical and pertinent solutions for totally or partially amending,

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<sup>24</sup>As republished in the Official Gazette of Romania, Part I, no. 625 of the 31<sup>st</sup> of August 2012.

supplementing and abolishing some legal documents. But between theory and practice is a big difference<sup>25</sup>.

Even considering the information above, we understand to continue our theoretical approach until its end.

And because the situation created as a result of the promulgation of the Order of the president of the National Authority for the Consumers' Protection no. 214/2011 is legally questionable because of the violation of some general law principles and, on the other hand, the entrepreneurs' organisations renounced to insist in cutting it through a solution of the competent court and, on the other hand, the economic agents authorised to mark the objects and jewellerys made of precious metals with the own guarantee mark are uninformed, we propose the adoption of one of the following regulation solutions:

1. The amendment of art. 6 paragraph (2) of the Order of the president of the National Authority for the Consumers' Protection no. 214/2011 for defining the notion of "registration" in compliance with the natural meaning attributed in the Explicative dictionary of the Romanian language<sup>26</sup>.

2. Supplementing the provisions of art. 2 of the Government Emergency Ordinance no. 190/2000 dedicated to definitions, by legal initiative, with a new point, pt. "11", in order to define the notion "registration", as it follows:

„11. registration – writing down the own guarantee marks established by the National Authority for the Consumers' Protection for the persons authorised in this respect in a special public register kept by this authority, in an alphanumeric system where letters represent the county and Bucharest, and the figures represent the order number of the application for assigning the mark and mentioning the precious metal for

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<sup>25</sup>A law project for amending and supplementing the Government Emergency Ordinance no. 190/2000, rightly, extremely disputed, adopted by the Senate in the meeting of 02.09.2010 has been still debated by one of the Commissions of the Chamber Deputies. The law project was registered at the Chamber Deputies at no. PL-x no. 445 of 06.09.2010.

<sup>26</sup> Considering the constant position of the National Authority for the Consumers' Protection we express our reservation that such a solution shall be promoted.

which the mark was assigned”, as well as with a text of abolishing all the contrary norms.

3. Amending by legal initiative the art. 17 paragraph (2) of the Government Emergency Ordinance no. 190/2000 as it follows: „(2) The use of false title marks, false own guarantee marks or of false marks of certification or the use of some marks that are not registered, in the respect of the meaning of the notion given by art. 2 pt. 11 of the present emergency ordinance represent an offence and is punishable under the law by imprisonment between 3 months and 3 years. Contrary dispositions are to be abolished appropriately.

4. Amending and supplementing the provisions of the Norms approved by Government Decision no. 1344/2003 or the abolishment of these and the adoption of new norms also approved by Government decision, for the application of the provisions of art. 12 paragraph (3) of the Government Emergency Ordinance no. 190/2000 and of art. 4 paragraph (3) of Law no. 24/2000 regarding the norms of legal technique for the elaboration of legal documents, as well as the abolishment of all the orders of the president of the National Authority for the Consumers’ Protection given with the violation of these provisions.

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# THE CONCEPT OF GUILT: ITS NOTION AND ESSENCE

Viorica URSU <sup>1</sup>

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**Abstract:**

*The doctrine of the guilt has occupied a special place in law since ancient times. As the foreign specialty literature as the national literature have developed the issues about its nature, content and forms not only in the general theory of law, but also in the legal branch sciences. It would seem that among the legal scholars once and forever the conception of guilt as an element of the subjective side of the offenses was formed and it became almost chrestomathy. This particular interpretation of the concept of guilt is offered in many modern legal textbooks.*

**Key-words:** *fault, guilt, liability, negligence, intention, crime.*

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The problem of the guilt seems to be exhausted and definitively resolved only at first glance. In fact, with a deceptive external simplicity, it causes serious difficulties in knowledge. The correctness of this conclusion is confirmed in particular by the difficulties arising from the definition of the guilt. Finally, there are significant differences in the interpretation of the nature of the guilt in some areas of legal sciences, although, apparently, it would be more correct to speak only about the nuances and the peculiarities of the guilt arising from the specifics of the legal regulation subject.

The guilt is a multilateral and multidimensional phenomenon, characterized by an approach on several lines of its determination.

To clarify the guilt we will try, first of all, to make the systematization and the analysis of the most common views on the definition of guilt, starting with the interpretation of this term in religion, philosophy, psychology and law, and to identify factors influencing the ambiguity of the term.

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According to the philosophical dictionary<sup>2</sup>, "Fault (guilt) is something worthy of charge. When the person is convicted, he (she) is charged that behaved wrongly and decided poorly, although he/she could behave and decide otherwise".

The explanatory dictionary of V. Dali gives us several meanings of the word "guilt": 1) the beginning, the cause, the source, the reason, the excuse; 2) the infringement, the misdemeanor, the felony, the sin; 3) the obligation, the duty. In turn, the derivative word "guilty" is used with several meanings: 1) the one who made himself guilty, who committed a particular unlawful act; 2) one that was a reason or cause for something<sup>3</sup>. This is probably the explanation for the fact that in everyday consciousness, sometimes in the most professional and sometimes even in the scientific conscience guilt is identified, on the one hand, with murder, delinquency, i.e. the act itself, but on the other hand - with cause or reason. Often the fault is viewed as a causal link between the act and its negative consequences, or the confusion occurs with one of the act's signs - with its illegality.

The guilt, according to DEX (2009)<sup>4</sup>, is an act which constitutes a deviation from what is (considered) right or good; mistake, guilt; sin; fault.

In religion, in the Old Testament the guilt was identified with the notion of liability. So Adam sought to put the blame on Eva and even God, who gave the woman (God entrusted Adam the care of the garden in which they lived, and in particular commands Adam not to eat from the tree of good and evil knowledge). In this formula can be traced pretty clearly the lack of delimitation between the guilt and the liability, as well as the fact that the fault is the cause of the God's anger and the subsequent hardships and deprivations which he has pounced on people.<sup>5</sup>

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<sup>2</sup> Helmut Schmidt., *Dicționar filosofic* (Moscova, 2003), 76

<sup>3</sup> В. Дали, *Толковый словарь живого великорусского языка. Vol. 1.* (Москва,1982), 204-205

<sup>4</sup> DEX 2009(Dicționarul explicativ al limbii române

<sup>5</sup> Юрчак Е. В., *Эволюция понятия вины в историческом контексте, Современные исследования социальных проблем*, 10 (2013):30, 262.

However the theologians talk about the sin and its effects, and that the sin is associated with the concept of *guilt*, conviction, separation from God, judgment and death.<sup>6</sup>

In the New Testament the term guilt is not used directly, but the guilt was understood as the liability for the act and the human's attitude towards this act. The feeling of guilt is a powerful and incredibly complex state. "In small doses, it is necessary and healthy and when it is in excess, it damages and its complete absence is harmful".<sup>7</sup>

Namely the divine submission of the guilt over Adam and Eve became the cause of humanity's prosecution for their deeds. The idea about the sinful nature of human life and the idea of the essence of the guilt as the deed of the God's appreciation of the sin were fundamental in the history of philosophical thought.

In philosophy, the guilt is understood as a category of ethics and morality, which reflects the social attitude and moral quality of the society toward the result of the inhuman behavior of the person, so it feels indebted to God and society.<sup>8</sup>

But the origins of philosophy there talked about the sin, which has its origin in the will, which decide against the laws of reason, the change of the deeds or the good works. The will is induced into error of self love, so this works as a motive in every sin. The will allows anyone to fall into sin and to draw the penalty conviction for sin. The sin, however, is original. The first sin of Adam is passed over the whole human race; because he is the "beginning" of the human race and "by virtue of procreation of the human nature it is transmitted with each or by everyone". As the sin is contrary to the divine will, it is the fault, but also the subsequent penalty. The *guilt* and the punishment must correspond to

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<sup>6</sup> Priebe Dennis, *A păcătui sau a nu păcătui* //<http://www.resursecrestine.ro/predici/59095/a-pacatui-sau-a-nu-pacatui>, accesat la 15.03.2016

<sup>7</sup> Braun S., Harrison L. *Binecuvantare de cealaltă parte. Cuvinte de înțelepciune și consolare din viața de apoi*. (Moscova: Sophia, 2004), 152

<sup>8</sup> Гусейн Идрисов, *Вина как условие гражданско-правовой ответственности на русском языке*, диссертация, <http://www.dissercat.com/content/vina-kak-uslovie-otvetstvennosti-v-rossiiskom-grazhdanskom-prave>, accesat la 20.03.2016.

each other; and since the *guilt* is infinite or endless the punishment is eternal.<sup>9</sup>

The decisive role in the motivation of the theory of the nature of the fault (guilt) belongs to the classical German philosophy. The dualism of the fault (guilt) is also apparent in its appearance due to I. Kant's and G. Hegel's contemporary concepts.<sup>10</sup>

Kant writes that, "When a man commits a crime, the *guilt* is totally his, because, aside from all the empirical conditions of the act, the mind was free". In his work 'metaphysics of Substantiation (*Grundlegung zur Metaphysik der Sitten*, 1785), "*der Sitten* 1797 criticism), he demonstrates that, on the one hand, the man is a being of the material world and of the practical reason" (*Kritik der praktischen Vernunft*, 1788)," The metaphysics of the moors" (*Die Metaphysik*), on the other hand the man is a highly super sensual, moral being. Judging the moral value of the human behavior in society, Kant formulates the following rule: "Act in such a way as your attitude towards humanity in your person and in the person of any other man to be in respect of a purpose, but not as a means towards it".<sup>11</sup> So in another context Kant formulates the principle of "the categorical imperative", considered as the foundation of morality: "act in such a way that the maximum of your actions may be imposed as a universal law."

*Georg Wilhelm Friedrich Hegel* (1770-1831) a remarkable German philosopher had a significant contribution to the study and the foundation of guilt. In his "Philosophy of right" he investigates the legal nature of the intention and guilt. Hegel comes to the conclusion that "the guilt is a completely foreign judgment, I made myself something wrong or I didn't. The fact that I am to be blamed for something, it does not follow that the offence may be charged ". He considers that, if a person's objects or things cause damage to other people or society, they do not

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<sup>9</sup> Ursu Viorica, *Evoluția conceptului de vinovăție cu valoare juridică în teologie și filosofie, în contextul istoric*, în *Legea și viața* 10 (2015), 37-41

<sup>10</sup> Ursu Viorica, *Evoluția conceptului de vinovăție cu valoare juridică în teologie și filosofie, în contextul istoric*, în *Legea și viața* 10 (2015), 37-41

<sup>11</sup> Ursu Viorica, *Evoluția conceptului de vinovăție cu valoare juridică în teologie și filosofie, în contextul istoric*, în *Legea și viața* 10 (2015), 37-41

refer to the deed of this man, although when the issue of liability of this fact is examined, this should be taken into account. The philosopher wrote: "If things, whose owner I am, cause injury to others, the latter does not constitute my own deed. However, I am responsible to an extent higher or lower for this injury". In this context, he comes to the conclusion that it must be considered guilty the one who knows and understands that he has committed. And when the person committing the deed does not know that what he/she does is not allowed to do, it should not be considered guilty: "The guilt from my wish is mine as long as I know about it." <sup>12</sup>

In **psychology**, the guilt is described as an antisocial phenomenon, a deviant behavior of the person and it is associated with the behavior of the unconscious desire to cause pain, sometimes without any reason. *Sigmund Freud* considered the guilt as a type of anxiety, "anxiety of consciousness", which is able to divide its own "me" in justice and sacrifice. The source of feeling the guilt is fear, which turns into consciousness and occurs in two forms - two sources of guilt: 1) the fear towards authority that imposes to abandon the primary satisfaction desires; 2) the fear of the "super-ego" which later leads to abandoning the wishes of prohibited and enforces the death penalty. <sup>13</sup>

In the conception of another author<sup>14</sup>, the guilt is the psychological state of the person that takes place in the situations where he/she feels personal responsibility, negatively appreciates his/her actions due to violation imperatives established and acts as a regulator of internal and interpersonal relationships.

In **law**, the guilt is a condition of legal liability either civil or criminal. The justification of the legal liability on the perpetrator is one of the grounds of legal liability, it is generally accepted that the application of the liability when the element of the guilt is missing,

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<sup>12</sup> G. Hegel, *Filosofia dreptului*, (Moscova: Mysli, 1990)

<sup>13</sup> Z. Freud. *Eu și Id-ul* (L: Academia, 1924)

<sup>14</sup> Гусейн Идрисов, *Вина как условие гражданско-правовой ответственности на русском языке*, диссертация, <http://www.dissercat.com/content/vina-kak-uslovie-otvetstvennosti-v-rossiiskom-grazhdanskom-prave>, 161, accesat la 22.03.2016

would annihilate one of the functions recognized by the legal liability, the educational function.<sup>15</sup>

In *Digesta* (or *Pandectae*) it is stated that: "The guilt is present when there was not provided what should be provided by a caring person, or when it announces something only when it was already impossible to avoid the danger."<sup>16</sup>

When he had to characterize the guilt in Roman law in general, *D. Grimm*<sup>17</sup> wrote: "The guilt is the illegal targeting of the person's will. The guilt may be the fact that a person knowingly commits this action, being aware of its illegality. In this case we are talking of *dolus* or *dolus malus*, the intention". Or "the guilt is the lack of proper care and attention, the lack of effort to avoid undue effects without direct intention to commit evil. In this case we are talking about the *guilt narrowly, by negligence*".

According to the Roman law the liability of the debtor in the case of non-execution or improper execution of an obligation, usually occurs when there is the guilt of the debtor. The guilt (fault) was understood as the failure to observe the behavior required by law, what was expressed in the following provision: "there is no guilt if everything necessary has been respected."<sup>18</sup>

The author<sup>19</sup> mentioned that "in the Roman law the debtor had the obligation to be responsible towards the creditor for the damage that had occurred because of the impossibility to fulfill completely or partially his obligation because of himself/herself and, in addition, in the cases where the performance of the obligation has become impossible due to *dolus in faciendo* or *non faciendo*, as well when its execution has become impossible due to his *fault*. This obligation of the debtor was deemed to be unconditional as much as the agreement to exempt from liability was considered void as being immoral, although the agreement for

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<sup>15</sup> Eugenia-Carmen Verdeș, *Răspunderea juridică. Relația dintre răspunderea civilă delictuală și răspunderea penală*, (Bucharest: Universul Juridic, 2011)

<sup>16</sup> Charles Henry Monro, trans. *The digeste of Justinian*, vol. II, (Cambridge at the University Press, 1909), D.9.2.31

<sup>17</sup> Гримм Д. Д., *Лекции по догме римского права* (Москва: Зерцало, 2003), 179

<sup>18</sup> Новицкий И.Б., Перетерский И.С., *Римское частное право*, (Москва 1996), 349

<sup>19</sup> Новицкий И.Б., Перетерский И.С., *Римское частное право*, 349.

forgiveness of the losses which had already been caused by the debtor was admissible and, on the contrary, it was considered valid."<sup>20</sup>

Those who share the psychological theory define the guilt as the subjective mental attitude of the person who commits the illegal act against this act and its consequences. According to a Russian author<sup>21</sup>, although in some cases the guilt is missing, however, there is an objective element and namely the awareness of the person who caused the injury, and he is obliged to repair the violated subjective right because being conscious, he assumed the risk, thus the risk was considered the subjective reason of the objective liability, but the objective basis - the wrongful deed.

Thus, the guilt represents the mental position that a certain man has towards a certain deed and its consequences; it is not something generic, ideal, abstract, but on the contrary, it is something concrete, manifested on the existential plan of a certain illicit deeds related psychologically to its perpetrator.

*Gh. Mihai*<sup>22</sup> defined the guilt as an attribute of a human being, who is responsible, free in spirit and deed toward the word, deed and/or thought, which gives them a subjective and valuable interpretation inconsistent with the universal values.

*N. Popa*<sup>23</sup> characterizes the guilt as the psychological attitude of a person who commits an unlawful act towards his deed, and against the consequences of such deeds.

*I. Dogaru* and *P. Drăghici*<sup>24</sup> define the guilt as "the mental attitude of the author of the illegal or unlawful deed against the cohabitation rules as toward the action or inaction deemed as well as to its consequences (toward the result).

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<sup>20</sup> Анненков К., *Система русского гражданского права. Том III. Права обязательственные* (С.-Петербург: М. М. Stasiulevici, 1901)

<sup>21</sup> Ойгензихт В.А., *Презумпции в советском гражданском праве* (Душанбе: Ирфон, 1976), 190

<sup>22</sup> Gh. Mihai, *Teoria generală a dreptului* (Bucharest: All Beck, 2001)

<sup>23</sup> N. Popa, *Teoria generală a dreptului* (Bucharest: Lumina Lex, 1992)

<sup>24</sup> I. Dogaru și P. Drăghici, *Drept civil. Teoria generală a obligațiilor* (Craiova: Themis), 237

*The professor D. Baltag*<sup>25</sup> defines the guilt as an objective state of the individual, a free mental attitude expressed towards his/her unlawful act and its consequences, which has a degree of social danger and the misrepresenting on the intellectual level of the causal relationship between the deed of the conduct and the outcome of material due to this deed, even though it did not have the representation of the facts and the consequences, had a real possibility of this representation.

With regard to normative theory, the professor *Antoni*<sup>26</sup> is the one who appreciates the German doctrine, which has exerted and continues to exert a strong influence over the entire Western European and he does not define any longer the guilt as a psychic link between the author and the wrongful deed (the psychological theory), but as "the internal link between the author - as the recipient, and the legitimacy of the rule", by virtue of which it appears "the emotional component of deception for violating the rule". In other words, according to this theory, the guilt is defined as a "reproach" addressed to the author for his illegal behavior and that reveals a missing or insufficient statement of reasons for the purposes of compliance with the rule.

With more concise and clear terms, the professor *U. Rindhauser*<sup>27</sup> states that the guilt is defined, in this view, as a "reproach" addressed to the author for his illegal behavior and that reveals a lack or an insufficient motivation in respecting the norm. If the author formed as the dominant reason to respect the rule, he would manage to avoid breaking it.

In a similar sense, the professor *C. Voicu*<sup>28</sup> said that "the guilt, regarded as constituent and the basis of the legal liability, suggests recognizing people's capacity to act with discernment to choose how to behave in relation to the aim pursued consciously".

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<sup>25</sup> Dumitru Baltag, „*Vinovăția – temei sau condiție a răspunderii juridice?*” *Revista națională de drept*, 6 (2006.)

<sup>26</sup> Gh. Antoniu, *Raportul de cauzalitate în dreptul penal* (București: Ed. Științifică, 1968).

<sup>27</sup> Rind Hauser, *Derecho penal de la culpabilidad y conducta peligrosa*. (Bogota: Universidad Extrado de Columbia, 1996)

<sup>28</sup> C. Voicu, *Teoria Generală a Dreptului* (București: Universul Juridic, 2008), 418.

For example, in the civil law textbook of the State University of St. Petersburg<sup>29</sup>, published in 1996, we find the well-known provisions of the literature of the Soviet period, according to which the guilt "is such a mental attitude of a person towards his illicit behavior that manifests negligence in relation to the interests of the society or the individuals. Such a concept of guilt is equally applicable both to citizens and legal persons ", and that" as a subjective condition of civil legal liability it is associated with mental processes that occur in the human mind", etc. The authors claimed that the people's guilt cannot be manifested itself in another way than through "a wrongful conduct of the organization's employees to its functional obligations (work) because the actions of employees of the debtor for the performance of his duties shall be deemed as actions of the debtor".<sup>30</sup>

In general, the problems with the concept and the forms of the guilt are developed meticulously in the theory of criminal law. The study of the guilt problem has revealed the extreme diversity of approaches to the definition of the guilt and the clarification of its relationship with the separated elements of the composition of the offense and as a natural consequence of this, the weight of the formulation of a universal definition. Thus, some authors believe that the concept of the guilt should include causation, intention, recklessness reasons, personality and environment. According to other authors, the guilt and the subjective side of the offense are identical concepts.<sup>31</sup> It is easy to see that in these conceptions the category "guilt" was interpreted too vast.

As you know, the lack of unanimity in the views on a particular issue does not contribute to the weakening of scientific interest to it, but it intensifies it. Therefore, taking into consideration the above context,

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<sup>29</sup> Рассолова Т.М., *Гражданское право. Учебник для студентов вузов* (Москва: ЮНИТИ-ДАНА, 2012), 498-499

<sup>30</sup> Рассолова Т.М., *Гражданское право*, 498-499

<sup>31</sup> Дагель П.С., Котов Д.П. *Субъективная сторона преступления и ее установление*, (Voronezh, 1974), 41-59; Спиридонов Л.И., *Теория государства и права*. (М.Проспект, 1997); Е. Кузнецов, В. Сальников, *Наука и государственный закон*. (S-P., 1999), 27, 152.; Черданцев, А. Ф., *Теория государства и права: Учебник для вузов*, (М.: Юрайт, 1999), 309

our study of the theoretical aspects of the guilt seems justified and appropriate.

The guilt is a conscious and volitional process, so as to determine its concept we must concentrate not only on mental attitude, but also on the person's *conscious* and *volitional* attitude toward the deed and its consequences.

Only the *conscious* and *volitional* attitude of the person to his/her actions and their consequences has a legal value during the crime in order to clarify the deed. Therefore, in order to formulate the concept of the guilt it is logical to make conscious and volitional focus on the attitude of the person toward the deed that is committed and its consequences.

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# THE EVOLUTION OF THE GUILT NOTION IN THE MEDIEVAL PERIOD AT SOME EUROPEAN NATIONS

Viorica URSU <sup>1</sup>

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## **Abstract:**

*The law is not static, immovable, given once and for ever, it is a social phenomenon during the historical evolution and it bears the imprint of historical ages and the spiritual particularities of different peoples. The law has left us such a fingerprint during the middle Ages, when it appeared and evolved with the development of the society in general and with the economic development and public labor specialization in particular. During this period the foundation for future national legal systems, within the formation of the national states was set up. The customary law from the early feudal era, the Canon law and the Roman law were the base for the formation of the legal systems of the European medieval states. In fact, the Canon criminal law has made much progress compared to the Roman law (it has determined the criminal sin and secondly it gave us the detailed meaning of guilt, although it has used much of its borrowings from the Roman lawyers' law, however, they managed to turn this concept into a more sophisticated and more differentiated one).*

**Key - words:** *blame, guilt, fault, intention, negligence, breach.*

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The middle Ages are the era when the foundation for future national legal systems has been gradually constituted within the formation of national states. This long process ends in most states in already the new age<sup>2</sup>. The customary law from the early feudal era, the Canon law and the Roman law were the base for the formation of the legal systems of the European medieval states.

A unique phenomenon, the reception of Roman law has been manifested in the XI -XII centuries in Western Europe. Despite the fact that the Roman law arose much earlier than the right of the early feudal

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<sup>2</sup> Жидкова О.А., Крашинникова Н.А., *История государства и права зарубежных стран* (Москва: Инфра-Норма-М, 1996), 192

monarchies, the level of the Roman lawyers' legal instruments was much higher. The meaning of the Roman law is defined by the enormous impact on the entire process of the appearance of the European law. The Roman law is characterized by the unparalleled accuracy the development of all existing legal relationships. The Roman lawyers have never forgotten the ultimate goal of law and their theoretical works show best how to handle the right as to remain fair<sup>3</sup>.

The consequences of accepting the Roman law occurred throughout the further history of the development of the European law and have not lost their value so far. Some laws, regulations and even whole codes were created being based on the Roman law rather than on their own country's law. The Roman law, in fact, has become an integral part of contemporary legal codes of many countries and has contributed to the development of the general legal principles underlying European legislation. The Roman law in its action had the same effect on unifying jurisprudence and legislation of European nations, as Latin had on them<sup>4</sup>.

The approaches regarding the definition of *guilt* and its forms that have been developed in the Roman law have not lost their value during the development of the humanity and the right. The notion of guilt was reinforced in the legal sources of the medieval Western European countries in the process of accepting the Roman law and relating it to the canon law. However, the Objectivist conception of the guilt characteristic for the right from the preceding periods was not definitively deprecated. It lasted almost until the end of the XVIII century and the beginning of the XIX century.

The content category of "*the guilt*" was discovered in the norms of the customary law of the concrete state at the beginning of the development of statehood in Western Europe. During this period the concept of the guilt is filled with new connotations. And in the future, under the influence of the Roman law and the canon law, the concepts of the guilt gradually bear some significant changes.

The canon law has emerged as the law of the Christian Church and

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<sup>3</sup> Хвостов В.М., *Система римского права* (Москва, 1908), 12

<sup>4</sup> Шершеневич Г.Ф., *Учебник русского гражданского права*. (Москва: Статут, 1995), 26

has gained a special importance because it was not only supported by the Catholic Church, but it was also universal and extraterritorial. It covered a wide circle of public relations, including some of the spiritual and secular life. The concept of the guilt in the canon law was based on the concept of guilt in the Christian religion. For many people, it was clear that the force, not only coincided with the right, but too often it disagreed and even eliminated it<sup>5</sup>. An attitude of true awe law as an aspiration for an ideal justice has characterized the middle Ages in this regard.

With the spread of Christianity, the Christian religion that becomes dominant establishes its own philosophy that will dominate the thinking for a long time. The concepts borrowed from the ancient Greek philosophy, the Neo-Platonism and the Jewish tradition were used for its establishment.

The blind faith in the divinity's intervention to show the *culpability* or the innocence of the accused has generated the existence of legal proof known as "ordalium" or "the God's judgment"<sup>6</sup>.

This proof was used in the case of theft, murder, witchcraft and adultery. The most used legal proofs were:

- *the cross-fire test* - the accused crossed the flames, he stepped on the hot fire or on the swaths of hot plough, holding in his hand a certain time a piece of hot iron, or some molten lead was poured in his palms;

- *the boiling water test* - was practiced in the medieval Europe by the Celts, the Scandinavians, the Anglo-Saxons, the Longobards, the Franks, (referred even in the legal acts of the Kings of the Franks) and it consisted in removing an object from a pot with boiling water by the hand. If after these tests, the burns of the imputed, bandaged for three days, disappeared, the person concerned was declared innocent;

- *the cold water test* - common in the Middle Ages for the Anglo-Saxons, in France, Italy, Spain and Germany, it consisted in throwing the accused with his arms tied with the legs, into a deep water. If the water

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<sup>5</sup>Ovidiu Drimba, *Istoria culturii și civilizație*, vol. V (Bucharest: SAECULUM I.O. and VESTALA, 1998), 348

<sup>6</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului vol I* (Bucharest: Lumina Lex, 2001), 31

kept him on the surface, he was considered innocent;

- *the swallowing test* (of some liquids, poisoned, sanctified, or damned food) was common for Franks, Frisians and Anglo-Saxons. For example, if a certain amount of bread and cheese could be swallowed up by the accused, without drinking water, it would have proved his guilt;

- *the cross test* - was a test of Christian origin, deriving from a penance applied for the monks; the accused had to remain motionless, with his arms stretched above his head in the shape of a cross as long as the recitation of prayers took place, the slightest movement that he made, would prove his culpability. Being authorized by the laws of the Franks, it remained in use until the end of the 9th century;

- *the coffin test* – being practiced in Germany, France, Spain (until the 17th century) and Italy, it supposed that all persons who could be suspected of murder to come in front of the victim's body; if the suspect's body began to move his lips, when somebody came closer, it meant that he was the culprit.<sup>7</sup>

The wide application of these tests revealed, with the exception of certain cases (suggestion, mystics, and sleight of hand), the people's credulity in the middle Ages, both ordinary people and people with some level of culture.

The *Salic law* in its oldest form, drafted by *Clovis* (486-496), which comprises some archaic aspects of the customary law, has been the most important law of the **Franks**. From this derived the laws of other Germanic peoples in Central Europe (VII-IX centuries). In the criminal law of the Franks<sup>8</sup> and namely in the *Salic law* (*Pactus Legis Salicae*)<sup>9</sup>, it

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<sup>7</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului*, 31

<sup>8</sup> Popa D. Marcel, Matei C. Horia, *Mica enciclopedie de istorie universală* (Bucharest: IRI, 1993), 146.

<sup>9</sup> *Legea Salică (Pactus Legis Salicae)* was a collection of laws used by the Franks, their official form being set in the 6th century, under the reign of Clovis I. The provisions included: the punishment for manslaughter, namely fines for theft and damage to personal property (including slaves), one third of the fines was reserved for court expenses; the interpretation of the laws was made by a jury of citizens. An interesting aspect and a great importance in the history of Europe is the law of inheritance; the *Salic law* banned the women to inherit lands and, therefore, their ascension to the throne.

was provided that in each case, the perpetrator had to be proven guilty<sup>10</sup>. If the offender confessed his fault, he necessarily needed to recover the cost of the damage caused. In another review, however, we found that at that time the confession of the accused was considered the queen of evidence<sup>11</sup>. We also find in this source of law the principle of personal character of the criminal liability: the father could no longer be held liable for the criminal facts of his son, the husband could no longer be held liable for the criminal facts of his wife, or the wife could no longer be held liable for the criminal facts of her husband. The presumption of innocence of the accused person has already been formed during this period in France and during the research. Or just because of this, a witness was needed, even if it was not enough that there should be at least one<sup>12</sup>. The witness test reinforced by the oath represented a fundamentally religious act of invocation of the deity as a witness or a guarantor in support of any claims made by the one who swears<sup>13</sup>. The oath was always accompanied by lifting the right hand gesture, with other hand on the shrine, on the lance or on a sacred text or on relics. And the punishment for perjury was also applied.

The tortures were also applied to get the confession of the accused. Since the thirteenth century, the torture was applied in both civil and criminal cases. It went so far with tortures that in the same century, Pope Innocent III authorized the civil courts in order to employ the torture for the extirpation of heresies<sup>14</sup>.

There were a few degrees of torture, according to the social status of the accused and the gravity of the offense. The priests, the elders, the pregnant women and women breast feeding their children were not subjected to torture, but the torture for the nobles, the doctors and the minors was more subdued. The practice of torture provided legally

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<sup>10</sup>A. Smochină, *Istoria universală a statului și dreptului (epoca antică și medievală)* (Chișinău: F. E. R “Tipografia Centrală”, 2002), 128.

<sup>11</sup> Жидкова О.А., Крашинникова Н.А., *История государства и права зарубежных стран*, 397; A. Smochină, *Istoria universală a statului și dreptului*, 131

<sup>12</sup> Mariț, Alexandru, *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală* (Bălți: F.E.-P. Tipogr. Centrală, 2005), 33

<sup>13</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului*, 31

<sup>14</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului*, 31

lasted at least until the end of the eighteenth century, when the French Revolution suppressed it<sup>15</sup>.

The excessive functioning of the judicial authority, which led to constant uncertainty and disorder, caused by the coexistence of contradictory legal principles derived from diverse traditions, characterized the medieval justice<sup>16</sup>.

Moreover, as the French historian Marc Bloch<sup>17</sup> noted, this time the administration of justice was not too complicated because the evidence means were rudimentary, the appeal to witnesses was uncommon, and the function of the judge was limited to receiving the parties' oath in counting the results of the proof test or the judiciary duel and sentencing.

Also in the Salic law in chapter XVIII, the paragraph has stated that: "If someone accuses in front of the king without fault, the responsibility anyway has already been provided for this". However, the offenses against property were assessed solely depending on the ill will with which they were committed<sup>18</sup>. According to the Ordinance of 1567, 1670 it was provided that the individual criminal responsibility was accepted as an exception and to the members of his family, even though the harshness of the punishment for the guilty person was left for the court<sup>19</sup>.

As well as in *English criminal law*, starting with the XII century, under the influence of Roman law and the canon law, the first points of view that required as the basis for criminal liability to stand the criminal guilt were crystallized. For the first time the principle of criminal liability of the person is mentioned after the teachings of St. Augustine: "The action does not make the man guilty, if it was committed without his willingness," the same principle was reflected in the laws of Henry I (1118). The English doctrine had a great influence over the meaning of

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<sup>15</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului*, 31

<sup>16</sup> Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului*, 31

<sup>17</sup> Marc Bloch, *La societate feudala* (Torino: Einaudi, 1976), 33

<sup>18</sup> Жидкова О.А., Крашинникова Н.А., *История государства и права зарубежных стран*, 251.

<sup>19</sup> Andrei Gușciuc, Liliana Chirtoacă, Veronica Roșca, *Istoria universală a statului și dreptului (perioada medievală)*, Vol.-2, (Chișinău: Elena, 2001), 57.

criminal guilt forms during the 13th century. However, Bratcon, analyzing the meaning of the intention and imprudence, mentioned about the murder that: "If the murderer had committed a murder, as an illegitimate action, then the liability occurred even in the absence of the criminal guilt." He had also extended the criminal liability issue and the moral-religious norms.<sup>20</sup>

One of the first monuments of the Russian legislation is "the Russian Truth" ("Русская правда"), created in 11-12th centuries. Unfortunately, the original text of "the Russian Truth" has not been preserved. However, there are over a hundred of different transcriptions of the "the Russian Truth", that S. Yushkov, the greatest researcher of that monument, has grouped chronologically into six editions<sup>21</sup>. There the concept of guilt and its forms are missing. The intentional offences, however, are described. In these articles are described the murders premeditated for anger, caused insult. The facts were delineated according to the presence or absence of the ill-will of the offender<sup>22</sup>. The assessment of the legal proceedings with respect to the presence or absence in them of the will of the offender has changed over the time.

In "the Russian Truth", according to the researchers, the delineation of the facts was made largely on the basis of external characteristics: committing the crime during a robbery, at a celebration or a quarrel. There is a distinction between the intentional and the negligent crimes: a premeditated murder occurs during the robbery, but during the celebration a careless crime takes place<sup>23</sup>.

Later, in the medieval Russian criminal law, various forms of criminal guilt on the concept of the subjective side of the crime, the intention and recklessness, but also some beginnings of the subjective dimension, such as, randomness are already known. Although such means of committing a criminal offence were divided between them by

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<sup>20</sup> Mariș Alexandru, *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală*, 34

<sup>21</sup> О.И. Чистякова, *Российское законодательство X-XX веков: В 9 т.* (Москва, 1984), 430

<sup>22</sup> С.В. Юшков, *Общественно-политический строй и право Киевского государства* (Москва: Госюриздат, 1949), 484

<sup>23</sup> Исаев И., *История государства и права России* (Москва: Юристъ, 2000), 150.

different aspects and dimensions of the subjective deed, however, they did not have any impact on the classification or the limits of punishment. The principle of objective criminal liability, i.e. it was judged not by reason, but by results, was predominant at that historical stage. Regarding the stages or the phases of the crime committed in those times, we can mention that for the mere intention to commit the crime, only by itself, the person could not be prosecuted<sup>24</sup>. But the offenders who demonstrated a mere intention to kill the tsar or the master or non protecting the masters were punished when needed<sup>25</sup>, the fact that showed the typical appearance of the concrete and strict objective liability.

In *the German criminal law*, where the casuist character of "the barbarian justice" was still present, the meaning or the concept of the intentional and involuntary criminal guilt had already existed<sup>26</sup>. Thus, the free man causing "from recklessness" an injury, according to Saiciu's Justice, had only to return it. While the bad intention or causing damage "out of malice" led to paying off some large fines. Two kinds of socially dangerous actions such as: offence and the procedure were known in Solicesc's law. The categories of offences were far more and more detailed in Amalan's law<sup>27</sup>.

Then there followed and other laws such as the criminal law from 1532, called Carolina's Code, or Carol's criminal Constitution according to which the liability for the committed offence was subject to only the person guilty of committing it<sup>28</sup>. Also, this law can still contain some entries regarding its forms: the intention and imprudence. But, aside from those references, however, the feudal criminal law established the criminal liability without any guilt, for another person's guilt not only

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<sup>24</sup> Исаев И., *История государства и права России*, 150-187.

<sup>25</sup> A. Smochină, *Istoria universală a statului și dreptului*, 205.

<sup>26</sup> Mariș Alexandru, *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală*, 33

<sup>27</sup> Mariș Alexandru, *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală*, 33

<sup>28</sup> Andrei Gușciuc, Liliana Chirtoacă, Veronica Roșca, *Istoria universală a statului și dreptului*, 77.

once<sup>29</sup>. It is noted, however, a more pronounced correlation between the criminal guilt and criminal punishment.

## CONCLUSIONS

So, the formation of ideas about the guilt has passed several stages, from indirect references in early feudal legislation, through the acceptance of the Roman law, with its well-developed structures, to the drafting of a complex doctrine about the guilt. In the early days of the formation of the European law, the concept of the guilt was quite weak, the customs of the tribal system were maintained and the guilt was identified with the illegal deed. Subsequently, the canon law had a strong influence on the development of the concept of the guilt, bringing with it a reference to the intellectual element, as well as to the Roman law with its legal categories and its well developed structures.

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<sup>29</sup>Mariț Alexandru, *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală,* 33

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# THE EVOLUTION OF THE LEGAL SANCTION IN SOME ANCIENT STATE ENTITIES

Ina BOSTAN<sup>1</sup>

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## **Abstract:**

*The concept study of the legal sanction necessarily implies historical vision, linked to decipher its origins. In accepting the thesis, according to which the right can express only the social needs of a community established in the political form, there is no doubt that the right appears in social historical conditions characterized by differences, specific for a political society.*

*The ancient works and subsequently those developed in the Middle Ages did not set any distinction between the concept of punishment and that of sanction, the latter intervening only in modern times as a variant of the punishment. At first, the two concepts were confused; there were only small differences in the quality between several types of punishments. From this perspective, our analysis is based on the "sanctions" imposed on the society, following a brief overview of the primitive society, the tribe, till the ancient Greek society, which was considered more advanced.*

**Key-words:** *social norm, punishment, legal sanction, the ancient era, society, community, sanctioning reaction, antisocial deeds*

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## **INTRODUCTION**

The notion of responsibility is inextricably linked to that of punishment applied as a result of a breach of social norms. Even though it was a clearer outline barely within Roman civilization, the *nulla poena sine lege* principle was applied since the most remote ages, although the rules of law have been developed in classical societies, which have influenced the culture and education of ancient worldwide, Greece and particularly, Ancient Rome. Thus, even if there were no standards by which to apply penalties for antisocial deeds committed by the community members, the guilty one received the punishments established by the community members. The first relatively primitive measures to punish the persons who broke the law applied by the

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company were to drive them away or to hit them with stones, having no relation to the rule of law.<sup>2</sup> When applying the death penalty has become a habit, it turned to the community in the rule of law, being enforced obligatorily.

During the human development at the stage when the social power was not yet organized, the injured person in his interests was forced to make his own right, avenge himself against those who had hurt them. With the organization of the social power, to punish those who broke the rules of coexistence, it was considered a social office. The community was thus substituted to the victim, taking his right to revenge. Demosthenes, in his plea "Against Conon" shows: "It was decided that, with regard to all these crimes, a judgment on the basis of laws should take place and not starting and deciding every person's own will." Quintilian shows that "private revenge is not only an enemy of the law, but of the peace, too." The emperors *Honorius* and *Theodosius*, the *King Theodoric* show that the state has the authority to punish and that the acts of private justice are no longer permissible.<sup>3</sup> It should be noted that vengeance is still a form of punishment in some societies, such as Albania, where the revenge practice was over time informally institutionalized at the cost of the genuine criminal law.<sup>4</sup>

The historical evolution of the social sanctioning reaction meant a tortuous and complex historical process from the very beginning in primitive society the individual, instinctive, violent and limitless reaction, continuing with revenge, the private composition, the law of retaliation and the state's increasingly strong intervention.<sup>5</sup> M. Djuvara appreciated

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<sup>2</sup> G.M. Calhoun, *The Growth of Criminal Law in Ancient Greece*, Law Book Exchange (New Jersey: LTD Union, 1999): 2.

<sup>3</sup> H. Grotius, *Despre dreptul războiului și al păcii* (București: Scientific Publishing House, 1968): 487-488.

<sup>4</sup> H.F. Ellenberger, „La vendetta”, in *Revue internationale de criminologie et de police technique* 2(1981): 125-142.

<sup>5</sup> Dumitru Baltag, *Teoria răspunderii și responsabilității juridice* (Chișinău, 2007): 138.

that, in any case, there could not be the legal sanction itself than with the idea of the legal community, the form from which the state evolved.<sup>6</sup>

Whether it is an excessively rough-specific feature of forming and strengthening process of the states (the code of Hammurabi), whether it is considered a creation of the divinity (the laws of Manu), the legal sanction is applied to some acts committed in order to disregard the law, with the aim to eliminate the imbalance (injustice) and to restore the normal functioning of the society.<sup>7</sup> However, even after the emergence of the state, it acknowledged in some cases the right of individuals to do themselves justice. Hugo Grotius mentions some examples in this regard as the Justinian Code, a law under the title *Quando liceat unicuique sine iudice se vindicare vel publicam devotionem* (when it is allowed to everyone without judgment to get revenge on himself or to avenge the violation of the faith versus the state) it allowed to anyone to kill the soldiers who robbed. This solution, as it appears from the text of the law, was justified on a preventive basis: knowing that they could be killed without trial the soldiers would not rob. The next law with the same title allowed to anyone to exert revenge against public thieves and army deserters.<sup>8</sup>

In the primitive societies, the right appeared to be closely related to religion and this is precisely why Fustel de Coulanges demonstrated in his famous work *La cité antique*, that "*the right has not appeared out of an abstract idea of justice, but derived from religion*" the phenomenon that determined that for a long time, the activity of judgment to be the monopoly of the priests. The theology was among the first subjects that legitimized the state's right to punish, the issue was touched by many theologians, such as *Th. Aquinas, Molina Lessio, Lugo*, but without becoming a central objective of their studies.<sup>9</sup>

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<sup>6</sup> Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică), Drept rațional, izvoare și drept pozitiv* (București: All, 1995): 231.

<sup>7</sup> Mihai Bădescu, *Concepte fundamentale în teoria și filosofia dreptului* (București: Lumina Lex, 2001): 3.

<sup>8</sup> Ibidem, 500. See other quoted examples at 488-489.

<sup>9</sup> C. Rotaru, *Fundamentele pedepsei. Teorii moderne, thesis* (București: University, manuscript, 2004), 5.

Thus we will make an analysis of the earliest periods of human society's development, particularly the antiquity in Babylon, because according to great scientists of the world, the right appeared in the ancient East. The Babylonian and Assyrian societies were based on a system of organic laws. As underlines and S. Moscati" *for the peoples of Mesopotamia, the right was a typical fundamental category of thinking, naturally seeking to transform the customs into the rules; so, another aspect of that worship of the order which coincides with the social existence.*"<sup>10</sup>

For Mesopotamians the divinity was a legislator. The king was designed only to convey people's legal standards. The great discovery of Babylonian law is the *code of Hammurabi*. The most important fact of the reign of Hammurabi owes its historical knowledge to the discovery in 1901, in the old capital of the *Elam, Susa* (currently Suş), a black basalt column on which those 317 items (35 deleted) of the famous *Code of Hammurabi* were dug. The legislative *code of Hammurabi* told us about the Babylonian hierarchical society of that period, which was, broadly, formed from three social layers: priests and dignitaries, freemen and slaves.<sup>11</sup> Being proclaimed 2000 years before Christ, the *Hammurabi's Code* contains strict legal rules, moral norms and religious rules. According to the principle considerations, the legislator from Babylon stated that the law should bring good things for the people, has to stop the strong person from harming the weak one.<sup>12</sup>

As with regards to the sanction - for us it represents the greatest importance-it was a very harsh penalty regime, otherwise characteristic for process of formation and consolidation of the States. The sentencing system lacks unity. The punishment varied according to the social conditions of the accused or the injured party. The offence brought against a person from a lower class was punished less severely than the

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<sup>10</sup> Sabatino Moscati, *Vechi civilizații semite* (București: Meridiane, 1975): 74 quoted by C. Stroe and N. Culic in *Momente din istoria filosofiei dreptului* (București: the Ministry of Interior's, 1994): 10.

<sup>11</sup> Iohanna Șarambei and Nicolae Șarambei, *Personalități ale lumii antice*, (București: Signs, 1997): 193-196.

<sup>12</sup> Nicolae Culic and Constantin Stroe, *Introducere în filosofia dreptului* (București: 1993): 11.

one brought against a member of the same class: *"If someone has removed the eye of a free man, to remove and his"* (art. 196); *"If he broke a bone or eye of a muşkenn, to pay half a silver mine"* (art. 186); *"If a free man (awelum) gave a slap to another free man he has to pay a silver mine"* (art. 203); *"If someone's slave has been given a slap to a free man, to cut one of his ears"* (art. 205); however, if the victim is a slave, the fine will rise at half the price versus (art. 199) and will be charged to its master.<sup>13</sup>

In order to be punished, the defendant must have committed the offence or crime in the way premeditated. The crimes committed by imprudence were punished more easily if he proved by oath that the act was not committed premeditated: *"If in a fight, someone hits another one and causes a wound and swears: "I did not hit him with intention", "he must pay only the doctor"* (art. 206); *"If, because of his coups, the wounded died and he would swear (that was not intentional) and if (the dead) was a free man, would pay a silver mine"* (art. 207).

A contribution of the Mesopotamians and in general, of the Semites, is the law of retaliation. The principle of retaliation constitutes a Semite contribution, more precisely the Hammurabi dynasty. This principle dominates the chapter concerning the offences damaging the physical integrity between the Patricians and it lacks attenuation only in what concerns the plebeians and the slaves. The law of retaliation provides in many situations, such as in article 196 (eye for eye), article 197 (bone for bone *"If someone broke another person's bone to be broken and his own bone"*), article 200 (a tooth for a tooth). In some cases, the law of retaliation keeps some specific shapes, known as the *"family compensations"*. The 209 and 210 articles provide that, where someone has caused the death of a free man's daughter, as a punishment the delinquent's daughter will be murdered.<sup>14</sup>

The death penalty was provided for the event of committing some acts directed against the property, for example: (art. 6) - *the theft from the Royal heritage or the theft from temples*; (art. 21) - *the theft committed*

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<sup>13</sup> Mihai Bădescu, *Concepte fundamentale în teoria și filosofia dreptului* (București: Lumina Lex, 2001): 9.

<sup>14</sup> Vladimir Hanga, *Mari legiuitori ai lumii* (București: Lumina Lex, 1994): 319.

by a burglary or a fire (art. 25). With the same punishment were sanctioned those who sold a stolen work (art. 9), which claimed a foreign thing though it didn't belong to them (art. 9), those who facilitated the runaway of the slaves (art. 15) and those who sheltered the runaways (art. 16) those who committed the deeds likely to prejudice the state's security (the revolt against the disposition, the disobedience to the mobilization orders, etc.).<sup>15</sup>

The capital punishment is applied in the case of the woman's adultery (art. 129), when raping the girls (art. 130), the incest (art. 154, 155, 157, 158), the assassination of the man by the woman (art. 153), leaving the home by the wife whose husband was taken prisoner (art. 133). The latter punishments had the aim to encourage developing of the patriarchal family.<sup>16</sup>

The code does not provide all the modes of execution of the capital punishment. There are specified only the drowning, burning and hanging.

Also, some corporal punishments having sanction material values and a meaningful symbol can be counted as a gentile rest of the community. Such sanctions symbolically reminded the offense committed and ensured the atonement meant within the magical views of the era, to purify the individual and also to be a warning to all who would try to defeat the law commands.

It should be noted the fact that at that time the constrain foundation, the basis of the punishment, was expressed through the theory of revenge. This theory has survived for a long period of time. With the strengthening of the development of social formations was manifested a stronger tendency to equalize the gravity of the act of vengeance to the gravity of the offence. This principle is common in almost the entire world's laws, the ancient period in India, China, and Roman Empire, in the Ten Commandments and in the five books of Moses.

The law of retaliation was gradually alleviated through the so-called voluntary compositions; the victim could opt out of revenge for an equivalent (metal, pet, etc.). Here "*we have the beginning of the State, as*

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<sup>15</sup> Vladimir Hanga, *Mari legiuitori ai lumii*: 78.

<sup>16</sup> Vladimir Hanga, *Mari legiuitori ai lumii*: 78.

*the guarantor of private law, it takes away the vengeance and replaces it with judicial punishment".*<sup>17</sup>

The main progresses of the code against previous legislations are: replacing the principle of personal revenge with that of sanctioning through judicial bodies' pronouncement (generally, by the state); it was said that (in the introduction) the premise of the state was to protect the weak people from the strong ones; it established that the punishment can be done only in a situation where the guilt was proven clearly".<sup>18</sup> The code is dominated by the idea of justice, but the justice could not be otherwise than as it appeared in it. Less applied for the slaves, the justice is pervasive because Hammurabi considered it as a law of nature. It is not the same for all people, but more or less it is to everyone, by virtue of the fact that they are people.<sup>19</sup>

In the general history of the civilization, this first legal monument has an important meaning: this time the law seeks to ensure the lives of citizens and guarantee them certain rights to an extent, still much higher than in other countries in antiquity.

Among the cultures of antiquity, the **Indian culture** cannot be compared - as the extension, variety and duration - than with the Chinese. "India and China - as stated O. Drîmba - are in fact the only large countries which represent a tradition founded on uninterrupted cultural continuity that goes back to the third millennium BC, traditions present today."<sup>20</sup>

Moreover, in any country of the Ancient East, in India, for example, the concept of law and the worship were confused. A religious rule became a rule that would legally regulate the social relations. These religious, moral, civil, legal rules were gathered in the collections - each being drafted by a school or a Brahman sect that enjoyed a true authority over their respective followers.

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<sup>17</sup> J. Jeremias, *Moses und Hammurabi* (Leipzig, 1903): 26.

<sup>18</sup> C. Stroe, N. Culic, *Momente din istoria filosofiei dreptului*: 14.

<sup>19</sup> C. Stroe, N. Culic, *Momente din istoria filosofiei dreptului*: 14.

<sup>20</sup> Ovidiu Drimba, *Istoria culturii și civilizației*, vol. I-X, *Saeculum 1.0 – Vestala P.H.*, (București: 1998), 372.

The best known of these collections is the code or the laws of Manu, whose original nucleus was perhaps a satire of the V-VI centuries BC. The laws of Manu are the most important law code of ancient India, assigned by Hindu tradition to Manu, the first man. The code is written in verse (2685 stanzas), the 12 books include: principles of metaphysics and theology, cosmogony, moral precepts, pedagogy, economics, commerce; rules for carrying out acts of marital debts and by relatives, friends and strangers; the main castes and debts of the secondary, so some against others, as well as members of the caste, among them getting domestic and foreign policy, strategy and tactics; tips for conclusion of political and military alliances, and then detailed agrarian, civil, criminal, commercial laws, etc.

The laws are necessary because they contain penalties, which are the most important instrument of the King in fulfilling his essential mission - justice." The punishment governs and protects the humanity" and the spirit of punishment is considered as the son of God, the protector of all that is doer of justice.<sup>21</sup> The criminal cases were tried by Brahmans, and the civilian by lay magistrates. There were rural courts, composed of three judges and judicial courts in towns.

Being generally regarded, the Law of Manu has coloring and religious sanction, like all ancient peoples' laws. In comparison with the laws of other legislators, as they were Kratu, Urihaspati, Paraşara and Narada, the Law of Manu has enjoyed a special pass and today it forms the basis of the Indian public and private law.

To prevent the confusion and the degradation, the wise Manu, the son of Brahma, drafted the code of laws, which show the good and evil deeds and the ancient customs of the four castes. The source of the code is the ancient custom approved by the divinity, expressing the transition from the custom to the law.

About Manu, who was assigned the composition of this act, nothing is known precisely. What is said in the text about him is related to the myth. However, we have no reason to doubt his historical existence, only that we do not know when he lived and who he was.

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<sup>21</sup> <http://ru.scribd.com/doc/7059258/Introd-drept-Anul-I-Sem-I>

The social balance, so necessary for the coexistence of the castes, wouldn't have been accomplished without a guarantee of compliance with debt, which, in "the laws of Manu" - is considered to be a punishment. The penalty is a creation of the deity. It should be applied to those who deserve, because: "If the King would never punish ceaselessly those who deserve to be punished, the strong would roast the weaker, as is the fish roasted" (VII, 7). Furthermore, "the punishment is justice" (VII, 18) and "the justice lies in applying the punishment according to the law" (IX, 249), which expresses the concept that the right must be bound by the sanction. The identification of Justice with punishment does not mean assimilation with the act of punishing, but with its consequences: the elimination of the imbalance (of injustice) and restoration of the normal operation by removing everyone's debt. Non-application of the death penalty has the same consequences as punishing an innocent. Regarding the penalties applied to acts committed in contempt as set forth in the law, we note that the offences and the crimes were carefully investigated and severely punished. "If the justice is destroyed, it also destroys; if it's defended, it defends ... the justice is the only friend that remains even after death ... "(VIII, 15, 17).<sup>22</sup>

In the Vedic age (1500-500 BC) the corporal punishments were not applied but only the fines. Then the death penalty was applied as in the assassination as for other cases: the plot against the king, entering in the rooms of the palace reserved for women, the flirt of elephants or horses belonging to the king, the thefts from wheat warehouses, arsenals and temple (VIII, 280). For other kinds of theft the finger, the hand or the leg was cut off or they were pulled through the sliver (VIII, 276-8).

The male adultery was punishable by imprisonment, but with pulling through the sliver if the woman was a "wife" from the king's group of wife. The adulterous woman had a strange punishment: she was trimmed, buttered, tied with the hands behind his back and put on a black donkey back to cross the town backwards - the symbol of debauchery.

We can conclude that the "Laws of Manu " stated more explicitly than other spiritual creations of the ancient East, the dependence of the vision about society and law, ontology, proposing a unitary conception of

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<sup>22</sup> C. Stroe, N. Culic, *Momente din istoria filosofiei dreptului*: 19 and the next.

the human, the space and the social, political and legal settlement of the society.

In ancient Greek society, at first, there were disputes based on the evidenced violations of private rights and only during the contemporary period of Hesiod<sup>23</sup>, after about 200 years, a few notions that could be considered, with difficulty, as forming part of the criminal law have been drawn. It was appreciated that in this age was achieved a breakthrough, particularly as it has been maintained the supremacy of civil rights defense in relation to penalizing the contravention-crime-committed as an offense against the social order.<sup>24</sup> To determine which traits are a branch of law, according to which for any antisocial deed will be applied a penalty, we must firstly clarify what was meant at that time by crime (murder), as an antisocial deed, and how it was defined. Thus, in ancient Greece, the crime (murder) was defined as the "violation or refusal to live up to the standards of behavior from society" as a "revolt of the individual against the society" or as a "forbidden action". To show more the way how the Greeks evaluated certain antisocial acts, we will quote only one paragraph of the Plutarch's work, "the Solon's Life", in which the reference is made to the lack of difference in treatment between a murderer and one who stole an object of little value: "*bizarrely the murder was considered the most serious of the facts but just as bad were punished and those condemned because they were lazy or those who had just stolen an apple or a cabbage*".<sup>25</sup>

As Solon and Lycurgus alongside, as *Drakon* in Athens and *Pittakos* in Mytilene were famous legislators, who were vested with absolute powers of the respective era, *Drakon* remained even more famous in history for the severity of the laws which he made. For the first time in this historical period, it has been provided criminal penalties for state intervention in extremely severe cases of homicide cases that until

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<sup>23</sup> He lived in the VIIIth cen.BC, being considered the oldest epic Greek poet, after Homer.

<sup>24</sup> R.J. Bonner, *Administration of Justice from Homer to Aristotle*, vol. I, 1911, apud G.M. Calhoun, *The Growth of Criminal Law in Ancient Greece*: 7.

<sup>25</sup> Plutarh, *The life of Solon*, apud R. Dargie, *Ancient Greece, Crime and Punishment*, (Minneapolis: Compass Point Books, 2007): 6.

then had been left to the aggrieved family, this appealing usually to the *vendetta*.

In the classical era of the Greek civilization, the administration of Justice was entrusted to the people's Assembly. The nature of the sentencing ranged, as in the code of Hammurabi, according to the social condition of the guilty ones, talking about pecuniary penalties (fines, confiscation), temporary or permanent banishment, the loss of civil rights, the prison (was not applied to the citizens) and the tortures, which were applied exclusively for the slaves - the yoke, scraping with iron red and pulling on the wheel. The traitors and the sacrilegious people of the sacred places were sentenced to death, killed with stones or thrown into an abyss. Instead, it is unknown what the usual way of capital punishment was. In this era, the Athenian justice had obvious weaknesses: the lack of a code of laws, the lack of a specialized legal body, the character class system, which let enough place for arbitrariness and excesses. Despite such issues, this justice produced indisputable progress, being able to recall in this regard the abolition of the law of retaliation or collective punishment.<sup>26</sup>

The Chinese legal regime, from the ancient times, was characterized by a system of extremely severe repression. The punishments were barbarian, as in all Asian countries. The most common, after the most trivial (cutting hair), consists of lashes or sticks (at first between 300 and 500, and in the second century BC the number was reduced to 100). Then it was the mutilation. The most common mutilations were scraping with the iron red, cutting of ears, nose, tongue, legs, castration and paw amputation. Relevant in this regard is a Royal Ordinance whereby the King threatened: "*If among you there are villains ... I'll cut off your nose and I will exterminate everyone, without sparing even their sons*".<sup>27</sup>

Later, in the era of the *Han* (167 BC) the criminal mutilation criminal has been substituted by the walking stick. The death penalty existed in different forms: strangling, decapitation, severing the body

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<sup>26</sup> Mihai Bădescu, *Concepte fundamentale în teoria și filosofia dreptului* : 93.

<sup>27</sup> Citat de O. Drîmba, *Istoria culturii și civilizației*, vol. I-X, *Saeculum* 1.0 – *Vestala* P.H : 47.

between two or throwing of the culprit in a kettle with boiling water. During the *Shang* the capital punishment was prescribed and for drunks.

The enforcement regime in ancient China highlights some specific features:

- first, the sanctions only looked repression crimes. Outside the criminal code, the civil code didn't exist;
- then, the punishments were extended over the entire family of the culprit and sometimes even over its neighbors. For example, in case of rebellion, the punishment of decapitation, both looked the guilty person and his male-line relatives, from a grandfather until brother, nephews and the relatives in the female line became slaves.<sup>28</sup>

The Hebrew civilization was formed and lasted for 14 centuries on a limited territory; the Israel's surface was originally of about 15000 km<sup>2</sup>. It is known that in the civilizations of the ancient East, the religion dominated all aspects of life; in none the dominant character doesn't appear so absolutely and exclusively as in the Jews. They had a unit of a substance between the religious, the moral and the legal life because it had common origins and context in which it took place, and the purpose of the precepts that ensured the conduct of life and that was unique: the acquisition of holiness before God.<sup>29</sup>

The Hebrew religion has a decisive function so that it is always invoked in life, in habits and etiquette, in their policy, law and morality, in their literature and art. The Hebrew culture appears today, configured, transfigured and disfigured by the religious factor.

In Hebrew " *Jahwe* " means " *the one who is* ", " *the one who makes possible to exist* ", " *the one who creates* ". At the origin, Jahwe embodied the omnipotent divinity of the nature, the god of the storm, the lightning and the volcanoes. Morality was its fundamental nature, the spirit of justice, the severity with which he punished mercilessly the guilty.

*"The most important element of the cult of Jahwe was not monotheism, but the sense of divine purpose which gave the Jews their social experience. In this way, the Jews have done a step that has not*

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<sup>28</sup> Mihai Bădescu, *Concepte fundamentale în teoria și filosofia dreptului*: 18.

<sup>29</sup> C.Stroe, N.Culic, *Momente din istoria filosofiei dreptului*: 28.

*done any other people: they found the expression of the divine not in the experience of the physical nature, but in the experience of social progress".*<sup>30</sup>

After the sentence was established, it followed the enforcement of the punishment. The corporal punishment consisted in ordinary coup sticks (not more than 40). Another punishment was imprisonment; for example, the thieves who could not repay the theft were sold as slaves. The imprisonment - introduced after the pattern of the surrounding peoples has been applied after the return of the Jews from the Babylonian captivity.

The death penalty was provided by law for voluntary homicide, for kidnapping a person with the aim to bring it in a state of slavery, for idolatry, sorcery and breaking the Sabbath day, and for the case when a daughter of priest occupied with prostitution. It was also applied for a severe reaction of the children against their parents, for adultery, sodomy, homosexuality, incest and bestiality. To be burned alive was provided as well as in the code of Hammurabi, in the cases of incest or for the daughter of a priest who was a prostitute: in ancient times, the same punishment was inflicted and for the woman's adulterous affair.

The Jews from the ancient times did not know about the punishment of crucifixion that was applied by the Persians, the Greeks and the Romans and about the mutilation provided by the Babylonians and Assyrians.

The execution of the capital punishment, which took place in public and usually consisted in killing stone, was entrusted to the family which suffered the offence or to the community. These sanctioning provisions that provided the death penalty or other penalties were applied in atrocious circumstances, quite rare and were formulated as a deterrent, frightening the potential offenders.

During the nomads, the Jewish people had the Supreme Law "blood revenge" principle which could not be suppressed later. Death was punishable by death; the family of the person killed was supposed to kill killer or a member of his family. The law of blood revenge was kept and

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<sup>30</sup> Ralf Tunes, *Les grandes culturas de la humanida*. The I-II vol. (Revoucionaria Publishing House, La Habana, 1980).

in the following period, sedentary life, being supplemented by the common law principle that was common for many Semitic peoples - the law of retaliation.

As for the ancient Jewish the justice was a state of equilibrium, the punishment was designed to restore the balance when it was broken. Restoring did not mean returning at the initial stage, but the appropriate modification of that element of the relationship that caused the imbalance. However, this principle has not been cruelly applied neither to the Jews, "*ad litter am*". Even the death penalty could be redeemed with money, at least when he was not a killer".<sup>31</sup>

In the Hebrew law, there are more influences of the Babylonian code; but overall, the originality of the Hebrew law is obvious. To impose absolute rules of law that he had formulated, the legislator Moses claimed that they were taught at Mount *Sinai* by *Jahwe* himself. Hammurabi is depicted receiving himself the legal rules of his famous Code directly in the hands of the *Şamaş*. But, unlike the Babylonian God, *Jahwe-Jehovah* was the God of righteousness, of morality and justice".

## CONCLUSIONS

Having analyzed the evolution of the sanction in the ancient period, the author concluded that the legal remedies at the time were pretty tough. Their hardness from that period are not comparable to the sanctioning system of today, the laws of antiquity did not make a clear distinction between the categories of punishable offenses, but rather delimited the penalties applicable to the social class to which belonged the person who violated the norm and victim.

But the most important achievement of that period, lies in the gradual replacement of retaliation principle, a principle that has persisted in almost all ancient state entities, with sanctions regulated legally, enshrined in the laws and codes that became, later, real legal monuments.

The evolution of the law to punish is summed up eloquently by Traian Pop: "It had to pass so many centuries, through so many

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<sup>31</sup>A. Bertholet, *Histoire de la civilisation d'Israel* (Paris: Payot, 1982). For the same reason, see: *Cartea a doua a Regilor*, XIV, 6; *Cartea a doua a lui Samuel*, XIV, 6 and the next (433.)

modifications, transformations, to get from passionate, instinctive, exaggerated reaction, manifested through primitive penalty, to the punishment of today. The private penalty is succeeded by the religious punishment and then the age or public punishment. The private vengeance is succeeded by the social and collective vengeance. The revenge is tempered by the law of retaliation and composition. The private vengeance or revenge is succeeded the divine expiation, and its legal expiation. The expiation idea is actually replaced by the idea of equity or justice. The idea of justice joins the idea of social utility or it is replaced by it. The moral, punishment functions are added or substituted by useful functions. The deterrent, barbaric and cruel penalties humanize, becoming milder. The positive corporal punishment is substituted by negative punishments, meaning deprivation of liberty. The punishment successively takes and another character: natural, religious, ethical, legal, ethical, legal, and social." <sup>32</sup>

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<sup>32</sup> T. Pop, *Curs de criminologie*, (Cluj: The Institute of Graphic Arts of Ardeal Publishing House, 1928): 232.

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# LEGAL INCOMPATIBILITIES - ELEMENT OF LEGAL COERCION SPECIFIC TO THE STATE OF LAW

Oleg TĂNASE<sup>1</sup>

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**Abstract:**

*The analysis of legal incompatibilities is designed as a report between the state, as a public authority and individual, as the bearer of certain rights and obligations, resulting from its status. Thus the incompatibility is an inseparable condition by a person, is determined by the existence of certain restrictions that are imposed by the state, as public power.*

*This condition of things does not seek a specific person, foreseen as individual, but its status and legal capacity, aiming the protection of public interests.*

**Key-words:** *incompatibility, state of law, the state power, legal coercion, legal liability, state authority*

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## INTRODUCTION

The establishment of incompatibilities, has its origin right from the appearance of functions, some activities *in concreto*, which state authority has delegated to the person, while creating certain restrictions on the there of exercising, having in the final the fulfillment with impartiality and objectivity of the tasks entrusted by public power.

The social relationships formed between individuals, exercising the function of public dignity, and public power, has led to the establishment of incompatibilities that were imposed as a barrier for exercising, in the same time, of more functions or performing of certain activities that would be endangered the fulfillment of public functions or of public dignity.

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In the current language the incompatibility is perceived as prohibition, inadequacy against two functions, activities, professions, that make impossible their concomitant conduction by a person.

In the legal language the incompatibility is perceived with existing restrictions in the ability of use of the person, as a result of his activity.

The capacity of general use of the person concerns all rights and obligations that are recognized in order to satisfy personal, material and cultural interests, according to universal interests, in conformity with the law and rules of social coexistence.

Any individual has the use capacity, because its absence would equate *the lato sensu* with lack of quality of the subject of civil law.<sup>2</sup>

Even if the incompatibility typically concerns the individual, as a subject of law, we believe that the incompatibilities are binding to legal persons too.

For legal entity, the ability of use includes the general and abstract ability to have rights and obligations that serve for the achievement of the aim for which the legal entity was established. Therefore, in the doctrine is spoken about the principle of speciality of using ability of the legal entity [...]<sup>3</sup>

The distinction is that the incompatibility toward individuals is related in special by the function they exercise, and for legal entities the incompatibilities are inserted in the constitutional documents.

So, the legal entity cannot exercise other activity than the one entered in the articles of incorporation and registered in the public register of legal entities (trade register).

The legal incompatibilities do not seek an individual or legal entity in particular, are not set out to damage certain rights and interests of the concerned persona, but are evident in order to protect the general interest necessary in a democratic society.

In its jurisprudence the European Court of Human Rights has established that the imposition of some incompatibilities is not contrary

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<sup>2</sup>Gabriel Boroi, *Civil Law, General Part* (Bucharest: All Beck, 1999), 49.

<sup>3</sup>Boroi, *Civil Law*, 51

to the Convention's provisions for the Protection of Human Rights and of Fundamental Freedoms (*The Case of Lykourazos against Greece*)<sup>4</sup>.

With title of example we mention that legal incompatibilities are present, in principle, in all branches of law:

- In Civil procedural law or criminal procedural law –the incompatibility for judge might arise if the judge who has pronounced a decision in a case, may not take part in the judgment of same case on appeal or recourse and not in retrial case;

- The Labor law - though largely the restrictions should take the form of protective measures, however, their effect is to prevent pregnant women and children under 18 years, to the performance of work under harmful or hurtful, dangerous, difficult and medical contraindicated conditions;

- Criminal law - the prohibition to hold positions involves the exercise of state authority, and the prohibition to occupy a position or pursue a profession of the kind that the convicted person has used for offense commitment, constitutes one of the forms of complementary punishment, but in fund of prohibition of certain rights. The application of penalty is mandatory when required by law, except that in this case, subsists the condition foreseen by law on the amount of the principal penalty.

- Commercial law - the Trade Society may not perform another activity, than that introduced in the articles of incorporation and registered in the trade register.

Depending on the degree and extent of incompatibilities, we believe that can be identified absolute and relative incompatibilities that since their occurrence, establish certain restrictions, producing legal effect.

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<sup>4</sup><https://wcd.coe.int/ViewDoc.jsp?p=&id=1010345&Site=COE&direct=true>; European court has indicated that in virtue of obligations of contracting states to organize elections under conditions which ensure the free of expression of the people's opinion, foreseen in art. 3 of the Protocol. No.1 to the Convention, the States have a wide discretion in the imposition of limitations or incompatibilities of public functions, depending on the historical and political factors peculiar to each state.

We are talking about absolute incompatibility - as legal status, that impose restrictions in activity and that cannot be covered only by the termination or waiver of activity.

We are in the presence of absolute incompatibility when, for example: the judge, who has pronounced a decision in a case, cannot take part at the judgment of the same case on appeal or recourse or at the retrial of the case.

Thus absolute incompatibility occurs independently of any conditions and social report, is unconditional of certain events occurring, being in an independence with the object that caused the incompatibility condition.

The relative incompatibility reveals subjective indices, of provisional nature, which taken together contain elements that raise doubts about impartiality. In the civil procedural law or criminal procedural law, the relative incompatibility of the judge is based on the conditions of declaration of abstention or demand for recusal. While it is a procedural incident, and that any procedural means can be settled during the process, this type of incompatibility ensures compliance of certain values (the respect of the rights and interests of the person who invoked them, putting also at the same time to execution certain obligations towards the incompatible person) so that for the resolution of this incident, in the panel of the judges cannot be included the one who makes the incompatibility's subject.

Therefore, for both types of incompatibility (absolute and relative) are specific few basic elements:

- Arising as result of some facts<sup>5</sup>,

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<sup>5</sup>The Occurrence of the facts could be due and result of a judicial error, but we believe it cannot cover cases of incompatibility. As an example we mention the following case examined judiciary: through the court decision that resolved a dispute of restorative to work, between an official and public authority (which has since been reorganized by separation), it has ordered the restoration to work of the officer in the position previously held. But due to reorganization of the authority, the judgment decision ordered to restore both authorities: the reorganized and separated by the reorganization. Consequently, both authorities have issued acts to restore the officer, but in practical terms the employee has performed the work only toward separated authority through reorganization, from which was remunerated.

- Their materialization take place through a legal constraint report (and the legal constraint report implies the idea of liability)
- The constraint report is perceived as a plurality of rights and obligations,
  - The rights and obligations have active character (supposing the obligations of "to make "something *in concreto*, for example in civil procedural law: the obligation to make declaration of abstention) and passive character (in Labor Law: giving up of an activity that is incompatible with his held position),
  - This plurality of rights and obligations results from material or procedural rules,
  - Their Non-consideration, have the effect of application of certain legal sanctions.

The sanction imposed for cases of incompatibility, is correlated with the occurrence source<sup>6</sup>, so as penalty may be engaged and "termination of employment report". In these circumstances, the legal standards not only result in restoring of law order which was not considered, but also in the strengthening of legality.

The importance of the principle of legality requires that the law to be respected, this duty is not only for individuals, as holders of rights and obligations, but equally for the public and private authorities<sup>7</sup>.

Also we mentioned that in practical terms there might be some confusion about the incompatibility and the conflicts of public interests.

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At a certain period of time, the official claimed salary and from reorganized authority, citing the judgment of decision of restoration to work. The resolving of this litigation was conducted in a separately process (in other full trial), and for reasons of incompatibility in concurrent holding of two positions, the court dismissed the judicial pretensions of the official.

<sup>6</sup>Dumitru Baltag, "The Current problems in the knowledge of essence and content of legal liability", the *Journal of Legal University Studies*, 2009 no.3-4.

<sup>7</sup>The report on the rule of law, adopted by the Venice Commission at its 86th plenary session, §42, 2011 - to the extent that the legality aim the acts of public officials, the requirement is that they act within the limits of attributions which have been conferred.

So if for existence of a conflict of interest, public persons must take a decision that would influence a personal interest, to be in a situation of incompatibility a public official should not take any decision, being sufficient the fact that he deals simultaneously two or more functions whose overlapping is prohibited by law.<sup>8</sup>

Therefore, both conditions as restrictions concern a person's behavior, the extent of these rights, being an exercise set only by law and required by law, so that the restrictions *extra legem* cannot produce legal effects.

Taking into account that the compliance of rules and of the fundamental principles that establish legal incompatibilities is the foundation of some constitutional relationships, these are the expression of some guarantees which lead to the respect of general interest and of values of state of law.

Reporting these restrictions to European values and principles is found:

- that are „proportional” with community interest,
- are „foreseen by law” and
- „necessary in a democratic society”.

Thus the cumulative meeting of these conditions does not result in the touch of fundamental human rights.

## CONCLUSIONS

Based on the above, we are convinced that the incompatibility, wherever occurring, does not violate the legitimate rights and interests of individuals, but offers guarantees specific to the status of law, aimed at protecting the public interest in a democratic society from certain facts or acts that could endanger the good functioning of the rule of law.

For these reasons and depending on the exact and real situations, it is possible to evaluate and appreciate the democratic character and the character of law of any state and of its institutions.

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<sup>8</sup>Guidelines on incompatibilities and conflicts of interest, developed by the National Integrity Agency of Romania, 14.

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# PROVIDING LEGAL ASSISTANCE IN CRIMINAL PROSECUTION COMPLETION

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**Abstract:**

*Providing legal assistance ranges from guarantees which must accompany any person who engages in the execution of the criminal prosecution acts and criminal prosecution completion, which represents a stage of this phase in which the criminal investigation body (NCP) and criminal prosecution bodies (CPP RM ), after having considered that they managed all necessary evidence, prepare the case in order to advance it to the prosecutor, so that he undertake the verification of criminal prosecution works and declare his opinion according to the law. It is of particular importance the contribution of the lawyer in contesting the legality of the actions and inactions of the criminal prosecution body and of the body exercising the operational investigation activity, respectively of the criminal prosecution measures and acts, which, in themselves, represent not just a realisation of the right of access to justice of the person, as guaranteed by the Constitution of the Republic of Moldova, namely by the Romanian Constitution and by Article 5, Article 6 and Article 13 of European Convention on Human Rights, but also an effective way to detect and remove any violation of human rights from the very phase of criminal prosecution. The active participation of the lawyer to criminal prosecution completion, during the presentation of the criminal prosecution material allows giving adequate appreciation to the circumstances of the criminal cause, and prevents limitation and subjectivity, determining fairness, impartiality of the criminal prosecution investigator, the prosecutor, the investigating judge,*

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*excluding the accusatory tendency in their activity, ensuring fair solutions to start criminal proceedings.*

**Key-words:** *lawyer, defender lawyer, criminal investigation body, prosecutor, legal assistance, criminal prosecution completion.*

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## **INTRODUCTION**

Providing legal assistance ranges from guarantees which must accompany any person who engages in the execution of the criminal prosecution acts and criminal prosecution completion, which represents a stage of this phase in which the criminal investigation body (NCPP<sup>2</sup>) and criminal prosecution bodies (CPP RM<sup>3</sup>), after having considered that they managed all necessary evidence, prepare the case in order to advance it to the prosecutor, so that he undertake the verification of criminal prosecution works and declare his opinion according to the law.

Criminal prosecution completion does not mean the end of the criminal prosecution phase, just the *completion of the criminal prosecution activity by the criminal investigation bodies (NCPP)* and by the criminal prosecution bodies (CPP RM).

Finalising the investigation of the cause in terms of all the activities required by the specifics of the cause, the criminal prosecution body, considering that the criminal investigation is complete, shall immediately submit the file to the prosecutor, accompanied by a report, which must be confined to the fact which formed the subject of the criminal prosecution, the defendant and the last legal classification of the offense. The report of the completion of the criminal prosecution must also include, in addition to the general statements, the incriminating act or acts of the defendant, the administered evidence and the legal classification. The report must also include the proposal which the criminal investigation body makes on the solution to be adopted by the prosecutor. Additionally, the report also

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<sup>2</sup> *Noul Cod penal. Noul Cod de procedură penală*, Bucharest: C. H. Beck, 2014.

<sup>3</sup> *Codul de procedură penală al Republicii Moldova*, no. 122-XV of March 14, 2003. In: Official Gazette of the Republic of Moldavia no. 104-110 on June 7, 2003.

includes additional data on material evidence, precautionary measures, preventive measures, legal costs.<sup>4</sup>

In this case, according to Art. 322, para. (1) the NCPP prosecutor is obliged within 15 days from the receipt of the file sent by the criminal investigation body according to Article 320 and Article 321, para. (1) NCPP to do the verification of the criminal prosecution works and to rule over them. If the prosecutor finds that it complied with statutory protections truth, the prosecution is complete, that there is necessary and legally managed evidence, gives the indictment in terms of article 327, item 1, letters a) NCPP or ordinance in terms of article 327, item 1, letters b) NCPP.

In the Republic of Moldavia, according to Art. 290, para. (1) the CPP RM prosecutor, within 10 days from the receipt of the file sent by the criminal prosecution body, checks the materials of the cause, the performed procedural actions, ruling over them, and when he finds that it complied with the criminal trial, regarding criminal prosecution, that the prosecution is complete, that there is sufficient legally managed evidence, he notifies the accused, his legal representative, the defense counsel, the injured party, the civil party, the civilly responsible party and their representatives about the completion of the criminal prosecution, the place and time when they can learn the criminal prosecution materials. The civil party, the civilly responsible party and their representatives are presented to inspect only the materials relating to the civil action they are a part of, according to article 293, para. (1) CPP RM, the informing of the lawyer being made, usually through communication in writing. According to article 293, para. (2) CPP RM the criminal prosecution materials are presented to the accused arrested in the presence of his defender, and at the request of the accused – to each of them separately. To get acquainted with the materials of criminal prosecution, they are presented in the file stitched, numbered and entered in the docket.

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<sup>4</sup> Boțian Elisabeta, *Drept procesual penal, Note de curs* (Sibiu: Burg, 2013) 108 (www.roger-univ.ro).

In judicial practice numbering the file pages in pencil has become a tradition, erasures and number corrections being met, and that is why we believe V.N. Burobin<sup>5</sup>'s proposal is correct that it would be fair if the file

At the request of the parties, the corpus delicti will also be presented, which cannot be kept together with and file materials, the audio and video recordings will be reproduced, except the cases provided in article 110 CPP RM. If the accused or the unarrested defendant is illiterate or cannot read (he is ill or cannot see etc.), the counsel will read the file and will present personally the evidence of the case<sup>6</sup>.

If there are reasonable grounds to believe that the life, physical integrity or liberty of the witness or of a close relative of his are under threat in connection with the statements that he makes in a criminal case regarding a crime, which is serious, extremely serious or exceptionally serious and if there are the respective technical means, the investigating judge or, where appropriate, the court, at the request of the defense counsel or the prosecutor may allow the respective witness to be heard without being physically present at the place where the criminal prosecution body is or in the room where the court hearing is conducted, by technical means provided for in article 110 CPP RM.

In this case there will not be presented the information about the real identity of the witness that is recorded by the investigating judge or , where appropriate, of the ex officio court in a separate official report, which is kept on the premises of the respective court in a sealed envelope in maximum confidentiality conditions. If the criminal case has more volumes, they are presented simultaneously to take cognizance of the respective materials, so that the person who becomes aware of them can return to any of these volumes several times, the prosecutor, by order, being allowed to establish a programme, coordinated with counsel, which sets the date and number of volumes for the study.

The deadline to take notice of the criminal prosecution material cannot be limited, but if the person becomes aware of the material abuses

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<sup>5</sup>V.N Burobin., *Manual de practică legală* (Moscow: MNÈPU, 2001), .324.

<sup>6</sup> Nicu Jidovu, *Dreptul la apărare a învinuitului și inculpatului* (Bucharest: Rosetti 2004), .44.

the situation, the prosecutor sets the way and the term of this action, given the volume of the file.

*It cannot be regarded as conveying the criminal prosecution materials the work of the prosecutor C. who called the arrested defendant in denial of food for six days, at the prosecutor's office and on the basis of a report drawn up by the prison doctor, who noted that he presented the defendant the materials of the case, contained in three volumes with over 1,300 pages within ten minutes, while the defendant presented the medical documents and requested submission to a forensic examination stating that his physical and mental condition makes him unable to read the materials and to formulate his defense on the file.<sup>7</sup>*

In order to ensure the keeping of the secrecy of state, commercial or of other secret protected by law, as well as in order to protect the life, the physical integrity and the liberty of the witness and of other people, the investigating judge according to the prosecution's request, may limit the right of the defense counsel and of the representative to take notice of the materials or information on their identity, the approach being examined under Art. 305 CPP RM .

Under art. 212, para. (2) CPP RM, if required to maintain confidentiality, the person conducting the criminal prosecution which prevents the defender and the representative attending the development of the actions of the criminal prosecution about the fact that they have no right to disclose the information regarding the criminal prosecution. These participants will give a written statement that they have been warned about the responsibility that they will bear according to art. 315 of the CP RM which states that the objective side of this crime is the disclosure by a person participating in criminal prosecution acts of the data obtained contrary to the prohibition of the prosecutor or the criminal prosecution officer. The disclosure of the criminal prosecution data can be made: orally or in writing via mass media, television radio, etc.<sup>8</sup>

According to Art.213, para. (5) CPP RM the defender and the representative as well as other people who, under the rules of criminal

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<sup>7</sup> Bucharest Court, Sentence on February 27 2001 no.147, criminal file no. 3969.

<sup>8</sup> Al.Barbăneagră and editorial team, *Codul penal comentat și adnotat* (Chișinău: Cartier juridic., 2005), 508.

procedure, will be presented in order to take action or otherwise communicated information constituting a state secret, shall give a prior written nondisclosure statement of such data. If the counsel or other representative, except the legal representative refuses to give such a statement, he is deprived of the right to participate in the criminal proceeding in question, and the other people will not have access to data that is a state secret. The declaration of non-disclosure of the people mentioned in this paragraph shall be taken by the person conducting the criminal prosecution or the court and is attached to the criminal case in question. The nondisclosure obligation assumed by the participants in the process does not stop them to ask for the examination of the data which constitute a state secret in a closed court hearing.

Taking note of the cause materials, the lawyer must inform the client openly about the weak and uncertain links of the cause, as well as the complications that can accompany proving the factual circumstances. This is necessary for the client to have a clear idea about the possible conduct of the cause. An experienced defender, anticipating court position, performs an early analysis of the evidence to be presented in court, the possible outcome of their verification under judicial examination, as well as the probability of the confirmation of the sample facts. This is why the lawyer must be convinced of the legality of his application<sup>9</sup>.

About the presentation of the criminal prosecution materials, a report is made to the defender and the accused, in which, apart from the entries listed in art. 260 CPP RM , there are indicated the number of volumes and the number of sheets of each volume of the file that was taken cognizance, the corpus delicti , the reproduced audio and video records as well as the date, hour and minutes of the beginning and end of taking cognizance of the cause file for each day.

The claims and statements put forward in the course of this action are submitted in the official report, and the written requests are attached to the report in which they are mentioned.

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<sup>9</sup> L. Brînză, „Rolul avocatului în reabilitarea persoanei în procesul penal“, *The National Law Journal* 4 (2002), 49 -51.

About the presentation of the criminal prosecution materials in order to take cognizance of them, each person mentioned in art.293 , para. (1) CPP RM is drawn a report. If the defendant has knowledge of the case materials in the presence of his lawyer, a unique report is made. When the mentioned people are separately aware of the criminal prosecution materials, a report is made for each of them separately.

*In the judicial practice in Romania, for example, it was established that the presentation of the criminal prosecution materials is not carried out according to the conditions laid down in Art. 250 et seq. C. Proc. pen. , if the procedure was interrupted by the introduction of an application for the recusal of the prosecutor competent to perform it.*

*From the analysis of the documents and works of the file, it results that on January 12, 2004, when presenting the criminal prosecution material, the defendant S.L. returned to the initial request of the provision of new evidence and said she would proceed to the recusal of the prosecutor of the case. On the same day , the defendant made the request for the recusal of the prosecutor, a request which was received by the prosecutor on duty, being dated January 12, 2004 , its record being made by the Prosecutor's Office attached to the Bucharest Court of Appeal on January 14, 2004, under the no. 147/VIII/1/2004 .*

*By order no. 147/VIII/1/2004 on January 14, 2004, the Prosecutor's Office attached to the Court of Appeal dismissed the recusal request of the case prosecutor .*

*From the sequence of these documents follows the fact that the recusal of the case prosecutor was made on January 12, 2004 , the same day the prosecutor was to present the criminal prosecution material to the defendant .*

*During the preparation of the report, the defendant declared her recusal intention of the prosecutor, reflected by filling in the application form to the lawyer on duty. The procedural act of the presentation of the criminal prosecution material was therefore discontinued and no longer completed in the form and conditions required by the provisions of art . 250 following the Criminal Procedure Code. In these circumstances , the defendant was not presented the criminal prosecution material as*

*determined by the provisions of art. 250 following the Criminal Procedure Code.*

*On the other hand, the criminal prosecution body, in the absence of the evidence analysis that the defendant was going to seek, has not been able to ascertain whether all the evidence supporting the guilt had been administered.*

*As the concerned criminal prosecution bodies did not meet the legal provisions regarding right of defense, it appears that the defendant was brought to an injury that can only be rebutted by the annulment of the act, being accomplished the requirements of Art. 197, para. (1) and (4) Criminal Procedure and therefore, the appeal was rejected.<sup>10</sup>*

Once you are aware of criminal prosecution material, the accused, the defense counsel and / or the representative are entitled to formulate new demands connected with the criminal prosecution, which is solved according to Art. 245-247 CPP RM, requests which must be clear, accurate and substantiated, only in these cases the defense and the accused being able rely on their positive resolution.

In the process of establishing the true objective, the attitude of the investigating officer has an important role and of the prosecutor towards requests of the counsel or the accused, the thorough knowledge of the case - being a compulsory condition of a qualified defense.

The defender, making acquaintance with the file, must study and analyse all the materials that directly or indirectly refers to his client. The materials that relate to other defendants must not be overlooked, especially when his interests are different.

A professional defender will study thoroughly all the materials of the criminal prosecution, starting with the decision to initiate a criminal case, and the conduct of criminal prosecution actions, and later the indictment, his correspondence with the file materials. In addition, he will fix any detected breaches of the procedural and material rules, of rights and legal interests of the accused. Also, the accumulated evidence

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<sup>10</sup> Romanian High Court of Cassation and Justice, criminal section, decision no. 6826 of November 22, 2006.

will be subjected to analysis if it was obtained legally and by legal procedure.

In the process of carrying out this activity, the defender is forced to undergo a critical study of the facts and circumstances that 'wake up' certain suspicion, such as: has the crime occurred ? ; has it been properly qualified ?; has he been listed all his rights or not ?, etc.

In the case several defendants are attracted in the criminal liability in the file, schemes are prepared by which we can establish real connections, but hidden, among the participants of the crime and tablets that can clearly reflect inconsistencies or errors in the testimonies of the case interrogators and the experts' conclusions. Also, as shown by practice drawing up personal files can lead to the simplification the defense.

In the acknowledgment of the criminal case, the counsel is provided with a series of rights, among them first of all the legislator being entitled to the right to hold meetings and discussions with the accused without the presence of another person, during which the counsel can learn some facts that have importance to the case, which can attract the attention of the defender or towards some circumstances which have been omitted. The meeting is also necessary because it contributes to the development of a single position in the next stages of the criminal process, applications and to solving the problems of requesting and conducting actions of criminal prosecutions.

The defender has the right in addition to that of getting acquainted with all the materials in the file and record any data in the file, make copies according to Article 68, para. (1), point 10 CPP RM and under article 293 par. (3) CPC RM also to demand the presentation of corpus delicti, and material evidence, the reproduction of audio and video records, if they were performed in the research, except the cases provided in article 110. In the cases when minors and other people suffering from mental illnesses participate in the file, such defense is inadmissible because these people cannot fully understand the meaning of the

materials presented, the defense counsel having the obligation to explain their essence<sup>11</sup>.

Once aware of the criminal prosecution materials, the applications forwarded are considered by the prosecutor immediately after their submission, and if he cannot resolve them immediately, the applications are to be resolved 'not later than 3 days from the date of receipt' under Art. 245-247 CPP RM. According to Art.247, para. (1) CPP RM the application is to be admissible if it contributes to the research under all aspects full, and objective of the circumstances of the cause, to the ensurance of the rights and legitimate interests of the parties in the process and of other people involved in the process.

In case of rejection, partial or total, of the demand of the counsel or of the accused, of the defendant, the criminal prosecution body adopts an ordinance that is brought to the attention of the people concerned, ordinance that may be appealed in the cases and in the manner prescribed by the current Code - Art.247, para. (2) CPP RM. As a guarantee of respecting the legality in the criminal proceedings, the legislature has provided for the possibility that any person dissatisfied with the acts and measures taken during the criminal prosecution to press charges against them. The complaint is addressed to the prosecutor who supervises the activity of the criminal investigation body and is submitted directly to either to him or the criminal investigation body. The prosecutor is obliged to resolve the complaint within 20 days of the receipt and immediately notify the person who made the complaint and how it was solved under Article 338 NCPP.

In the Republic of Moldavia as well, the legislature has provided for the possibility that any person dissatisfied with the legality of the actions and inactions of the criminal prosecution body and the body exercising the operative activity of investigations to press charges against them.

As such, according to art. 298, par. (1) CPP RM the counsel and the defendant, the suspect, their legal representative, the injured party,

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<sup>11</sup> Gh Bică. et al, *Drept penal, Partea generală* (Bucharest: Romania of Tomorrow Foundation, 2008), 29.

the civil party, the civilly responsible party and their representatives, as well as other people whose rights and interests have been violated can make complaints against the actions and inactions of the criminal prosecution body and of the body exercising the operative activity of investigations addressed to the prosecutor who leads the criminal prosecution under par. (2) of art.298 CPP RM.

This is the procedural right of the lawyer, which ensures the efficiency and solvency of his participation in the criminal case, which creates to the defender the possibility to fully defend the rights and legal interests of his client throughout the entire duration of the trial. The right to make complaints against the actions and decisions of the criminal prosecution body or of the prosecutor is also a form of supervision over criminal prosecution on behalf of the prosecutor's office, by ensuring its objectivity and legality.

If the prosecutor disposes the applications for admissions, he also disposes, where necessary, of the completion of the criminal prosecution, indicating the further actions to be carried out and, where appropriate, submits the file to the criminal prosecution body for enforcement, with the establishment of the enforcement deadline.

After the completion of the criminal prosecution, the supplementary criminal prosecution materials are presented to the defense counsel and the accused to take cognizance of them in the manner provided in the text of the article .293 CPP RM and whom about the respective report is written.

Before examining the case in court, the counsel must meet with his defendant, to consult him on the indictment and on other problems encountered, and then making use of the indictment, to review this document and to see whether it corresponds to the case materials.

Notwithstanding the prior knowledge of the file materials, without thoroughly studying the criminal file materials, the lawyer has no right and cannot pay his client qualified legal assistance, being forbidden to participate in the trial by article 54, par. (5) of Law no. 1260-XV on the law in the Republic of Moldavia, as amended by Law no. 215-XVI dated July 13, 2006, published in the Official Gazette no. 126-127 in the Republic of Moldavia, September 12, 2002 . Only taking cognizance and

analysing all case materials, the lawyer has the possibility to check the fullness, objectivity and implementation in all aspects of the criminal prosecution. Those defenders do not act correctly who, based on their experience, believe that they will enter the core of the file materials during judicial debates on the merits of the judicial case. The careless, superficial study of the file does not allow the defender to choose a correct line of defense, making it less effective to guarantee the rights and legal interests of the accused. The defender also proceeds incorrectly, studying only the reports of those witnesses who are indicated in the indictment because the explanations of the others may have some circumstances which, in some cases, can make a big difference. The initial materials, the expertises must be equally investigated, as well as the depositions of the injured parties, the witnesses, other defendants, etc.

The defender, making acquaintance with the criminal case, must study all the materials which refer directly or indirectly to his client not overlooking the materials that relate to the other defendants, especially when their interests are different. Besides this, the defender will fix any detected breaches of the procedural and material rules, of the rights and legal interests of the accused, the accumulated evidence also being subjected to analysis if they were obtained through legal manner and procedure.

In accordance with Article 68, para. (1), point 10) CPP RM the counsel has the right to read the materials of the criminal case since the completion of the criminal prosecution and record any data in the file, make copies, and under Article 80, para. (1), item 8) CPP RM representative of the victim, of the injured party, of the civil party, and of the civilly responsible party is entitled to take cognizance of the materials of the criminal case since the completion of criminal prosecution, including in the case of the dismissal of the trial and record any data from the file on the interests of the represented person.

From these provisions we can conclude that the defender lawyer, taking cognizance of the materials of the file, is entitled to make copies, but this right is not regulated for the representative lawyer, who is invested with the right to make notes. The discrimination in rights of the representative in comparison with the defender in connection with the

completion of the criminal prosecution is obvious and in our vision it affects the adversarial principle, as well as the principle of equality of arms in the process, because these trial participants represent the prosecution and the defense.

The right to a fair trial involves respecting the principle of ‘equality of arms’, expressing the idea that every part of the process must have equal opportunities to present their cause and that no one should have a substantial advantage over his opponent. In the Neizmeister case (1968) the European Court held that, in accordance with the adversarial principle, each party must have the possibility to challenge the evidence of the other party under conditions that do not place it under a substantial disadvantage compared to its opponent.

This principle is used by the European Court of Human Rights in order to protect the human rights in its work while ensuring that none of the parties to the dispute do not enjoy any unfair advantage, both in criminal and in the civil process. Each party must be invested with reasonable possibilities to present their cause under the conditions that do not create disadvantages with regard to the opposition. Starting from the fact that the principle may play a role in every phase of the process, the importance of appearances and high sensitivity attributed to the administration of justice is also imposed to many subjects

The adversarial principle reflected in the decisions of the European Court assumes that each party must have the same opportunities in the resolution of the case and none must have unentitled privileges<sup>12</sup>.

In this situation, we consider it appropriate to assign by law the right to the representative of the victim, the injured party, the civil party, civilly responsible as well to make copies of the file materials.

From the survey it was established that the respondents were not of the same opinion on whether lawyers have adequate access to information. Some have reported few difficulties or that they have not met privileges difficulties at all, others have said that the right of the lawyers to information is not respected in practice. In general, there are

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<sup>12</sup> N., Volonciu, *Tratat de procedură penală. Partea generală. Volume I* (Bucharest: C.H.Beck, 1996), .34.

no restrictions to review cases and lawyers are allowed to take notes and make copies of the files. However, in practice, lawyers generally do not make copies of the entire file, because of the lack of photocopiers, in the judicial process only the prosecutor and the judge have the entire copies of the files. The interviewees reported that it is difficult to obtain copies of the documents that were not included in the case file. The responsible people do not always respond to requests for documents, and the lack of photocopiers can prevent the answer of responsible people to such requests. Although a creative approach may be necessary, most surveyed lawyers were able to get the information they needed<sup>13</sup>.

According to art. 94, para. (1) CPP RM in the criminal case cannot be admitted as evidence and, therefore, are excluded from the file and cannot be made the basis of the sentence the data which were obtained by the violation of the rights of defense of the suspect, defendants, victim, witness, namely by breaking the data which were obtained under the conditions stipulated in points 1) - 10) of the article.

In section 2 of the decision of the plenum of the Supreme Court of Justice of the Republic of Moldavia, No. 30 of November 1998 *Regarding the application of laws to ensure the rights of the defense in the criminal proceedings of the suspect, accused and defendant*, it is stated that his conviction cannot be based on evidence obtained through illegal methods. Putting a sentence based on evidence obtained through illegal methods directly affects the right to a fair trial provided by art. 6 from the European Convention on Human Rights.

These essential violations lead to violation of constitutional rights and liberties of the accused and the provisions of the criminal procedure law by the deprivation of the defendant of these rights and by the restriction of the guaranteed rights, which influenced the accuracy of the obtained information.

Given these important regulations for the purposes for the good development of the criminal proceedings, the lawyer in these cases must submit a request regarding the exclusion of of the evidence administered

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<sup>13</sup> *Legal Profession Reform Index for Moldova..* American Bar Association, April 2004, p 18

by the prosecution through illegal methods, namely showing which criminal procedural rules were violated.

Based on the provisions of art. 290 CPP RM the prosecutor, if he finds evidence obtained contrary to the law and the violation of the rights of the suspect, by reasoned order, approved by the superior prosecutor, he excludes such evidence from the file materiales. The evidence excluded from the file are kept under art. 211, para (2) CPP RM, i.e. in the archive of the body he compiled.

All applications, complaints and requests submitted after referring the case to trial are settled by the court hearing the case. (Art. 297, para. (4) CPP RM) . In judicial practice of the Republic of Moldavie it did not reach to the uniform interpretation of the provisions of Art. 297, para. (4) CPP RM. For example, *from the materials of the case , it results that the complaints of the lawyer was examined by the investigating judge on March 1, 2006 , being given in this regard the respective conclusion, which dates from the same day. The criminal case of R. G. was sent for trial on the merits before this date - 27 February 2006 and on 28 February 2006 it was assigned to the judge D.G. In such circumstances, the judge was not entitled to consider the filed complaint because , as required by paragraph 4 Art.297 CPP RM, all applications, complaints and requests submitted after referring the case to trial are settled by the court hearing the case.*

*For these reasons, the appeal for annulment filed by Deputy Attorney General is to be admitted, and the conclusion of the investigating judge from Bălți District Court on March 1, 2006 , through which the complaint of lawyer V.M. in the interests of the accused R.G.was admitted as illegal, is to be scrapped<sup>14</sup>.*

In this decision of the Criminal Division of the Supreme Court it is explained that the court takes substantive examination of the applications, complaints and submissions made before, but pending before sending the criminal case in court.

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<sup>14</sup> *The decision of the Criminal Division of the Supreme Court of Justice of Republic of Moldavie no.1re - 206 of 26 September 2006//Avocatul poporului, no.1, special edition, 2007, 12*

In another similar case tried by the Criminal Division of the Supreme Court of Justice it was found ‘that the complaint entered in Bălți court on March 29, 2005, distributed to the investigating judge and called for examination on April 8, 2004. While the criminal case was received in judgment on April 8, 2005 and set for review on 24 May 2005. Thus, the court of appeal considers that the resolution of this complaint held solely for the competency of the investigating judge’<sup>15</sup>.

In both cases, the court of appeal, as shown, has adopted different decisions, even diametrically opposed.

The third vision, found in the specialized literature, is that regardless of the time when the complaint was filed, until sending the criminal prosecution case to trial or after, once the complaint was made to the investigating judge, in accordance with the provisions of art. 313 CPP RM and it refers to the sphere of the judicial review during the criminal prosecution or it is against the illegal acts of the criminal prosecution authorities - the prosecutor or authorities carrying out the special investigation activity, examining it represents a judicial procedure governed by the quoted article and is settled exclusively by the investigating judge, the only court empowered with the right to judicial control at the criminal prosecution phase within 10 days with the participation of the prosecutor and with the quotation of the person who filed the complaint<sup>16</sup>.

## CONCLUSION

În conclusion, provide legal assistance shall be made by a lawyer in the conditions of Romanian laws: Law no. 51/1995 and Profession statute of lawyer and Moldovan laws: Law no. 1260-XV and Profession statute of lawyer and includes: handing legal acts and extrajudicial taking of statements of accused and defendants, the hearing of witnesses and experts , for expert searches, on-site investigations, renditions of material

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<sup>15</sup> *The decision of the Criminal Division of the Supreme Court of Justice of Republic of Moldavia no.1re - 88 of 30 June 2005//Avocatul poporului, no.1, special edition, 13*

<sup>16</sup> Gh. Malic , *Practica judiciară. Avocatul poporului, no.1(special edition, 2007), 9 - 10.*

evidence well as other procedural activities related to the production of evidence. The active participation of the lawyer to criminal prosecution completion, during the presentation of the criminal prosecution material allows giving adequate appreciation to the circumstances of the criminal cause, and prevents limitation and subjectivity, determining fairness, impartiality of the criminal prosecution investigator, the prosecutor, the investigating judge, excluding the accusatory tendency in their activity, ensuring fair solutions to start criminal proceedings.

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