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DIE WERTEORDNUNG UND DER GRUNDRECHTSSCHUTZ DER NEUEN ORDNUNG DES INTEGRIERTEN EUROPA

Prof. dr. dr. h.c.mult. Herbert SCHAMBECK
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Zusammenfassung

Die neue Ordnung des integrierten Europa ist nach dem Zweiten Weltkrieg zur Sicherung des Friedens beginnend zwischen Deutschland, Frankreich, den Beneluxstaaten und Italien in wirtschaftlicher Kooperation sowie in Konfrontation mit dem Kommunismus in Mittel- und Osteuropa entstanden. Diesem heutigen Staatenverbund der EU gehören 27 Mitgliedsländer mit 490 Millionen Einwohner an.

Die EU ist in ihrer Entwicklung sowohl eine Wirtschafts- und Währungsgemeinschaft als auch eine Rechts- und Wertegemeinschaft geworden. Letzteres zeigt sich vor allem in den Werten, auf die sich die Union gründet, nämlich die Achtung der Menschenwürde, Freiheit, Demokratie, Gleichheit, Rechtsstaatlichkeit, die Menschenrechte sowie der Minderheitenschutz.

Die Menschenrechte haben der EU einen besonderen Schutz durch die Charta der Grundrechte erfahren, die neben den Verträgen eigenständig und gleichrangig besteht. Diese Grundrechtecharta der EU beinhaltet liberale, soziale, demokratische und justizielle Rechte.

Durch den Vertrag von Lissabon ist dazu insofern eine Erweiterung des Rechtsschutzes erfolgt, da die EU der Europäischen Menschenrechtskonvention beitreten wird; dem Einzelnen ist daher ein dreifacher Weg zu Höchstgerichten für den Grundrechtsschutz gegeben, nämlich zum staatlichen Verfassungsgerichtshof, zum Europäischen Gerichtshof zum Schutz der Menschenrechte und Grundfreiheiten in Straßburg sowie zum Europäischen Gerichtshof in Luxemburg.

I. Auf die Frage „Was ist Europa"? hat SALVADOR DE MADARIAGA schon vor Jahrzehnten erklärt: „Was wollen wir eigentlich? Eine wirtschaftliche Einheit? Eine Verteidigungsgemeinschaft? Solange uns nicht das Bewusstsein eines höheren Zweckes erfüllt, werden diese beiden Ziele unerreichbar bleiben, ja sie lohnen nicht einmal eine ernste Anstrengung".[1]

Über alles Materielle und Institutionelle hinaus war auch ROBERT SCHUMAN das Ideelle für den neuen Weg Europas der Integration so wichtig: „Man kann nicht oft genug wiederholen: die Einheit Europas wird nicht einzig und

[1] Salvador de Madariago, Weltpolitisches Kaleidoskop, Reden und Aufsätze, Zürich-Stuttgart 1965.

nicht hauptsächlich durch europäische Institutionen zustande kommen; ihre Beschaffung wird der geistigen Wegbereitung folgen".[2]

Die politische Landschaft Europas ist vielfältig in ihrer organisierten Repräsentation und dynamisch in ihrer wechselseitigen Entwicklung. Das gilt nicht allein für die verschiedenen europäischen Organisationen in ihrem Nebeneinander, sondern auch innerhalb der wohl einflussreichsten Form europäischer Integration, der Europäischen Union.

In diesem Zusammenhang möchte ich an die 12 von 15 EU-Staaten erinnern, welche mit 1. Jänner 2002 den Euro eingeführt haben und eine Währungsunion bilden. Weiters an die 13 Staaten, die sich in einem zweiten EU-Kreis nach dem Schengener-Abkommen in innerpolitischen, polizeilichen und fremdenpolizeilichen Angelegenheiten zusammengeschlossen haben. Daneben gibt es noch den sicherheits- und verteidigungspolitischen Kreis der Westeuropäischen Union (WEU) mit 14 Staaten der sich wieder in jene Staatsgruppen spaltet, die als EU-Staaten auch der NATO angehören oder, wie Österreich, nicht.

Betrachtet man neben diesen politischen Strukturen des organisierten Europa auch seine geographische Form, dann ist es eine nach Osten offene große Halbinsel, welche Lemberg, was vielfach übersehen wird, als Mittelpunkt hat, und mit einem europäisch orientierten Teil Asiens den Kontinent weitest prägt. Europa ist aber kein eigener von Asien abgehobener Erdteil. Es reicht vom Atlantik bis zum Ural, lässt sich nach dem Westen durch Küsten abgrenzen, ist aber offen durch die Weite Russlands, das an Alaska grenzt. Wenn man trotzdem von Europa spricht, dann, weil man auf ein bestimmtes Maß an Gemeinsamkeit Bezug nimmt. Sie zeigt sich in bestimmten Kräften und Entwicklungen, die für Europa prägend waren. Das war früher lange Zeit ein imperialer Universalismus, wie z.B. das Imperium Romanum und später das Heilige Römische Reich deutscher Nation, dann der humanistische Individualismus, welcher den verschiedenen Gebieten der Wissenschaft zugutegekommen ist, und vor allem am nachhaltigsten bis heute, die Stellung des Menschen mit seinen Grundrechten erklärend und sichernd, das Christentum.

Dieses Europa geistiger Gemeinsamkeit hat durch jahrhundertelang eine Art Vorbildfunktion in der Welt gehabt, die es aber vor allem durch seinen Kolonialismus und in Folge der beiden Weltkriege sowie der damit schon eingangs genannten Verluste an Menschen eingebüßt hat.

II. Aus dieser Geschichte muss gelernt werden, und das, was auf dem Kontinent Europa möglich ist, nicht bloß in einer wirtschaftlichen Soll- und Habenrechnung oder in einem politischen Machtkartell gesehen und begründet

[2] Robert Schuman, Für Europa, Vorwort von Konrad Adenauer, Hamburg-Genf-Paris 1963, S. 57.

werden, sondern vielmehr in einer Grenzen überschreitenden zueinander führenden Geistigkeit. PAPST JOHANNES PAUL II. hat schon vor zwanzig Jahren in seiner 1982 in Santiago de Compostela gehaltenen Rede aufgerufen: „Altes Europa, finde wieder zu dir selbst"[3] Es geht ihm damit nicht um ein politisches Sonderprogramm, auch nicht um eine katholische Sondermoral, sondern um eine menschliche Ordnung im privaten und öffentliche Leben, die in Werten des Christentums eine den Bereich von Kirche und Religion übergreifende Wegweisung erhält.

Zu diesen Werten, die für die Europäisierung des Kontinents Europas bestimmend und prägend sein können, zählt natürlich auch mit das Selbstbestimmungsrecht der Völker und der Minderheitenschutz, nämlich, es sei betont, einschließlich des Schutzes der ethischen und religiösen Minderheiten. Das verlangt den Respekt gegenüber der Religion und Nation, denen der einzelne Mensch angehört, besonders wenn diese Menschen in einem Staat nicht die Mehrheit bildet. Solche Probleme werden dann nicht durch das Verbot und Verfolgen von religiösen Glaubenshaltungen, etwa durch Ausweisung oder Einreiseverbot von Priestern oder durch das Verbot der Kultur bzw. des Gebrauchs der Muttersprache einer ethnischen Minderheit gelöst!

Leider gibt es auch in der neuen Ordnung Europas einen großen Unterschied zwischen proklamierten und praktizierten Werten, was auf Kosten der Glaubwürdigkeit der Politik geht.

Viele Ideologien und politische Herrschaftssysteme, wie Kommunismus und Nationalsozialismus, haben den Anschlag auf die Freiheit und Würde des Menschen versucht; dies ist misslungen.

Die Menschen, manuell und intellektuell Tätige, ältere und jüngere Menschen, Männer und Frauen, sind auf die Straßen und Plätze gegangen und haben sich für eine humane Ordnung eingesetzt, und das nicht auf Grund des positiven Rechtes ihrer Staaten, sondern gegen dieses. Bewusst oder unbewusst, deutlich oder nicht haben sie sich für ein natürliches Recht eingesetzt, mit dem sie geboren wurden. Ausgehend von Polen, der Heimat PAPST JOHANNES PAUL II., ergriff diese Bewegung die bisher kommunistischen Staaten Mittel- und Osteuropas und es kam, am deutlichsten durch den Fall der Berliner Mauer, zum Ende der Teilung Europas. In bemerkenswerter Weise kam es bei Wahrung der Verfassungs- und Rechtskontinuität zu einem Wechsel der politischen Systeme.[4] Anstelle der früheren Konformität des Kommunismus trat nun die Pluralität der freien Demokratien; sie ist keine Gefahr, sondern eine Chance, nämlich in der

[3] Papst Johannes Paul II., „Altes Europa, finde wieder zu dir selbst", L'Osservatore Romano, Wochenausgabe in deutscher Sprache vom 28. November 1982, S. 15.

[4] Siehe näher Herbert Schambeck, Entwicklungstendenzen der demokratischen Verfassungsstaatlichkeit in Mittel- und Osteuropa, in: Politische Kultur, Demokratie und christliche Werte in Europa, Situationen – Herausforderungen – Orientierungen, Rom 2001, S. 21 ff.

Vielfalt die Möglichkeit und in der Möglichkeit die Gelegenheit, auf Grund der wieder gewonnenen Freiheit in Eigenverantwortung zur Persönlichkeitsfindung des Menschen und durch Eigenleistung der Menschen mit jeweils subsidiärer Hilfe von Staat und Gesellschaft, zu kulturellem Fortschritt, wirtschaftlichem Wachstum und sozialer Sicherheit zu gelangen. Dies setzt einen Mindestkonsens an gemeinsamen Werten in Erkenntnis, Beachtung und Befolgung voraus.

III. Es wäre aber zu kurz und falsch gedacht, die neue Ordnung Europas nur als eine juristische Konstruktion mit verschiedenen politisch strategischen Überlegungen anzusehen. Das gilt für alle Formen der Organisationen in der Gemeinschaft europäischer Staaten, insbesondere aber für die Europäische Union. Gerade auch als politische Union ist sie nicht bloß eine Gemeinschaft zu wirtschafts-, währungs-, außen- und sicherheitspolitischen Zwecken. So heißt es auch schon im Art. 1 des Vertrages über die Europäischen Union: „Aufgabe der Union ist es, die Beziehungen zwischen den Mitgliedstaaten sowie zwischen ihren Völkern kohärent und solidarisch zu gestalten". Dies ist aber nur möglich im Bewusstsein der Gemeinsamkeit, die auf Dauer nur dann bestehen kann, wenn sie auch geistig begründet ist. Dies verlangt aber auch das „Wiedererwachen des moralischen Gewissens"[5] und nicht, um die Warnung von JOSEF KARDINAL RATZINGER zu zitieren „das zunehmende Absinken der europäischen Idee in eine bloße ökonomische Arithmetik, die zwar Europas wirtschaftliche Macht in der Welt immer weiter steigerte, aber die guten ethischen Ziele immer mehr auf Besitzvermehrung reduzierte und in die eine Logik des Marktes einebnete".[6]

Ersten Repräsentanten des integrierten Europas war und ist dieses Erfordernis auch bewusst. So sprach 1989 JAQUES DELORS von der Notwendigkeit, „das Gewissen Europas zu formen".[7]

IV. Dieses Europa bedarf einer Brüderlichkeit, die sich im Geist, in Wort und Tat äußert. Ich meine vor allem eine Brüderlichkeit, die ökumenisch und ökonomisch zugleich ist. Ökumenisch im Bewusstsein, dass JESUS CHRISTUS für alle Menschen gestorben ist, die zur Heilsfindung berufen sind, und er sie erlösen will. Diese Brüderlichkeit sollte sich nicht allein in Worten, sondern auch

[5] Siehe näher Europas Muttersprache ist das Christentum, Ansprache Papst Johannes Paul II. zum Abschluss des vorsynodalen Symposiums europäischer Wissenschaftler im Vatikan, L'Osservatore Romano, Wochenausgabe in deutscher Sprache vom 15. November 1991, Beilage XLIII, Dokumente.

[6] Josef Kardinal Ratzinger, Wendezeit für Europa? Diagnosen und Prognosen zur Lage von Kirche und Welt, Freiburg 1991, S. 84.

[7] Jaques Delors, Reconsillier l'ideal et la necessité, Rede vor dem Collége d'Europe in Brügge, am 17. Oktober 1989, S. 1 ; beachte auch die Ansprache von Vaclav Havel, gehalten am Trinity College in Dublin am 28. Juni 1996.

in Taten zeigen und dem Einzelnen nicht nur die Freiheit eröffnen, sondern auch die kulturellen, politischen, sozialen und wirtschaftlichen Voraussetzungen geboten werden, um diese Freiheit auch selbst zu nutzen. Dies bedarf zu der ökumenischen auch eine ökonomische Brüderlichkeit, welche die Gesellschaft im Staat auch als Solidargemeinschaft erfahren lässt. Eine partnerschaftliche Ordnung von jüngeren und älteren, gesunden und behinderten Menschen, sowie von engagierten und einsamen Menschen in lauter Welt, besonders aber von Arbeitgebern und Arbeitnehmern, von manuell und intellektuell Tätigen, könnte dies ermöglichen.

Österreich hat diese Möglichkeit der friedlichen Interessenvertretung und des gemeinwohlgerechten Interessenausgleichs, das Beispiel der freiwilligen Partnerschaft von Arbeitgeber- und Arbeitnehmervertretung in der Wirtschafts- und Sozialpolitik gegeben. Diese ist in der heutigen Demokratie so wichtig.

Der demokratische Verfassungsstaat verlangt daher auch mit den klassischen, nämlich liberalen und demokratischen Grundrechten in entsprechender Form als Sozialgestaltungsempfehlung die Anerkennung von Sozialrechten, die auf die Existenzsicherung des Menschen gerichtet sind.

Als Staatsrechtslehrer möchte ich in diesem Zusammenhang auf die Möglichkeiten des sozialen Rechtsstaates und der sozialen Marktwirtschaft hinweisen. Dabei dürfen wir nicht übersehen, dass das notwendig Institutionelle das Ideelle nicht ersetzen, wohl aber ergänzen kann.

Zu diesem organisatorisch Grundsätzlichen meine ich insbesondere für das integrierte Europa das, was in den Art. 2 ff. des EU-Vertrages mit den Grundlagen der Union, der nationalen Identität, den Menschenrechten und der Ausstattung der Mittel zur Erreichung der Ziele angeführt ist. Danach beruht die Union auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedstaaten gemeinsam.

Die Union achtet die Grundrechte, wie sie in der am 4. November 1950 in Rom unterzeichneten Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten als allgemeine Grundsätze des Gemeinschaftsrechts ergeben.

Die Union achtet die nationale Identität ihrer Mitgliedstaaten.

Besonders möchte ich auch auf die Forderung nach den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten verweisen; sie beinhalten vor allem ein demokratisches Wahlrecht, eine Verfassungs- und Gesetzesbindung des Staatshandelns, die Gewaltenteilung, die Unabhängigkeit der Gerichte, die Justizmächtigkeit der Verwaltung, die Verfassungs- und Verwaltungsgerichtsbarkeit, die Finanzkontrolle und die Amtshaftung sowie vor

allem die Grundrechte einschließlich des ethnischen und religiösen Minderheitenschutzes.

Diese Hinweise auf das in den Staaten der neuen Ordnung Europas Notwendige und Mögliche verdeutlichen die Freiheit als Pflicht. Die uns eröffnete Freiheit ist ja keine im Sinne der Zügellosigkeit, d.h. keine Freiheit von, sondern vielmehr eine Freiheit zu etwas, nämlich mittels einer Gewissensentscheidung Werte der Menschlichkeit zu erkennen und im privaten und öffentlichen Leben zu verwirklichen, damit Friede möglich ist.

V. Zu dem Positiven dieses letzten Jahrhunderts zählt nämlich die Sehnsucht nach Frieden und nach der Wahrung der Menschenrechte im Allgemeinen sowie das Bemühen um Integration in Europa im Besonderen. Diese Integration erfolgte nach dem 2. Weltkrieg zunächst in dem Bemühen um ein befriedigendes Miteinander von Deutschland und Frankreich sowie der Beneluxstaaten und später in der Konfrontation des freien Westeuropa mit dem kommunistischen Mittel- und Osteuropa.

Der Weg zu dieser neuen Ordnung des integrierten Europa[8] erfolgte in Etappen, nämlich die Gründung 1951 der Gemeinschaft für Kohle und Stahl durch Deutschland, Frankreich, Italien, Luxemburg und den Niederlanden[9], 1957 der Europäischen Wirtschaftsgemeinschaft (EWG)[10] und der Europäischen Atomgemeinschaft (EURATOM)[11]; 1965 wurden diese drei Gemeinschaften im Fusionsvertrag vereint[12].

1987 entwickelte die EG unter dem Kommissionspräsidenten JAQUES DELORS mit der Einheitlichen Europäische Akte[13] den Plan eines EG-Binnenmarktes, der bis 1993 realisiert wurde.[14] Dieser Wirtschaftsgemeinschaft wurde 1992 durch den Vertrag von Maastricht[15] der Weg zu einer politischen Union eröffnet und der Euro als gemeinsame Währung in Aussicht genommen. Der wirtschaftlichen Kooperation folgte die politische Integration. Immer mehr entwickelte sich die EU zu einer Wirtschafts- und Währungsgemeinschaft sowie zu

[8] Siehe Peter Fischer, Heribert Franz Köck, Margit Karollus, Europarecht, Wien 2002, S. 16 ff., und Rudolf Streinz, Christoph Ohler, Christoph Herrmann, Die neue Verfassung für Europa, München 2005.
[9] Auch Montanunion genannt. Der Text des Vertrages zur Gründung der EGKS in: (deutsches) BGBl. 1952 II, S. 448 ff. (nicht im Amtsblatt veröffentlicht).
[10] Text in: (deutsches) BGBl. 1957 II, S. 766 ff. (Nur später konsolidierte Versionen auch im Amtsblatt veröffentlicht).
[11] Text in: (deutsches) BGBl. 1957 II, S. 1018 ff.
[12] ABl.Nr. 152 vom 13. Juli 1967, S. 1 ff.
[13] ABl.L169 vom 29.7.1987, S. 1 ff.
[14] Amtsblatt Nr. L 169 vom 29. Juli 1987, S. 1 ff.
[15] ABl.C191 vom 29.7.1992, S. 1 ff.

einer Rechts- und Wertegemeinschaft[16] in einem Staatenverbund von 490 Millionen Einwohnern der 27 Mitgliedsländer; mit dem Beitritt Kroatiens am 1. Juli 2013 nähert sie sich der 500 Millionen-Grenze. als Für diesen Staatenverbund gilt das 1950 abgegebene Bekenntnis von JEAN MONNET[17]: „Wir schließen keine Staaten zusammen, wir vereinigen Menschen".

Diesen Menschen, das sei hinzugefügt, stehen Grundrechte[18] zu. Grundrechte sind Ausdruck des Strebens des Menschen nach Rechtssicherheit, Freiheit und Gerechtigkeit. Grundrechte sind subjektive Schutzrechte, welche dem Einzelnen, sei es als physische oder juristische Person, gegenüber dem Staat oder in dem Staat zustehen. Erstmals sind die Grundrechte im Rahmen der Europäischen Union durch die Charta der Grundrechte der Europäischen Union[19] kodifiziert. Mit der Charta sind die EU-Grundrechte erstmals umfassend schriftlich und in einer verständlichen Form niedergelegt. Sie orientiert sich an der Europäischen Menschenrechtskonvention 1950, an der Sozialcharta des Europarates 1961 und der Union[20] sowie der Rechtsprechung des Gerichtshofs der Europäischen Union und des Europäischen Gerichtshofes für Menschenrechte. Die Charta wurde ursprünglich vom ersten europäischen Konvent unter dem Vorsitz von ROMAN HERZOG[21] erarbeitet und u.a. vom Europäischen Parlament und vom Rat der Europäischen Union gebilligt. Rechtskraft erlangte die zur Eröffnung der Regierungskonferenz von Nizza am 7. Dezember 2000 feierlich proklamierte Grundrechtecharta nach dem Scheitern des Europäischen Verfassungsvertrages[22] jedoch erst am 1. Dezember 2009 gemeinsam mit dem Inkrafttreten des Vertrags von Lissabon[23]. Die Grundrechtecharta[24] ist nicht Teil des Unionsvertrags oder des

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[16] Näher Herbert Schambeck, Das integrierte Europa auch als Wertegemeinschaft „Jean Monnet" European Module „History oft he European idea, ccivilization and construction, Pitesti 2008, S. 20 ff.

[17] Jean Monnet, Erinnerungen eines Europäers, Baden-Baden 1988.

[18] Dazu Herbert Schambeck, Die Grundrechte im demokratischen Verfassungsstaat, in: Ordnung im sozialen Wandel, Festschrift für Johannes Messner zum 85. Geburtstag, hrsg. von A. Klose, H. Schambeck, R. Weiler, V. Zsifkovists, Berlin 1976, S. 445 ff.

[19] ABl.2007 C 303/1.

[20] Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer von 1989; Text in: KOM (89) 248 endg.

[21] Dazu Roman Herzog, Jahre der Politik. Die Erinnerungen, München 2007, S. 295 ff.

[22] Siehe Herbert Schambeck, Über die Entwicklung des sich integrierenden Europa zum EU-Verfassungsvertrag und zum Reformvertrag von Lissabon, European Unions History Culture and Citizenship, Current problems of European Integration, April 17 – 18th, 2009, Pitesti 2009, S. 13 ff.; derselbe, Der Reformvertrag von Lissabon und die europäische Integration, European Unions History, Culture and Citizenship, May 13 – 14th, 2011, Pitesti 2011, S. 7 ff.

[23] ABl-C290 vom 30.11.2009; Christian Calliess, Die neue EU nach dem Vertrag von Lissabon, Tübingen 2010; Herbert Schambeck, Die Verfassung der Staaten und die neue

Vertrags über die Arbeitsweise der Europäischen Union, sondern besteht neben diesen Verträgen eigenständig und gleichrangig! (Art. 6 EUV).

VI. Die Charta enthält die auf Ebene der Union geltenden Grundrechte, die bisher nur als allgemeiner Verweis auf die Europäische Menschenrechtskonvention und auf die gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten der Europäischen Union im Vertrag genannt wurden (Art. 6 Abs. 2 des EU-Vertrages). Damit sollen die Grundrechte für den Einzelnen transparenter werden. Zugleich sollen Identität und Legitimität der Europäischen Union gestärkt werden. In sechs Titeln (Würde des Menschen, Freiheit, Gleichheit, Solidarität, Bürgerrechte und justizielle Rechte) fasst die Charta die allgemeinen Menschen- und Bürgerrechte und die wirtschaftlichen und sozialen Rechte in einem Dokument zusammen. Ein weiterer Titel regelt die sogenannten horizontalen Fragen; er enthält die Regeln, die querschnittartig für alle Grundrechte gelten (Adressaten der Grundrechte, Grundrechtsschranken, Verhältnis zu anderen Grundrechtsgewährleistungen, insbesondere zur Europäischen Menschenrechtskonvention, Missbrauchsverbot).

In diesen Grundrechten der EU drücken sich die Grundrechte des abendländischen Rechtsdenkens[25] in ihrer Tradition sowie in ihrem Beitrag zur demokratischen Verfassungsstaatlichkeit mit dem System der sozialen Marktwirtschaft deutlich aus. Wie sich deutlich aus Art. 6 des Vertrages über die Europäische Union ergibt, gibt es drei Grundrechtsquellen für die EU: Grundrechte der Charta der Grundrechte der EU vom 7. Dezember 2000 in der am 12. Dezember 2007 in Straßburg angepassten Fassung, die Rechte der europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, sowie jene, die sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten der EU als allgemeine Grundsätze ergebenden Rechte.[26] Die Grundrechtecharta ist zwar nicht in die Verträge eingebaut, nach Art. 6 Abs. 1 EUV sind die Charta der Grundrechte und die Verträge rechtlich gleichrangig. Diesen Grundrechten der EU

Ordnung des sich integrierenden Europa, Disputationes Societatis Scientiarum Bohemiae 1, Praha 2011.

[24] Beachte Kölner Gemeinschaftskommentar zur europäischen Grundrechte-Charta, hrsg. von Peter Tettinger und Klaus Stern, München 2006; Heribert F. Köck, Das Verhältnis des Grundrechtsschutzes nach der europäischen Menschenrechtskonvention und nach dem Recht der europäischen Union unter besonderer Berücksichtigung des Beitritts der Letzteren zur EMRK, in: Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstages, hrsg. von Michael Sachs und Helmut Siekmann, Berlin 2012, S. 785 ff.

[25] Siehe Alfred Verdross, Abendländische Rechtsphilosophie, 2. Aufl. Wien 1963.

[26] Vgl. Art. 6, Abs.3 Unionsvertrag: „Die Grundrechte, wie sie in der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten ergeben, sind als allgemeine Grundsätze Teil des Unionsrechts".

wird eine aussagekräftige Präambel vorangestellt, nach der sich die Union „in dem Bewusstsein ihres geistig-religiösen und sittlichen Erbes … auf die unteilbaren und universellen Werte der Würde des Menschen, der Freiheit, der Gleichheit und der Solidarität" gründet. „Sie beruht auf den Grundsätzen der Demokratie und der Rechtsstaatlichkeit. Sie stellt den Menschen in den Mittelpunkt ihres Handelns, indem sie die Unionsbürgerschaft und eine Raum der Freiheit, der Sicherheit und des Rechtes begründet."

Geradezu bekenntnishaft beginnt der in den sechs Titeln erfasste Katalog der EU-Grundrechte mit der Achtung der „Würde des Menschen" im Art. 1 des Titels I: „Die Würde des Menschen ist unantastbar. Sie ist zu achten und zu schützen". Die Erläuterungen des Präsidiums des Grundrechtskonvents erklären ausdrücklich „dass die Menschenwürde das eigentliche Fundament der Grundrechte sei und auch ein Grundrecht an sich".[27] Diese Erklärung der unantastbaren sowie zu achtenden und zu schützenden Würde des Menschen (Art. I GRC) wird in diesem Titel I verbunden mit dem Recht auf Leben, welches das Verbot der Todesstrafe und der Hinrichtung mit einschließt (Art. 2 GRC), dem Recht auf körperliche und geistige Unversehrtheit einschließlich des Verbots eugenischer Praktiken und des reproduktiven Klonens von Menschen (Art. 3 GRC), dem Verbot der Folter und unmenschlicher oder erniedrigender Strafen oder Behandlung (Art. 4 GRC) sowie dem Verbot der Sklaverei, der Zwangsarbeit und des Menschenhandels (Art. 5 GRC).

VII. Die Reihe der spezifischen Grundrechte wird mit den liberalen Rechten in Titel II „Freiheiten" begonnen, nämlich dem Recht auf Freiheit und Sicherheit (Art. 6 GRC), auf Achtung des Privat- und Familienlebens (Art. 7 GRC), auf Schutz personenbezogener Daten (Art. 8 GRC), das Recht, eine Ehe einzugehen und eine Familie zu gründen (Art. 9 GRC), auf Gedanken, Gewissensgründen (Art. 10 GRC), auf Meinungs- und Informationsfreiheit (Art. 11 GRC), auf Versammlungs- und Vereinsfreiheit, ausdrücklich bezogen auch auf die politischen Parteien (Art. 12 GRC), auf die Freiheit der Kunst und der Wissenschaft (Art. 13 GRC), auf Bildung (Art. 14 GRC), auf Berufsfreiheit und das Recht zu arbeiten (Art. 15 GRC), auf unternehmerische Freiheit (Art. 16 GRC), auf Eigentum einschließlich der Möglichkeit der Enteignung zum Wohl der Allgemeinheit unter gesetzlichen Bedingungen (Art. 17 GRC), auf Asyl (Art. 18 GRC) und Schutz bei Abschiebung, Ausweisung und Auslieferung mit Verbot der Kollektivausweisung (Art. 19 GRC). Diesen liberalen Grundrechten, die auch einige Ansätze zu sozialen Grundrechten aus der Sicht der Arbeitgeber und Arbeitnehmer (Art. 15, 16 und 17 GRC) beinhalten, folgen im Titel III

[27] Erläuterungen des Präsidiums des Grundrechtskonvents vom 20.9.2000, Charte 4471/00, Convent 48,3; Erläuterungen zur Charta der Grundrechte, ABl. 2007, C303, 17.

Gleichheitsgrundrechte, nämlich die Gebote der Gleichheit vor dem Gesetz (Art. 20 GRC), der Nichtdiskriminierung (Art. 21 GRC), der Vielfalt der Kulturen, Religionen und Sprachen (Art. 22 GRC), der Gleichheit von Frauen und Männern (Art. 23 GRC), der Anerkennung der Rechte älterer Menschen (Art. 25 GRC) und der Integration von Menschen mit Behinderung (Art. 26 GRC).

Den sozialen Grundrechten wird nach den erwähnten Ansätzen bei den liberalen Rechten (Art. 15, 16, 17 GRC) im Titel II ein eigener Katalog im Titel IV „Solidarität" gewidmet. Diese beziehen sich auf das Recht auf Unterrichtung und Anhörung der Arbeitnehmerinnen und Arbeitnehmer im Unternehmen (Art. 27 GRC), auf Kollektivverhandlungen (Art. 28 GRC), auf Zugang zu einem Arbeitsvermittlungsdienst (Art. 29 GRC), Schutz bei ungerechtfertigter Entlassung (Art. 30 GRC), Anspruch auf gerechte und angemessene Arbeitsbedingungen (Art. 30 GRC), auf das Verbot der Kinderarbeit und den Schutz der Jugendlichen am Arbeitsplatz (Art. 32 GRC) sowie auf den Schutz des Familien- und Berufslebens (Art. 33 GRC), auf soziale Sicherheit und soziale Unterstützung (Art. 34 GRC), Gesundheitsschutz (Art. 35 GRC), auf Zugang zu Dienstleistungen von allgemeinem wirtschaftlichem Interesse (Art. 36 GRC) sowie auf den Umwelt- (Art. 37 GRC) und Verbraucherschutz (Art. 38 GRC). Dem Miteinander von Arbeitgebern und Arbeitnehmern im Titel IV Solidarität im Sozial- und Wirtschaftsleben folgen unter Titel V für das politische Leben auf Gemeinde-, Staats- und Europaebene die „Bürgerrechte", nämlich das aktive und passive Wahlrecht bei den Wahlen zum Europäischen Parlament (Art. 39 GRC), bei den Kommunalwahlen (Art. 40 GRC), das Recht auf eine gute Verwaltung (Art. 41 GRC), auf Zugang zu Dokumenten (Art. 42 GRC), auf Befassung eines europäischen Bürgerbeauftragten (Art. 43 GRC), das Recht, eine Petition an das europäische Parlament zu richten (Art. 44 GRC), auf Freizügigkeit und Aufenthaltsfreiheit (Art. 45 GRC) sowie auf diplomatischen und konsularischen Schutz (Art. 46 GRC).

Der Ankündigung der Präambel zur Charta der Grundrechte der Europäischen Union folgend, den Menschen in einen Raum der Freiheit, der Sicherheit und des Rechts zu stellen, werden, im Titel VI „justizielle Rechte" positiviert, und zwar das Recht auf einen wirksamen Rechtsbehelf und auf ein unparteiisches Gericht (Art. 47 GRC), die Unschuldsvermutung und das Recht auf Verteidigung (Art. 48 GRC), auf Beachtung der Grundsätze der Gesetzesmäßigkeit und Verhältnismäßigkeit im Zusammenhang mit Straftaten und Strafen sowie das Recht, wegen derselben Straftat nicht zweimal strafrechtlich verfolgt oder bestraft zu werden (Art. 50 GRC). Neben der Charta der Grundrechte der Europäischen Union enthält das Unionsrecht einige weitere Grundrechte, wie das Verbot der Diskriminierung aus Gründen der Staatsangehörigkeit (Art. 18 AEUV) den Grundsatz des gleichen Entgelts für Männer und Frauen bei gleicher und gleichwertiger Arbeit (Art. 157 AEUV).

Eine Erweiterung des Rechtsschutzes erfolgte durch den Vertrag von Lissabon[28], der im Art. 6 Abs. 2 EUV den Beitritt der EU zur Europäischen Menschenrechtskonvention und so die unmittelbare Bindung auch an die Grundrechte der EMRK vorsieht. Auf diese Weise ist dem Einzelnen ein dreifacher Weg zu Höchstgerichten für den Grundrechtsschutz gegeben, nämlich zum staatlichen Verfassungsgerichtshof, zum Europäischen Gerichtshof zum Schutz der Menschenrechte und Grundfreiheiten in Straßburg sowie zum Europäischen Gerichtshof in Luxemburg.[29]

VIII. Zusammenfassend kann festgestellt werden: Die Grundrechtecharta bindet zum einen die Organe der Union unter Einhaltung des Subsidiaritätsprinzips. Zum anderen bindet sie die Organe der Mitgliedstaaten, aber nur insoweit diese Unionsrecht durchführen, was Art. 51 im Titel VII „Allgemeine Bestimmungen über Auslegung und Anwendung der Charta" betont. Die EU soll damit aber nicht den Charakter eines Oberstaates erhalten, sondern vielmehr als Verbund von Staaten, was schon wertorientiert in den Präambeln des Vertrages von Lissabon und der Grundrechtecharta wegweisend steht, einen Verbund von Legalität und Humanität begründen, der dem Einzelnen als physische und als juristische Person Rechtsschutz gewährt und einen Dialog zwischen dem Einzelnen und dem Staatenverbund der EU sowie ihrer Mitgliedsländer begründet.

[28] Siehe Der Vertrag von Lissabon, hrsg. von Rolf Schwartmann, Heidelberg 2010.

[29] Vgl. Heribert Franz Köck, Das Verhältnis des Grundrechtsschutzes nach der Europäischen Menschenrechtskonvention und nach dem Recht der Europäischen Union unter besonderer Berücksichtigung des Beitritts der letzteren zur EMRK, in: Michael Sachs/Helmut Siekmann (Hrsg.), Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern zum 80. Geburtstag, Berlin 2012, 785 ff.

THE RELIGIOUS, PHILOSOPHICAL AND CULTURAL ROOTS OF THE "EUROPEAN VALUES"

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Abstract

Articles 2 and 3 TEU proclaim the basic values of the European Union. These values have to be discussed before the background of the present pluralism of society, of the state, and of its particular structure of integration, the supranational organization. By doing so, it is possible to show that the European values are either expression of, or condition for, or consequence of the common good to be recognised even in a pluralistic context.

The idea of the common good and its various aspects has a long tradition in European thinking, although not all of these aspects have been recognised at the same time. The esteem held for peace and security, for freedom, and for welfare, has only developed step by step, and modern phenomena like individualism and pluralism have strongly influenced this development. For this reason, European values have different roots in history, even if it is possible to demonstrate that they fit into one consistent system.

THE VALUES OF THE EUROPEAN UNION AND THEIR SIGNIFICANCE FOR THE UNION AND ITS MEMBER STATES

The European Union is a Union of values.[30] These values are stated in Article 2 TEU, according to which "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-

[30] Cf. HERBERT SCHAMBECK, Die neue Ordnung Europas – Weg auch zu einer Rechts- und Wertegemeinschaft, in: PEUTINGER-COLLEGIUM (ed.), *Bayerischer Monatsspiegel*, Februar 2002, pp. 18 et seqs.; IDEM, Zur Entwicklung der Europäischen Integration –Im Miteinander von Österreich und Ungarn – Ein Beitrag auch zu einer Rechts- und Wertegemeinschaft, in: ANDRÁSSY UNIVERSITÄT (ed.), *Andrássy-Abhandlungen*, Budapest 2004; IDEM, Das integrierte Europa auch als Wertegemeinschaft, in: UNIVERSITY OF PITEŞTI, FACULTY OF LAW AND ADMINISTRATIVE STUDIES (ed.), *„Jean Monnet" European Module, Die internationale Konferenz. Die Geschichte der Europäischen Union, Kultur und Bürgerschaft*, Ministry of Education, Research and Youth, , Pitesti 2008, pp. 9 et seqs.

discrimination, tolerance, justice, solidarity and equality between women and men prevail."

In Article 3 Paragraph 1 TEU, the Union's aim is stated as being "to promote peace, its values and the well-being of its peoples." Accordingly, Article 13 Paragraph 1 calls for "an institutional framework which shall aim", first and foremost, "to promote its values", which goes hand in hand with "advance[ing] its objectives, serv[ing] its interests, those of its citizens and those of the Member States, and ensur[ing] the consistency, effectiveness and continuity of its policies and actions."

In order to prevent this basis from being diluted, Art 49 TEU states that no State may become a member of the Union which does not "respect[.] the values referred to in Article 2 and is committed to promoting them".

Article 13, Paragraph 1 TEU, which states object and purpose of the Union's institutional framework, first refers to the promotion of its values, followed by advancing its objectives, serving its interests, those of its citizens and those of the Member States, and ensuring the consistency, effectiveness and continuity of its policies and actions. These values are governing not only the internal actions of the Union but also its external ones. Their importance in this this context is underlined by the fact that Article 21, Paragraph 1, Sub-Paragraph 1 TEU which forms part of the "General Provisions on the Union's External Relations" practically contains a restatement of Article 2 TEU when it says: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." And Paragraph 13, Paragraph 3 TEU provides that "[t]The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action."

Article 21, Paragraph 1, Sub-Paragraph 2, and Paragraph 2 TEU distinguish, in a certain way, two different kinds of countries. The first category is formed by those which profess the same values as the European Union. With regard to them "which share the principles referred to in the first subparagraph", "[t]he Union shall seek to develop relations and build partnerships." To the second category belong all other countries. With them, "[c]ooperation in all fields of international relation" is to be sought "in order to: (a) safeguard [the Union's] values, fundamental interests, security, independence and integrity" and "(b) consolidate and support democracy, the rule of law, human rights and the principles of international law". Article 32 TEU makes it a duty of the Member States to "ensure, through the convergence of their actions, that the Union is able to

assert its interests and values on the international scene. Member States shall show mutual solidarity."

In the context of the Common Security and Defence Policy (Articles 42 *et seqs.* TEU), "[t]he Council may", according to Article 42, Paragraph 5 TEU, "entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests."

THE "INHERITANCE OF EUROPE"

It can be no doubt that the values expressed in Article 2 TEU and repeated in Article 21, Paragraph1, Sub-Paragraph 1 TEU form the ideological core of the European Union's social, political and, consequently, legal order. They correspond to a philosophical view of man and society which fits the needs of modern religious, philosophical and political pluralism. However, they have not just been invented for, or deduced from, the present stage of society. Rather, they have been perceived, formulated, proclaimed and transformed into politics in the course of time. This is generally recognised. In Paragraph 2 of the Preamble TEU, "the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" are traced back to "the cultural, religious and humanist inheritance of Europe, from which [these values] have developed".

Culture, religion and humanism

What does this "cultural, religious and humanist inheritance of Europe" stand for? The formulation requires a preliminary remark. Culture, religion and humanism cannot be regarded three different elements of Europe's identity as characterised by its values. The three notions are interdependent and even, to a certain degree, overlapping. Thus, religion is certainly part of a person's, a group's, an ethnic entity's or a people's culture. On the other hand, religion has to take into account the cultural environment if it does not want to remain something alien to the particular society.[31]

Humanism, too, can be related to culture and religion. Humanism can be as much a derivate from religion as it can serve to regenerate religion by purifying it from inhuman theories or practices. On the other hand, religion, and the approach taken towards it or rather to freedom of religion which comprises both individual and collective religious freedom, can be the touch-stone for true humanism, because not everything that appears under the name of humanism may justly

[31] This requirement corresponds to the general rule that he who wants himself to be understood has to express himself in a manner understandable to the other because *quidquid recipitur ad modum recipientis recipitur*.

invoke that label.[32] On the other hand, true humanism can be a touch-stone for society, because a society that is not humane and tolerant does not respect the individual and violates the very values on which it has to be based if it may justly claim to be pluralistic.

It therefore seems to be adequate not to deal with these three – not elements but – aspects of the "inheritance of Europe" separately but together. This is all the more justified as the individual as well as society necessarily combines or rather integrates all these aspects, because man is not only an *ens sociale*, a social being, but also an *ens culturale*, a cultural being, and an *ens religiosum*, a religious being, at least inasmuch as it is confronted with all these matters and has to take a positive or negative stance towards them.

Of course, it is not possible here to tell the entire history of ideas which have shaped Europe and which are at the basis of its values. Rather, we have to make the presupposition that there is a sufficient common knowledge of this history and that we can take it as a starting point for our considerations.

Social pluralism, not individual relativism

If there is any particularly basic value within these basic values then it is freedom. This appears not only from an analysis of the wording of Article 2 TEU but is a direct requirement for the mutual recognition of pluralism. I can accept the different opinions of others only if I can rely on it that they will not try to impose them upon me. This does not necessarily imply relativism. Relativism is a position that denies the possibility of discerning truth. The pluralistic society is not characterised, as some might believe, by the adherence of all, or of a substantial part of all, individuals to relativism.[33] (In fact, one might argue that there does not and cannot exist a truly relativistic individual, at least not in practice, because everyone has to make his choices in coping with the problems confronting him; and he will necessarily make that choice which seems to him to be the right one for him; and the notion of what seems to be right for him already includes a value judgment. Concededly, he may not be able to give a fully reasoned explanation for his choice. But to claim that only a fully reasoned argument will exclude relativism

[32] Thus, movements which invoke humanism in their fight against religion cannot claim to be humanistic or even humane, because humanism is not necessarily opposed to religion and does not "naturally" correspond to atheism or laicism.

[33] Relativism is a position according to which there either is no absolute truth or – if there should be absolute truth – it is not discernible to man. Relativism itself appears on an absolute and in a relative form, the latter not excluding their ability to perceive certain absolute truths. Cf., *inter alia*, JACK W. MEILAND/MICHAEL KRAUSZ (eds.). *Relativism, Cognitive and Moral*, Notre Dame 1982; JOSEPH MARGOLIS/MICHAEL KRAUSZ/R. M. BURIAN (eds.), *Rationality, Relativism, and the Human Sciences*, Dordrecht-Boston 1986; MICHAEL KRAUSZ (ed)., *Relativism: A Contemporary Anthology*, New York 2010.

is the reduction of cognition to reasoning and is the expression of a rationalistic approach. But rationalism[34] is an untenable approach because it presupposes that every "reasoned" argument can be traced back to another "reasoned" argument – a position that implies a *recursus ad infinitum*) while, in fact, what is the starting point, i.e. what is at the beginning of every reasoned argument is the intuition, that is the insight into certain evident truths.[35])

Freedom, peace and security, welfare

Freedom, however, cannot be enjoyed unless certain requirements are met. The exercise of freedom has as its necessary conditions two other basic values, namely, on the one hand, peace and security, and, on the other, welfare. That security and welfare are also cornerstones of a society characterised by freedom is shown by the fact that Article 3 TEU names them together and on one level with the values listed in Article 2: "The Union's aim is to promote peace, its values and the well-being of its peoples." (That peace is mentioned even before the "values" of Article 2 – and therefore even before freedom – reflects, intentionally or unintentionally, the scale of appreciation applied by human beings to the three just-mentioned goods: The first aspiration of man is to survive, the second one to live in freedom and the third one to have sufficient access to the goods of this world in order to be able to realise his freedom and thereby unfolding one's life according to one's own conception.)

1. Peace and security

Even in ancient times, peace was considered a felicitous state of affairs and a gift of the gods.[36] But then it was not considered a legal or moral duty. Rather,

[34] Rationalism, in its absolute form, is a position which holds that treason is the unique path to knowledge. But there also exists rationalism in a relative form, according to which reason has precedence over other ways of acquiring knowledge. Cf. ROBERT AUDI, Relativisms, in: *The Cambridge Dictionary of Philosophy*, 2nd ed. Cambridge, UK, 1999, p. 771.

[35] Evidence in its philosophical meaning, as used here, means an immediate or direct insight the truth of which cannot be questioned because it could only be questioned by arguments based on reason, but the very material reason has to work with is furnished by evidence. Evidence is intuitive and no discursive. Cf. W. HALBFASS/K. HELD, *Evidenz*, in: JOACHIM RITTER (ed.), *Histoisches Wörterbuch der Philsophie*, Vol. 2, Basel-Darmstadt 1972, pp. 829 *et seqs.*

[36] PLUTARCH, in *Life of King Numa*, wrote: "[Janus] also has a temple at Rome with double doors, which they call the gates of war; for the temple always stands open in time of war, but is closed when peace has come. The latter was a difficult matter, and it rarely happened, since the realm was always engaged in some war". PLUTARCH'S Lives, Vol. I, Translated from the Greek with Notes and a Life of Plutarch by AUBREY STEWART/GEORGE LONG, 4 vols., London-New York 1894.

war and peace were a matter of convenience, and we could say that war was always considered to be acceptable alternative to peace or – if we would like to use a modern formulation – the continuation of politics by other means.[37] The qualification of war as a means of settling of (what we would call today) international disputes as a method unworthy for man as a reasonable being is owed to Christian philosophy, from the times of Augustine[38] through Scholastic[39] and the School of Salamanca[40] up the present day.[41] And if war could not completely eliminated because of the refusal of some powers to accept international arbitration or adjudication as the sole means of dispute settlement and to renounce war as a means of pursuing national policies,[42] at least distinction was originally made between just and unjust wars, and only those wars were considered permissible which were waged for the enforcement of a just cause or for fending off an aggression based on an unjust claim.[43]

Unfortunately, this doctrine of the *bellum iustum* was never fully accepted in practice and later also diluted in theory, when Hugo Grotius developed the idea of a *bellum utrique iustum* which mixes up the objective and the subjective side by making the qualification of a just war not dependent on an objectively just cause but on the subjective good faith of one and the other belligerents. While continuing to pay lip service to the *bellum iustum* doctrine, many States used it only as a pretext for their political ends; and in the second half of the nineteenth century,

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[37] "War is but the continuation of politics by other means" („Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln"), CARL PHILIPP GOTTLIEB VON CLAUSEWITZ, *Vom Kriege* I, 1, p. 24.

[38] AURELIUS AUGUSTINUS, *De civitate Dei*, XIX.

[39] Cf. THOMAS AQUINAS, *Summa theologiae*, qu. 96, art. 3 ("bonum commune iustitiae et pacis"); *Summa contra gentes*, III, 129; also *De regimine principum* , I, 1, and I, 14.

[40] Cf. FRANCISCO DE VITORIA, *Relectio de Indis* III, 6; also *De iure belli*, 10-12 and 13; FRANCISCO SUÁREZ, *De bello*, sect. 6, no. 5.

[41] Cf. the Second Vatican's Council Pastoral Constitution on the Church in the Modern World *Gaudium et Spes* of 1965, which extensively deals with the issues connected with „The Fostering of Peace and the Promotion of a Community of Nations" in articles 77-93: The Avoidance of War (articles 79-82), Setting Up an International Community (articles 83-93).

[42] Although this was already object and purpose of the Briand-Kellogg Pact (officially General Treaty for Renunciation of War as an Instrument of National Policy) concluded in Paris 1928, and of the Saavedra Lamas Treaty (officially Anti-war Treaty of Non-aggression and Conciliation) concluded in Rio de Janeiro 1933.

[43] Cf., *inter alia*, MICHAEL WALZER, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. New York 1977; MICHAEL W. BROUGH,/JOHN W. LANGO/HARRY VAN DER LINDEN (eds.), *Rethinking the Just War Tradition*, Albany, NY, 2007.

with the rise of legal positivism,[44] the *bellum iustum* doctrine was finally discarded and war became a licit instrument for continuing politics by other (i.e. military) means.[45]

Even after World War I and the setting up of the League of Nations,[46] positivism prevented the fathers of the Covenant to return to the distinction between just and unjust wars. Rather, then as later on the attempt was made to contain war by laying down certain positive prohibitions against war in international law. While experience proved that such prohibitions can easily be circumvented and that it would be preferable to have international disputes decided by a system of compulsory jurisdiction of a court of arbitral tribunal, the Charter of the United Nations, the organisation that replaced the League after World War II, still does not provide for compulsory jurisdiction of the International Court of Justice[47] and leaves decisions on whether and how to meet an aggressor to the inhomogeneous group of the five permanent members of the Security Council[48] which rarely find an common denominator, thereby making the principle of collective self-defence a rather inefficient means for preserving peace.[49]

Peace and security, though a priority objective of the European Union, has not yet been firmly established on the universal level, as is brought out both by the history of international relations after World War II and by an analysis of the Charter of the United Nations which – notwithstanding the principles of absolute prohibition of the use of force and of collective security enshrined there – contains too many weak points in order to be able to guarantee that peace. For examples, we

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[44] Legal positivism is a school of thought of philosophy of law which bases the validity of law either on the mere fact of enforcement or on a so-called hypothetical basic norm. Essentially, legal positivism is the rejection of natural law and the allegation that the notion of justice is meaningless beyond the boundaries of positive law. The most prominent representative of legal positivism in the twentieth century was HANS KELSEN with his *Pure theory of law* (*Reine Rechtslehre*, 2nd ed. 1960, English translation 1967).

[45] Cf. *supra*, fn. 8.

[46] The League of Nations was established by Part I of the Treaty of Versailles 1919; the Covenant was also embodied in the other Peace Treaties concluded in Paris as well as in the State Treaty of Saint-Germain of 1920.

[47] The Statute of the International Court of Justice is annexed to the Charter of the United Nations of 1945, of which it forms an integral part. Art. 36 states in Paragraph 1: „The jurisdiction of the Court comprises all cases *which the parties refer to it* and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." (Italics supplied.)

[48] China, France, Russia, the United Kingdom and the United States.

[49] The idea behind the principle of collective self-defence is that the international community as a whole will be stronger as any possible aggressor State, a presumption the validity of which has become doubtful in the age of super powers with nuclear weapons.

have only to think of the right to veto[50] of the permanent Members of the Security Council or of the lack of compulsory jurisdiction of the International Court of Justice.[51]

However, it would be wrong to look at these weak points as being only constructional deficiencies of the United Nations that could be easily amended. On the contrary, it is the lasting distrust within the international community that prevents a more workable organisation from being set up. And this lasting distrust has not so much to do with the suspicion that one or the other State might engage in power politics of the traditional kind but with the fact that the members of the international community do not all share those values which are the values of the European Union.

The most disputed value is the very one which is – apart from peace and security as the basis of every functioning body politic – central to the European Union, namely freedom. Freedom is the essential fundament of a pluralist society and its political forms of organisation, the State and the supranational community of States, and it is missing or seriously curtailed in all countries which do not recognise and respect religious, philosophical, and, consequently, political pluralism. The position taken vis-à-vis pluralism and freedom differs from that taken by the European Union and its Member States in all those countries which restrict the enjoyment of freedom by some illiberal and – in the end – totalitarian criterion, be it a religious or a philosophical or even an allegedly "scientific" one, which makes "science", or rather what appears under the pretext of science, the measure stick of "reasonable" governance.

2. Welfare

If the issue of freedom could be settled world-wide by consensus on the line of the notion of freedom as understood within the European Union, it would not only be easier to strengthen peace and security, it would also facilitate international cooperation for the purpose of economic development and a more equitable distribution of world wealth.

The common good

Having said this to the issue of how European values, peace and security, and welfare, and thus the national, European, and universal common good are interconnected we will turn back to the roots of these European values.

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[50] According to Article 27, Paragraph 3 UN Charter, Decisions of the Security Council not concerning procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

[51] Cf. *supra*, fn. 18.

The common good, being the embodiment of all those goods which are common to all men because everyone needs to partake in them in order to be able to live a decent life, presupposes that everyone has a rightful claim to a decent life. This claim, however, is based in the quality of the individual as a human being, and to be a human being endows everyman with human dignity.

1. Human dignity

It goes without saying, therefore, that human dignity is the idea behind the European values. Yet, the rights that can be claimed by every man and woman because of his or her human dignity have received different attention at different times. Nevertheless, it can be said that full recognition of these rights has happened step by step and under the impact of progressive religious and philosophical ideas.

The notion of the dignity of man has various roots, partly in the Jewish-Christian tradition that man has been created in the image of God, partly in the Christian tradition of the brotherhood of all men under the common fatherhood of God, partly in the philosophical position held in particular by the Stoa of universal citizenship of all men that superseded the traditional position that the rights a man were bound to his appertaining to a particular State and ended where the jurisdiction of that State ended – a situation that was especially troublesome in old Greece which was fragmented into many small city states. These traditions merged in Christian philosophy, especially that of St. Augustine and his followers. However, it took another almost thousand years, until Francisco de Vitoria, founder and first head of the School of Salamanca of the sixteenth century, to stress that the dignity of man was already founded in natural law which was to be considered the *ius divinum natural*, God's law to be found in the order of the creation, and that this natural law and the rights and duties deriving from it could neither be changed nor curtailed by God's positive law contained in the revelation, because God cannot contradict himself.

2. Freedom of religion

While Vitoria defended the view that the relationship between Christian and heathen States were based on natural law and not on religion,[52] Francisco Suárez transferred this insight to the relationship between individuals and between individuals and the State.[53] But thisa insight was not immediately accepted either by the Church or the State. This was due to the position that it was the duty of the Christian prince or, more generally, of the Christian State to set up

[52] See, in particular, FRANCISCO DE VITORIA, *Relectio de Indis*, II, 1; De potestate civile, 5.
[53] According to FRANCISCO SUÁREZ, *De legibus ac Deo legislatore*, I, c. 13, no. 3, it falls to the State to transform men into good citiztens, while it is for the Church to make them good human beings.

an order conforming to the precepts of the gospel, and that any ideas deviating from these precepts were objectively wrong and should not be tolerated by the State. This position, namely that error cannot have the same right as truth, was the official doctrine of the Catholic Church but also of the main Protestant Churches, the Lutheran and the Calvinist or Reformed Church.

The flaw of this position originates from the fact that at the time pluralism was either ignored or rejected in official theory and practice by the argument that every human being was endowed with reason and was thus capable of discerning right and wrong, and that someone who adhered to wrong ideas must either be crazy or in bad faith, and that crazy or evil people had to be constrained by the law less they would bring harm to society.

Of course, this position could not be maintained without exceptions; and one such exception were those articles in the Peace Treaties of Westphalia which granted religious freedom to both Catholics and Protestants of either of the main denominations. However, tolerance continued to be regarded a concession reluctantly granted by the State in order to avoid greater evils for society, and thus left the situation of the tolerated faith and its followers precarious.

3. Enlightenment

Since the Churches failed to recognise tolerance as an obligation towards the individual based on the latter's dignity, and since they used the State, wherever they could to so, to enforce their creed on all dissenters or to at least harass them as much as possible, the elaboration of the rights of man flowing from man's dignity fell, from the seventeenth to the twenties century, mainly to the representatives of non-religious philosophies who tried to draft their concepts by reason alone. Because of its positive effects, this movement has found its place in the history of the human mind under the label of enlightenment.[54]

But even enlightenment did not immediately recognise pluralism and its necessary consequences; rather, its representatives substituted dogmatic religion by dogmatic rationalism, joining with their foes in the conviction that any reasonable man was capable to conceive the truth and to act accordingly. This kind of dogmatic rationalism was no less fundamentalist than dogmatic religion of the time; and the fervour by which the French Revolution, during the reign of terror, executed its opponents was even more surprising than (let's say) the zeal with which the Spanish inquisition persecuted the heretics of its time.

[54] Cf. LOUIS DUPRÉ, *The Enlightenment and the Intellectual Foundations of Modern Culture*, New Haven 2004.

The threat to human dignity: totalitarian ideologies

In addition, the nineteenth century saw the emergence of philosophies which had a tendency to not only ignore pluralism but to regard it a phenomenon in the development of man and society that would be overcome by the final attainment of mankind's goal – be it the convergence of man's mind with the mind of God, as in Hegel's idealistic philosophy,[55] be it the convergence of man with his equals in a class-less society, as in the dialectic materialism[56] of Marx. Both concepts resulted in the most heinous totalitarian regimes so far known in the history of mankind, the racist national socialism which aspired to the creation of the Aryan super-man, and the real socialism which invoked the necessity of ruthless class struggle until the elimination or re-education of all enemies of the workers' class or rather of the communist party as that class' avant-garde.

The reaction: acceptance of pluralism

It was only after the fall of these antagonistic but (in a negative way) congenial ideologies that Europe was able to step by step build up a political order that recognized pluralism as a social phenomenon that has existed, and will continue to exist, in all societies as a data that is firmly based on experience that different men at different times and under different conditions may have different views on even the most basic issues of life. In contrast to what some opponents of pluralism tend to believe, recognition of pluralism essentially has nothing to do with relativism or agnosticism. It has only to do with the insight that no one – not even society as such or its political forms of organisation, the State and the supranational community – has been granted the right, be it by God or by "nature", to impose his or her views on anybody else.

For this reason, in a pluralistic society the State and the European Union and their respective laws are based on the recognition of those set of rules which make them acceptable to everyone, because they are necessary of the establishment of peace and security, of freedom, and of welfare. And this is just that set of rules which leads to the common enjoyment of the common good.

1. The fragile bases of the pluralistic system

The fact that the values of the European Union are values of a pluralistic society and do not comprise any values which are not intrinsically connected with pluralism and are not required by pluralism does not mean that the individual

[55] Idealism is a philosophical position which asserts the primacy of the mind over the matter.

[56] Materialism is a philosophical position that asserts the primacy of the material world; dialectic materialism retains the Hegelian method within this materialist framework, and emphasizes the process of historical change arising from contradiction and class struggle based in a particular social context

cannot or should not base his relationship to these values on something more than the understanding that without them, their recognition and their preservation peace and security, liberty, and welfare will be in jeopardy. Historical experience shows us that there have always been ideologies and their representatives who have not relied on the principle of social reciprocity but have considered themselves strong enough to secure their own good without bothering about the common good understood as the good of all.

The State of the pluralistic society is not, of course, completely helpless against attempts to subvert its fundament. It can take measures, both of a preventive and a repressive character. That such measures do not contravene the cornerstone of pluralism, i.e. freedom, has been recognized, right from the beginning, by Article 17 ECHR[57], according to which "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." This means that there is no freedom for the enemies of freedom. On the other hand, however, to resist threats to freedom, the State needs not only sufficient power but also moral strength. And the moral strength of the State is the moral strength of its citizens. But the State cannot infuse moral strength into its citizens. This phenomenon was correctly brought to the point by Ernst-Wolfgang Böckenförde in the following way: "The libertarian, secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it risked for freedom's sake."[58]

For Böckenförde, the dilemma faced by the libertarian State, results from the fact that „ it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself procure these interior forces of regulation that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its libertarianism and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars."[59]

2. The religious and/or philosophical conviction of the individual citizenas the backbone of the pluralistic society

The State thus depends on the moral strength of its citizens and their readiness to defend it and its liberal order. Since, however, the citizens cannot in

[57] Prohibition of abuse of rights.
[58] ERNST-WOLFGANG BÖCKENFÖRDE, *Staat, Gesellschaft, Freiheit*, Frankfurt 1976, p. 60. The book also appeared under the English title *State, Society, and Liberty: Studies in Political Theory and Constitutional Law*, New York 1991.
[59] *Ibid.*

turn depend for moral strength on the State, their basis for moral strength can only lie in themselves, in their religious or non-religious conviction, i.e. in a firm philosophy of life.

The values of the European Union are theoretical posits from the practical recognition of religious, philosophical, social and political pluralism. It falls to the individual citizen to turn those posits into personal conviction. This coincides with the nature of man in its sound form. It is normal for society to be pluralistic; but the pluralistic individual would be schizophrenic.

"Cultural roots" of European values?

Can the "European values" be said to also have cultural roots? If "cultural roots" mean that some ideas have penetrated society in such a way that they are accepted and even taken for granted by the vast majority, then the "European values" have no strong cultural roots even in Western Europe and in countries with European tradition overseas. Many fundamental rights listed in the various national and international catalogues of human right have not been respected by the State until the second half of the nineteenth century, although this rule knows of certain exceptions like the Bill of rights in der Constitution of the United States of 1789/71[60] or the Declaration on the Rights of the Man and of the Citizen (Déclaration des droits de l'homme et du citoyen) adopted 1789 in the course of the French Revolution.[61] Moreover, authoritarian or even totalitarian regimes like fascism, national socialism and communism have been accepted or at least tolerated by the majority of people in the so perverted societies, although there have been dissenters from the beginning to the end of these regimes.

Pluralism and the values connected with it have become to be taken for granted even in Europe only after 1945 or even 1989. Yet, for many people in Europe these values have become something like a matter of course within a period of only one or two generations. That this was possible shows the inherent strength of Europe's religious, philosophical and humanistic traditions; that it took so long can be taken as a proof for the argument that the implementation of the best ideas must be preceded by a catharsis that is brought about by a crisis and the suffering co

[60] The Bill of Rights is the collective name for the first ten amendments to the United States Constitution. They were adopted in 1789 and entered into force in 1791.

[61] According to the preamble of the Constitution of the French Fifth Republic of 1958, the principles set forth in the Declaration have constitutional value.

THE UNIVERSALITY OF HUMAN RIGHTS AND THE UNIVERSALITY OF PUNISHMENT[62]

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Abstract

The International Criminal Court (ICC) is part of the globalisation process, removing certain matters from the jurisdiction of national states, such as human rights, fully conscious of the fact that these are neither recognised nor guaranteed in today's societies, nor are the appropriate punishments recognised or guaranteed when rights are violated. The Statute of the International Criminal Court directs International Law towards the firm commitment to uphold the rule of law over force. If the human rights or moral rights are universal, should the punishment be universal, too, when they were violated?

1. APPROACHING THE UNIVERSALITY OF HUMAN RIGHTS

Human rights unveil to us a world in which a common ethic for all human beings exists, in which we become moral agents. We possess human rights by the very nature of being human, and not because we are citizens within a specific legal system, which would imply that legislators create such rights, decide their content, and recognize them by casting them into law. Moreover, if legislation is the source of rights, one would not be able to call such rights universal, as they would not exist on their own without being guaranteed by a "conventionally organized force."[63] This argument, as I see it, allows one to precisely and conceptually distinguish between the categories of human rights and fundamental rights.

Rather, human rights or *moral rights* are the "essence", the "justification", or the "reason" that set into motion and activate the mechanisms of normative protection for the sake of converting a particular human right into a fundamental right. In this sense, the human rights precede the legal norms, the latter of which "only serve as vehicles for the protection of the former."[64] Legal norms are,

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[63] OLLERO, TASSARA, ANDRÉS: *Tiene razón el derecho?*, Congreso de los Diputados, Madrid, 1996, p. 390.

[64] LAPORTA, FRANCISCO: <<Sobre el concepto de derechos humanos>>, *Revista Doxa*, nº 4, Centro de Estudios Constitucionales y seminario de filosofía del Derecho de la Universidad de Alicante, Alicante, 1987, pp. 26-28.

therefore, necessary but not sufficient to promote the universality of human rights go across the world, precisely because they serve as the means to the desired end, but do not constitute the goal itself.

If I stress the difference between human rights and fundamental rights, it is because such a distinction allows us to determine whether a given legal system betrays these basic moral requirements that we call human rights, and, if so, whether a possible retribution in the form of sanction or punishment is justified. Thus, human rights constitute "the framework within which it is possible to critique the legal norms or institutions of legal law."[65] VERDROSS[66] dedicated one his last monographs to the topic of natural law, which he titled "*Static and Dynamic Natural Law*."[67] One might think that human rights fall within static natural law, as they draw on principles "that precede positive law and can be deduced from the natural light of reason."[68] These fundamental principles are permanent[69] and therefore act as the "conscience of legal law"[70], as it raises human dignity as the foundation for all human goals.[71] This "critical morality", as HART called it, is derived not just from positive guidelines, but from critical principles that place moral restraints on the legal system[72], lending reason to law[73]. And this critical morality is called upon to determine the limits of what the democratic and legitimized sovereign will can do.[74]

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[65] BULYGIN, EUGENIO: <<Sobre el status ontológico de los derechos humanos>>, *Doxa. Cuadernos de Filosofía del Derecho*, n°4, op. cit., p.79.

[66] Vid. VERDROSS, ALFRED: <<Zum Problem der Rechtsunterworfenheit des Gesetzgebers>>, 45 *Juristische Blatter*, 1916, pp. 471 ff and pp. 483 ff., new edition in: *Die Wiener Rehstheoretische Schule*, Vol. 2, pp. 1545 ff.; <<Primares Naturrecht, Sekundares Naturrecht und positives Recht in der christlichen Rechtsphilosophie>>, in *'Jus et Lex', Festgabe zum 70. Geburtstag von Max Gutzwiller*, Basel, 1959, pp. 447 ff., new edition, Vol. 1, pp. 787 ff. And also *Dynamisches Naturrecht*, *Forum XII/137*, Mayo 1965, pp. 223 ff., new edition, Vol. 1, pp. 933 ff.

[67] VERDROSS, ALFRED: *Statisches und dynamisches Naturrecht*, Freiburg i. Br., Rombach, 1971.

[68] Vid Ibídem, p. 9.

[69] Vid. Ibídem, p. 116.

[70] Vid. Ibídem, p. 114.

[71] Vid. Ibídem, p. 117.

[72] LAPORTA, FRANCISCO: *Entre el Derecho y la Mora*l, Fontamara, México D.F., first ed. 1993, second ed. 1995, pp. 52-53.

[73] OLLERO TASSARA, ANDRÉS: *¿Tiene razón el derecho?*, op. cit.

[74] BANASZAK/JABLONSKI: <<Das Naturrecht in der Polnischen Verfassung vom 2. April 1997>>, in *Die Wiederkehr des Naturrechts und die Neuevangelisierung Europas*, edit. Rudolf Weiler, Viena, 2005, p. 220.

From MILL to DWORKIN[75], who proclaimed that rights are the triumph over the majority, and continuing on in HART, we find the idea that moral limits exist that laws cannot transgress, even when the majority of society supports such laws. And the mere fact that the majority approves a legal norm does not justify the norm's content nor its reach in moral terms. "Legal power is legitimized not only by its origins in consent, but also by not violating the limits that bound an area delineated by moral guidelines and criteria."[76] As emphasised by SCHAMBECK, the violation of human rights occurs not only due to the wrong interpretation of basic rights, but is also due to bad political decisions in the social and economic arena.[77]

The holder of subjective right must always be able to engender the creation of an individual norm that proscribes the execution of a sanction against someone who does not fulfil his or her obligations[78], that is, against a subject who violated legally protected interests; there is no point in attributing rights to individuals, if such attribution is not adequately enforced.[79] In this manner, while human rights are defined by the characteristics of universality, fundamentality in their objectives, generality, moral validity, and priority before positive law, following the arguments of ALEXY[80], fundamental rights are, in turn, characterized by the manner in which they are protected legally[81], as evidenced by the English phrase

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[75] Vid. Albert Calsamiglia: <<Ensayo sobre Dworkin>>, introduction toworkin, *Los Derechos en serio*, translated by Guastavino, Barcelona, Ariel, 1985, p. 17.

[76] Vid. Ibídem, p. 51.

[77] SCHAMBECK, HERBERT: <<Derecho Natural en la era de la responsabilidad>>. Revista *Persona y Derecho* nº 62, Navarra, 2010, pp. 153-179.

[78] Vid. KELSEN, HANS: <<El concepto de habilitación: distintos significados de esta palabra. El "derecho en el sentido subjetivo">>, in *Teoría General de las Normas*. (Hugo Carlos Delory Jacobs Juan Federico Arriola), Ed. Trillas, México D.F., 1994, pp. 142-143.

[79] KELSEN, HANS: *Teoría General del Derecho y del Estado* (traducción de Eduardo García Máynez), UNAM, México, 1969, p.94. Vid. LOSANO, MARIO G.: *La nozione di sistema giuridico in Hans Kelsen*, Amaliensträssler Heft n°4, Università degli Studi di Milano – Dipartimento Giuridico-Politico. Sezione di Teoria Generale e Informatica del Diritto, Cuesp, Milano, 1998.

[80] ALEXY, ROBERT: <<Sobre el desarrollo de los derechos humanos y fundamentales en Alemania>>, en *Diálogo Científico*, vol.11, n° 1/2, Centro de Comunicación Científica con Ibero-América, Tubinga, 2002, pp. 15-16. Vid. LAPORTA, FRANCISCO: <<Sobre el concepto de derechos humanos>>, *Doxa. Cuadernos de Filosofía del Derecho*, n°4, op. cit., pp. 32-44.

[81] Vid. ROBLES, GREGORIO: *Los derechos fundamentales y la ética en la sociedad actual*, Cuadernos Civitas, Madrid, 1992, pp. 19-23.

"if there is no remedy, there is no right". The rights are worth what their judicial guarantees are worth.[82]

Since the approval of the Universal Declaration of Human Rights by the United Nations' General Assembly on December 10, 1948,[83] a great number of international legal instruments have emerged that legally bind States to protect human rights, such that the international responsibility and jurisdiction in these matters is becoming more and more assured. This international declaration highlighted not only the importance of providing a foundation for rights, specifically in the content of its Preamble, but also, for the first time, we find an international legal norm that underlines the equal dignity among human beings and the equality of rights to freely develop one's personality, "thereby prohibiting interpersonal relationships of dominance, which are hallmarks of the social model across the entire planet."[84]

2. THE GLOBALISATION OF PUNISHMENT THROUGH THE INTERNATIONAL CRIMINAL COURT

In the 20th century, the international community finally reached a consensus, defining genocide, crimes against humanity and war crimes, and, therefore, created a permanent international court to judge such crimes. The International Criminal Court (ICC) is, therefore, part of the globalisation process[85], removing certain matters from the jurisdiction of national states, such as human rights, fully conscious of the fact that these are neither recognised nor guaranteed in today's societies, nor are the appropriate punishments recognised or guaranteed when rights are violated.

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[82] LÓPEZ BASAGUREN, ALBERTO: <<Comunidad Europea, integración de ordenamientos y pluralidad de jurisdicciones en la protección de los derechos fundamentales>>, CORCUERA ATIENZA, JAVIER (Editor): *La protección de los derechos fundamentales en la Unión Europea*, Instituto Internacional de Sociología Jurídica de Oñati, Madrid, 2002, p.121.

[83] DE PRADA, AURELIO: <<*Un doble y único aniversario: el nuestro. A propósito de la Declaración Universal de Derechos Humanos y Mayo del 68*>>, *Persona y Derecho* nº 59 Pamplona 2008, p. 357-376, in ROBLES, G. y MEDINA, D.: *Ensayos sobre el derecho y la justicia. Libro Homenaje a Ana Cebeira Moro*. Editorial SFD, Córdoba 2009. p. 223-246.

[84] MARTÍNEZ SAMPERE, EVA: <<La universalidad de los derechos humanos>>, *Thémata. Revista de Filosofía*, nº 39, Universidad de Sevilla, 2007, p. 66.

[85] GHAI YASH: <<La globalización y la política de Derechos>>, in HWITT CYNTHIA y MINUJIN ALBERTO, (Eds.), *Globalización y Derechos Humanos*, Santillana, Bogotá, 1999. SOUSA SANTOS, BOANAVENTURA: *La globalización del Derecho*, ILSA, Bogotá, 1999.

In contrast, the Nuremberg and Tokyo trials, which addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War, were temporary. To the victors went not only the spoils of war, but also the right to judge and punish the vanquished. Only in hindsight, with the permanent institution of the ICC, did such trials gain legitimacy, some fifty years later. The legitimacy of such trials is undermined only by the fact that one of the victorious states still fails, to this day, to recognize the ICC. Yet the impunity of state authorities has been rejected by numerous international instruments in the intervening time span; these include, among others, Article 3 of the Project of a Legal Treaty in Matters of Crimes against Peace and Security of Humanity (1954); Article 7 (2) of the Statute of the International Tribunal for the former Yugoslavia (1993), Article 6 (2) of the Statute of the International Tribunal for Ruanda (1994); and Article 7 of the Project of a Legal Treaty in Matters of Crimes against Peace and Security of Humanity (1996).

The Cold War had been used as an excuse to justify the violation of human rights as a by-product of the ideological battle between enemy States and governments. But, as the Cold War ended in the 1990s, tribunals such as the International Criminal Tribunal for the former Yugoslavia or the Tribunal for Rwanda became the result of international consensus—crimes against humanity should not go unpunished. These, however, were limited in their jurisdiction, both in regards to the conflicts and the timeframe in which alleged crimes were committed. An independent, permanent criminal court was still needed. On 17 July 1998, 120 States adopted the Rome Statute, which would a permanent International Criminal Court upon ratification. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. As the very Preamble to the Rome Statute declares, the international community is "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". The establishment of the tribunal has proved to be a great advance in International Law, but of particular significance is the fact that the jurisdiction of the Tribunal extends also to particular or natural persons, implying the Tribunal's responsibility to punish individuals, not just States, as can be deduced from Article 25 of the Statute. On several occasions, the Security Council of the United Nations has invoked this principle to try to bring the parties responsible for transgressions in Burundi and Somalia to justice. In both cases, the Council recalled, "all persons who commit or authorise the commission of serious violations of international humanitarian law are individually responsible for such violations

The fight against impunity, the essential objective of the International Court, is complemented by the normative consecration of crimes. Fort the first time in history, humanity has a legal codex, if one can call it that, governing international criminal law. The material jurisdiction of the Court is limited to four

areas, namely the crimes of genocide,[86] crimes against humanity,[87] war crimes[88] and the crime of aggression that are defined by various punishable acts.

Keeping in mind that the crimes that fall under the jurisdiction of the Court refer not only to internal or transnational armed conflicts, but also to situations encountered during the regular exercise of power by State governments, we realise that the Court constitutes a legitimized institution to punish, coerce, and oblige states and individuals to respect human rights, that is, in case of violation of International Humanitarian Law or of human rights. Numerous international treaties and agreements cover such rights, whether the times be of war or not, and the Court is charged with their enforcement.

Now, such an interpretation clashes with the concept that a "violation of human rights" can only be committed by the actions of the State and state authorities. The argument for such a view rests in the considerations that it is the responsibility of the State to protect human rights, and, as such, only the State can violate them. This is the line of thinking followed, for example, by the Inter-American Commission on Human Rights: "The entire system of protection of human rights is designed based on recognising the State as the subject of the basic legal relationship in matters of human rights, and it is against the State that suit can be brought when the rights recognised by the Convention have been violated." From this point of view, the premise that subversive or terrorist groups could violate human rights would be tantamount to conferring a certain legitimacy to such groups, which would add to the contradiction that such groups, by their very nature and illegal behaviours, inherently do violate such rights. Moreover, as the Attorney General for Human Rights maintains, legitimizing such groups would lead to "legal feudalism", in which citizens would have to search for the group that offers better guarantees to protect their human rights, and select one or the other. No one is unaware of the fact that this would necessarily lead to the inequality of citizens before the law; the destruction of the rule of law, the denaturalization itself of the concept of human rights, and the rapid slide towards barbarism."[89]

The founders of the Court at the Rome Conference adopted a reasoning that turns out to be less problematic, which is supported by official documents of the United Nations, and distinguishes between violations and crimes. The former are particular to the State and the latter are particular to persons, who can be agents or not of the State. To summarise, only individuals can commit crimes, and only the State can commit violations. This is the spirit of Article 4 of the Convention on

[86] Vid. Article 6.
[87] Vid. Article 7.
[88] Vid. Article 8.
[89] MENDOZA PALOMINO, ÁLVARO: <<La Corte Penal Internacional y la impunidad>>,http://www.monografias.com/trabajos29/corte-penal-internacional-impunidad/.shtml

the Prevention and Punishment of the Crime of Genocide:[90] <<Persons committing genocide or any of the other acts enumerated in article III (Genocide; Conspiracy to commit genocide; Direct and public incitement to commit genocide; Attempt to commit genocide; Complicity in genocide) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals>>.

With the preceding clarification, the argument is supported that crimes against humanity, which offend and ignore human rights, are not restricted to territorial limits by being directed towards the population of one nation, but matter to all humanity. From this perspective, such crimes are an affront to all. This, in truth, is the spirit and justification underlying the creation of the Tribunal: the protection of humanity, as one can read in the Statute's preamble, which reminds us to be "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The Statute of Rome seems to be guided strongly by the feelings of aversion to and rejection of the so-called crimes against humanity, even though it later it describes them more neutrally as "the most serious crimes of concern to the international community as a whole" (Art. 5) or "for the most serious crimes of international concern" (Art. 1). These crimes transcend national boundaries and wound humanitarian sentiment around the world. The objective, in legal terms, is to protect the "feeling of universal brotherhood" by punishing or sanctioning offenders.

The desire to break the cycle of impunity for the most serious and aberrant violations against human dignity is reaffirmed by the provisions concerning the Court's jurisdiction. A suit can be brought before the Court by States adhering to the Statute or by the Security Council. The latter possibility allows the Court to investigate and judge crimes within its jurisdiction, even if the State involved is not a signatory. Under title VII of the charter, the Security Council's role reflects the belief on the part of the signatories that the punishment of crimes against humanity is directly connected to peace and international security—and as it is the Security Council's role to uphold these, it should play an active role in bringing matters to the Court's attention.

In addition, the Prosecutor can initiate an investigation. This last provision constitutes one of the most important victories achieved in Rome. Indeed, complaints from the most varied sources can lead to investigations. In accordance with article 15 of the Statute, "The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court". With this provision, the non-signatory States, non-governmental organizations, the

[90] Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII.

victims of such crimes, organizations and concerned individuals can call on the Prosecutor to intervene and start a preliminary investigation. This signifies a departure from the principle of exclusivity of the application of such instruments to the States that have ratified the International Treaties, which reduces the claim to State sovereignty in matters of crimes against humanity; on the other hand, the authors of such crime are placed into the spotlight not only of the States and government institutions, but also of their peers across the world. Without a doubt, it is a provision that affirms the independence of the Court, removing it from any political manipulation by States or governments, which was seen as the principle cause of impunity in such matters.

Nonetheless, one cannot say that the Rome Statute completely eliminates the State's interests in such matters. In fact, the same article 15 establishes that the Prosecutor needs the authorisation from the Pre-Trial Chamber to start a formal investigation. On the other hand, it is clear that the Court plays a complementary role to national courts, and, in this sense, can only exercise jurisdiction when the State is unwilling or unable genuinely to carry out the investigation or prosecution and bring the perpetrators to justice, according to article 17. The statutes do not rule out that once the States have been informed that they have jurisdiction in a particular case, that they can then take corresponding actions and thereby remove the case from the purview of the Court. Such provisions might appear to be a resort for States to preserve their sovereign power to punish. To many, this signifies an obstacle to those who pursue those who commit crimes against humanity, even more so when these are governmental authorities. However, the aim and spirit of the Statute is not to allow the States to evade their responsibilities. Article 17 implies that the Court must investigate whether there is, or there is not, a covert intent to shield the accused person or persons from criminal responsibility for the crimes that are covered by the Court, by asserting State jurisdiction. Therefore, the determination to effectively prosecute and punish these crimes is preserved.

Based on all of the above points, we can conclude that the Statute of the International Criminal Court directs International Law towards the firm commitment to uphold the rule of law over force—we should not forget that the respect for fundamental rights and the punishments meted out for their violation rest in the power of the strong, while human rights rest on the power of morality.[91]

[91] KÜNG, HANS, *Proyecto de una ética mundial.* G.Canal, Trotta, Madrid, 1991. PUREZA, J. M., <<¿Derecho cosmopolita o uniformador ? Derechos humanos, Estado de Derecho y Democracia en la posguerra fría>>, in Pérez Luño, A. E. (ed.), *Derechos Humanos y Constitucionalismo ante el Tercer Milenio,* Marcial Pons, Madrid, 1996.

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ON THE VALUES AND PROCESS OF EUROPEAN INTEGRATION

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Abstract

The Authors of the article perceive European integration as a complex, multi-dimensional process, where law serve as a tool to realize other values, rooted deeply in cultures of the European states. The Authors take the view, that deeper integration, which is necessary and unavoidable, should be constructed according to the principle: united in diversity. From this perspective, some legal and axiological issues, valid for deepening and strengthening the European Union, are subject of consideration in the article.

INTRODUCTION

History of Europe is in big part a story of permanent war and conflict. Every peace treaty made between European states in the past, contained seeds of contention, that exploded, sooner or later, and turned into another conflict. What seemed to be, for non-european observers, a vicious circle and constant process of civil war in Europe, for Europeans meant a part of daily life experience for almost every generation. Finally, after all atrocities of WWII Europeans have drawn a new deal for post war Europe, where mistakes from the past could be avoided. It didn`t mean, that suddenly level of consciousness among Europeans had risen up and horizons broadened, so citizens of European states understood miserable situation they found themselves in after WWII. At the very beginning there was a vision, few wise Europeans had, who managed to materialize it in very concrete form of legal provisions. From this perspective, European Union is a gift given to their nations by their founding fathers. Their genius effected in successful creation of new legal order, that has had a potential to be effective and to work for future generations. Here we touch very important issue we have to realize. The way we understand the legal system and the purpose it serves. The law can be seen as a yoke we put on ourselves, as a set of rules that creates a system we want to live in, to seek perfection.[92] Here, the law can be perceived as a chance, a tool we can use

[92] L. Fuller, *Anatomia prawa*, Instytut Wydawniczy „Daimonion", Lublin 1993, p. 9.

to grow up. Let`s change the perspective for a while, and a law can be seen as a visible sign of our imperfections, again a yoke we deliberately take on to keep, like in the most chilling Shakespeare`s dramas, the darkest parts of our souls closed forever, and prevent it to come out on the surface of our human nature. In other words, we are well conscious of our human condition and deliberately choose to live in a system, that creates us a chance to develop our human potential. It is easy to guess, that I have in mind a polity build around principles of democracy, human rights and rule of law. All these principles are necessary to guarantee individual freedom. This freedom can not be treated as an aim, but rather as a tool, that make it possible to realize our full human potential. In such system freedom can be perceived rather as a chance. We all well know, that any alternative to this system is what Europeans went through in XX century, with all its consequences. Knowing and realizing all these facts from our European history, we can fully appreciate value of our democratic, constitutional culture, our states and European Union have been build on.

THREE ELEMENTS OF THE EUROPEAN UNION

Now, let me say few words about the construction of European Union. The European Community, that the creators of European Union proposed is founded on the unity of three elements:

1/ Form, i.e. an institutional expression of co-operation between the countries constituting EU and various forms of acts of EU law, both primary and secondary;

2/ Content, i.e. the so-called European law and the policy of EU bodies as well as economic co-operation. I would like to emphasize here, that neither the primary, nor the secondary law comprises the complete scope of social relations but only the areas which the EU members have decided to subject to its regulation. EU law (about 15 000 legislative acts annually) can not be viewed in isolation from the internal law of EU Member States. It is created by representatives of individual member states legitimized by their constitutions. Thus EU does not replace the states, as they remain – as formulated by the German Federal Constitutional Tribunal – "the sovereigns of treaties". The same refers to the political issues entrusted to EU bodies.

3/ Values. They derive from the values common for all the nations constituting the EU.

EU law and the policy of EU bodies on the one hand reflect a certain, socially accepted system of values and beliefs and on the other, by formulating a programme for the future, they embody certain ideas and strive to implement them by influencing both the awareness of whole societies and individual citizens. In this way a two-fold aim is achieved: they promulgate some values, principles and ideas and simultaneously stimulate adoption of other. In both cases, the values in question are the values constituting the basis for co-operation between people in a

given society. EU law resolutions and the decisions of EU bodies are from this perspective a means of forming attitudes of individuals, as desired from the point of view of EU institutions and Member States. They also outline the guidelines for the activity of EU and Member State bodies in this area. It should be emphasized here, that the tasks implemented within the framework outlined here by no means consist in rejecting the pluralism of outlooks and ideas, natural in a democratic society, in imposing on an individual a new pattern of behavior, or in prohibition of propagating new attitudes, falling into a socially accepted framework and in preserving, stabilizing at any cost traditional standards of conduct.

The first two elements have been researched by legal, economic and political sciences for many years; they have been extensively discussed in scientific terms and are relatively well known to EU citizens. Their foundations rest on certain values and due to their fundamental, original significance it is to them, that I would like today to devote my attention.

The EU is developing very dynamically, but its development is based on consecutive treaties expressing the will of Member States, the will democratically legitimized by and rooted in the will of the citizens of individual states. The process of forming the will is outlined by constitutional law of individual Member States. The law determines the principles of participation of its representatives in the process of integration and determines their authorization. Neither the primary nor the secondary EU law comprises the entirety of social relations, but only the areas which the EU members have decided to subject to its regulation. EU Member States maintain their sovereignty and "multidimensional and multilevel character of the European Union causes considerable flexibility. Participation in the EU policies varies depending on their nature and on the member states themselves. The Schengen Agreement, Eurozone or the Western European Union do not comprise the same countries. Similarly, some states remain neutral, while others belong to the NATO. […] rejection of one of the EU policies is not tantamount to rejecting the whole process"[93].

The great dynamics is observed within all the three elements. In the case of the first two, the phenomenon is hardly surprising, as it is connected with the development of civilization, with the constantly changing social reality. It seems, however, that in the case of values a certain degree of stabilization could be expected, as their system does not undergo considerable changes. In any case, the creation of political, economic and legal community in Western Europe has from the mid-20th century been centred on certain values and their implementation, with which any sensible European could identify, especially after the sad experience of Nazi and communist totalitarianisms. They included: dignity of an individual,

[93] A. Missir di Lusignano, *Członkostwo w Unii Europejskiej a suwerenność narodowa {Membership in European Union and national sovereignity]* , in: E. Popławska (ed.), *Konstytucja dla rozszerzającej się Europy*, Warszawa 2000, p. 39.

unalienable rights and liberties, tolerance, democratic system of exercising authority, division of authority, market economy based on elements ensuring social justice.

European integration developing since the 1950`s ensured implementation of the values in question, first in the western part of the continent, later, after the fall of communism, in Central and Eastern Europe. However, the end of division of Europe into two blocks has not brought it harmony and unity. It turned out that dormant conflicts may revive. The same notions may be understood differently, even if they are expressed in legal terms.

Cicero said: *Non ergo a praetoris edicto, ut plerique nunc, neque a dudecim tabulis, ut superiores, sed penitus ex intima philosophia hauriendam itiris disciplinam putas* (the law is not the edicts issued by praetors, as some think, neither is it the Twelve Tables as it was thought in the past; it is philosophy – a certain way of thinking). This means that the law, to be unambiguously interpreted, should be based on a uniform system of values. Only then – as wrote E.W. Böckenförde – will it really become a legal order and not a system of coercion.

It should be emphasized here, that now, the fundamental values originally decisive for European integration have been implemented, as exemplified by the inviolability of human dignity. Dignity is not perceived as a feature or a complex of rights granted by the state, as it is primary in relation to any political entity. Being a source of rights and liberties, the notion of dignity determines the manner of their interpretation and implementation by the state. Consequently, any public endeavour should take into account the existence of a certain sphere of autonomy within which a human being may find social fulfilment, while on the other hand public activity should not result in creating legal or real-life situations depriving an individual of dignity.

THE SOCIAL RIGHTS ISSUE

We are now facing a question about the purpose, which the integration should serve. EU seems to lack acceptance of one, universally adopted system of values transgressing the system from the initial period of forming EEC and EU, which substantially hinders further integration. This is substantiated by the fate of the Treaty establishing a Constitution for Europe and the painful, though the successful process of ratification of the Lisbon Treaty. As an example, we may quote the contentious issue of including the regulation concerning social rights in the Charter of Fundamental Rights. The comparison of the catalogue of constitutional human rights, common for all the EU Member States, shows that its core is formed by traditional (classic) personal liberties and political rights. Social, cultural and economic rights (with the exception of property rights) are to a varying degree present in individual constitutions and in their case no elements common for them all can be determined. This is caused by the controversy in the science of law

and among various political movements concerning the need of and extent of constitutional regulation of social rights and the whole social sphere.

Opponents of subjecting social rights to constitutional regulation maintain, that since the degree of their implementation always depends on current and constantly changing economic situation, the matter should thus be subject to statutory legislation. In their view the regulation's place in the legal hierarchy should not determine the extent of social effects of state's effort. They also emphasize that social rights have a postulatory character. In their case a state must first elaborate and then implement complete social programmes[94]. If, apart from the norms of postulatory character, the constitution included social rights enabling an individual to claim benefits from the state, to meet these it might have to take over the control of economy, which would contradict the provisions of property rights and economic freedom[95]. In this context, it is the essence of the constitution, that is important, the role it is to play in the state. This is referred to by W. Martens, who writes: "Where […] the guarantee of freedom is interpreted as the guarantee of existence, a constitution devoted to the principle of liberty contradicts itself"[96]. From this perspective including social rights in the constitution is prevented by fear of undermining the effectiveness of political rights and civil liberties in a situation, where the same catalogue would protect an individual against the state and would simultaneously authorize him or her to demand benefits from it. Because of this "the constitution […] is transformed from the act which determines the limits of authority into the act which determines the sphere of the authority's obligations. Consequently, this transforms the constitution into a peculiar charter of social life"[97]. Additionally, the state is not obliged to guarantee social rights and to provide actual conditions enabling individuals and social groups to benefit from their constitutionally guaranteed rights. This aims at preventing the use of other rights included in the constitution to satisfy social claims.

Proponents of constitutional regulation of social rights advocate the need of departing from the treatment of fundamental rights and liberties as the means of merely protecting individuals against the interference on the part of the state. The constitutional guarantee of civil liberties and political rights thus requires taking into account economic, social and cultural conditions, i.e. introducing social rights into the constitution. According to P. Häberle, in the contemporary state "a

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[94] Cf. J.P. Müller, *Soziale Grundrechte in der Verfassung ?*, Basel – Frankfurt am Main 1981, p. 41-44, 203.
[95] Cf. F. Horner, *Die sozialen Grundrechte*, Salzburg, München 1974,, p. 225.
[96] W. Martens, P. Häberle, *Grundrechte im Leistungsstaat*, Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer, z. 30 (1972), p. 33.
[97] J. Ciemniewski, *Konstytucja państwa socjalnego czy konstytucja państwa liberalnego ?*, w: *Prawo w okresie przemian ustrojowych w Polsce. Z badań Instytutu Nauk Prawnych PAN*, Warszawa 1995, p. 68-69.

complex tool develops, which includes the following elements: guarantee of fundamental rights as widely-understood social rights, as the aim of the constitution, as the subjective entitlement to benefits and as the interpretation guidelines for the judiciary"[98]. He also notes, that "absence of or modest presentation of social matter in the constitution does not prevent the state from the possibility of conducting broad social policy transforming it into a welfare state. Presence of precise and elaborate social matter in the constitution determines this direction. Therefore, from the point of view of the majority of citizens who will benefit from social rights […] it is desirable that […] the constitution includes elaborate and precise regulations of the social matter"[99].

For the proponents of social rights in the states lacking constitutional regulation of the matter or where this regulation is limited, the Charter of Fundamental Rights has a great significance for two reasons. Firstly, the Charter includes the statements distinctly indicating the existence of social rights, thanks to which they, interpreted as fundamental, would be indirectly introduced into the legal systems of these states. Secondly, the charter enables to grant a social function to the rights already included in the constitution, which are not treated as social. Then "classic fundamental civic rights are mixed with fundamental social rights, which may be appealed from as being directly applicable and as subjective constitutional law"[100]. Pursuant to these citizens could demand the state to provide certain benefits, both of material character and as means enabling them to take advantage of the regulations created by the state aiming at providing social conditions for their implementation.

MARRIAGE AND FAMILY LAW

Another example is the dispute concerning the role of a family and marriage, which was so significant for the first referendum in Ireland. The main issue is the right to marry and the right to start a family. EU includes the countries with restrictive regulation concerning divorce (Malta) and the countries, which accept homosexual marriage (e.g. Spain). At the forum of EU institutions and in many individual Member States, this dispute about the role of family and marriage has become a dispute about the role of freedom of speech and religion.

People inspired by Christianity or Islam find it difficult to accept a departure from a traditional notion of a family.

Criticism of views negating non-traditional values is sometimes treated as reprehensible and punishable hatred. This obviously affects the notion of freedom

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[98] W. Martens, P. Häberle, *Grundrechte …,*p. 73.

[99] B. Zawadzka, *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa 1996, p. 94.

[100] J. P. Müller, *Katalog i zakres obowiązywania praw podstawowych*, w: Z. Czeszejko-Sochacki (red.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Białystok 2001, p. 78.

of speech and forces public authority to undertake inquisition activity – as in the case of the reverend Ake Green. Equalling a critical view, proposing different values, with attack results in suspension of freedom of speech and delegating to the state the power of decision, as to what is permitted. J. J. Rousseau said, that he may disagree with someone's views but he is ready to sacrifice his life, so that the view may be propagated. A. de Tocqueville warned, that it is the whole of the citizens of a democratic country and not public authority, who have the power of deciding, whether someone's views are right or wrong. Once an attempt to restrict this power is made, there will be no end to further restrictions.

It should be remembered, in this context, that when a new Polish constitution was resolved in 1997, the text of its preamble caused a heated political and ideological dispute. Eventually a compromise formula was adopted referring to the ten centuries of the history of the state and the nation and indicating a significant role of Christian heritage. It was also emphasized, that opening to Europe and the world does not contradict the sense of national identity and attachment to cultural roots.

In this context the following view of the Polish Constitutional Tribunal is worth quoting: "The interpretation of EU law by the European Court of Justice should not exceed the functions and competences delegated by Member States to EU. It should also correlate with the principle of subsidiarity, determining the activity of the community-EU institutions. The interpretation should also be based on the assumption of mutual loyalty between the community-EU institutions and the Member States. The assumption generates – on the Court's part – the obligation to favour national legal systems, while on the part of Member States – the obligation to observe EU norms to the highest achievable standards […] Member States reserve the right to evaluate, whether the EU legislative bodies, resolving a given act (of law), observed delegated competences and whether they exercised their powers in accordance with the principles of subsidiarity and proportionality. Exceeding this framework results in the fact that the principle of the priority of EU law does not apply to the acts (provisions) resolved in excess of these limitations"[101].

The Polish Constitutional Tribunal emphasized, that "relative autonomy of legal systems, based on their own internal hierarchical principles, is not tantamount to absence of mutual influence. It also does not eliminate the possibility of collision between the regulations of the EU and the provisions of the Constitution. The latter would take place, when there was irrevocable contradiction between a constitutional norm and the EU norm, a contradiction, which could not be eliminated with the use of interpretation respecting relative autonomy of the European law and the national law. Such a situation can not be ruled out but it may

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

– due to […] common character of assumptions and values – appear only exceptionally"[102].

For the so-called new Member States of EU, which include Poland, it is especially important, that the disputes concerning values discussed above were, as emphasized by the Ioan Ganfalean, resolved respecting the principles of "solidarity, consensus and in the spirit of compromise"[103]. The values, on which the whole EU legal system is based, can not be imposed on any country by another country, neither can they be imposed on a minority by a majority currently in power within individual states.

It must be remembered that common values and the EU law implementing them stimulate the identification of citizens of EU Member States with the Union as a whole. This serves the purpose of increasing their interest in public life and their contribution to influencing the will of their own countries and the Union – e.g. by participating in the elections to the European Parliament. For the purpose of implementing this task it is important, that European integration is in its form and content, an expression of a broad social consensus, a result of compromise between various social groups and political powers. This multiplicity must form an integrated whole, which in its turn affects its ability to perform economic and political functions of a new entity. The EU law may constitute the basis of the social development of united Europe, only when it is accepted by the citizens, when it protects their interests, ensures freedom and the possibility of the development of an individual, guarantees internal peace, by creating mechanisms of solving social conflict, provides the citizens with the possibility of exercising authority, not only in their own country but also in EU and supervising not only the national but also European institutions. From this perspective it may be observed, that the Union strives to implement these objectives and that the proposals of differentiating the rate of integration within two-speed Europe or unjustified criticism of new EU members wishing to voice their views have become the thing of the past.

The Treaty of Lisbon enables us to hope that new decision-making mechanisms will enable to reach a compromise in determining new values, influencing the quality and form of integration.

CONCLUSIONS

To sum up, what has been said above, it is always worth remembering, particularly now in hard times of economic crisis, that European Union is a product of a countries, which belong to the same civilization, European civilization.

[102] OTK ZU Nr 5/A/2005, poz. 49.
[103] I. Ganfalean, *The Impelmentation of European Law In Romania*, Annales Universitatis Apulensis, Series Jurisprudentia 11/2008, p. 123.

Civilization, which bases on rationalism of ancient philosophers, roman law and Christian ethics, which treats human dignity as inviolable. EU has been the biggest success for post war Europe, its biggest achievement and hope for better future for its citizens. For about 60 years Europe has been on the move, constantly improving its structure, strengthening its polity, with only one goal – to make turning back to early 50`s impossible. It is a time again, like 60 years ago founding fathers did, to come back to the core values, which constitute European Union and this civilization. This project is simply too important to give it up. Therefore, there is no alternative to European Union and the values it embodies.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

CONTRIBUTIONS TO THE THEORY OF ABUSE OF RIGHT

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Summary

The concept of abuse of rights is relatively new and at the same time, questionable for science General Theory of Law. This article reflects the opinions of reference in terms of theories, issues that could be integrated into this concept. Setting subjective rights of individuals and their implementation in good faith is immeasurable practical importance. The problem is to determine the essence of this concept.Dilemma materialized to accept the status of abuse of rights or qualify this phrase as an unlawful act, which would have consequences for liability.

Keywords: *subjective rights, abuse of rights, the subjective theory of abuse of rights, objective theory of abuse of rights, abuse of right classification, principles of abuse of rights, the exercise of a subjective right.*

One of the most difficult issues facing those who study law is the problem of realization and implementation of law. Realization of law is a process. This process involves behavior, which must correspond to the spirit and letter of the law. Then, when this behavior does not meet these rigor, when legal norms are violated by subjects, we meet two new categories: abuse of rights and fraud by law as related issues, inextricably linked to the relationship between the spirit and the letter of the law and in while relevant to the general theory of law.

Importance of tackling abuse of rights in terms of the general theory of law is given so that gives an overview of abuse of law, as well marking distinct and special elements of abuse of rights in different branches. If until now have developed specialized studies devoted to some form of abuse of rights, this work analyzes the concept in a different approach following a generalization, a summary based on the study of law in question.

The problem of abuse of rights has a long history. Origin of abuse of rights theory is not easily determined because there are several opinions contrary to this topic, so we can conclude that the theory of abuse of rights is viewed through the prism of two diametrically opposite concepts, the subjective and objective, concepts that have subsequently guided the spirit of the laws of different countries.

Earlier we said that the origin of abuse of rights theory are two theories, the theory of subjective and objective theory of abuse of rights. Followers of the subjective theory (M. Planiol, G. Ripert) based on the concept of subjective rights absolute and their isolation from their social purpose and function. They believed that the only criterion for assessing domestic abuse as is the psychological factor, subjective intent to harm resulted in[104]. Moreover, Georges Ripert says that "infliction of harm was the only reason to work", resulting thus that guilt as psychological factor, subjective, leading to the existence of abuse of rights should take only as intended (as unthinkable abuse as committed by negligence, carelessness, recklessness). This limitation of the scope of the infringements intended only abuse was one of the first mistakes of the subjective theory, design them being restrictive, narrow and individualized[105]. We note another error of this theory: the lack of any objective evidence that external factor, such as removal or diversion from economic or social purpose interest. In addition, abuse in the exercise of a right to be confused with subjective bad faith, fraud, which also is not correct. One of the authors progressive legal literature French Louis Josserand, French lawyer, Dean of the Faculty of Law of Lyon, on the subject investigated rightly said, "would be inconceivable that legal powers can serve as weapons ill-intent, malice and bad faith. Fraud, which vitiates all acts which application to terminate all legal rules should not give free rein under the benevolent too subjective rights, it must be fought without mercy, otherwise însuşii right - being put into service for anti-social purposes , parodied the unworthy by those who use it - would be likely to "die" under the blows of this desecration"[106].

Evolving from absolute conception of subjective rights and their isolation from their social purpose and function of the objectives followers theory of abuse of rights, came from absolutization relativity subjective rights and observing that each of them has a social purpose. This theory was developed in bourgeois society, capitalist philosophical doctrines based on solidarity, but also in practical situations with large companies saw their small properties limited development land, without legal means of pressure on them[107].

This theory, called social purpose, arising from misuse of power concept of administrative law (exceeding the discretionary powers set out in legislation and legal principles, or, one can speak of diversion of power then when it is used for purposes other than those established by law), is regarded as developed by L. Josserand.

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[104] M. Planiol,G. Ripert. Francois treat pratique de droit civil. T III. Paris, 1930. p. 575-580.
[105] Ibid.
[106] L. Josserand. The Labus de droit. Paris, 1905. P. 51. http /books.gougle.md / books / about / for (visited 2/20/13).
[107] H. Constantin Palade. Abuse of rights. 2010. p. 80.

Diversion concept of power is very close to the concept of abuse of rights. Therefore this concept is interpreted as followers subjective theory of abuse of rights, as well as the theory of goals.

One issue discussed in doctrine and jurisprudence, diversion of power related concepts as abuse of law to achieve those if misuse of powers necessary or not to proceed with an element of intentional[108]. Advocate General Lagrange in the no. 3/1954 are held that "the hallmark of misuse of power is not an objective violation of a rule of law, but illegal subjective intent, as contrary to the law, the Authority issued Decision" (diversion subjective theory of power) . Instead ECJ, who shared objective theory of power diversion nr.8/1955 decision stating that there is misuse of power and then, when, by a serious lack of foresight or district, was pursued another purpose than provided by law, no need to highlight the obvious intent to circumvent the law[109].

As previously mentioned, the theory is L. Josserand objectives. The basic idea of these theories is "soul's purpose lies in social law". For it is improper act "act contrary to the institution, its spirit and purpose"[110].

Objective set theory, then, that the first criterion (although there are other criteria, such as why a legitimate social interests, aim right) of the intended social function. Author T. degrees asserts that this conception of L. Josserand jump away from reality and the theory of subjective and objective, bringing a new criterion: the purpose and destination of rights, but at the same time recognizes the merit of L. Josserand be combined with the objective subjective criterion[111]. Yet objective theory has some shortcomings. One of the shortcomings is ignoring the psychological factor, subjective guilt in committing abuse of law. Another problem is defining social goal against weather concepts as unstable as the criterion of morality and the different political orientations throughout history.

As mentioned previously, there are legal doctrine authors annihilates the very existence of abuse of rights (S.N. Bratus, N.S. Malein and others), considering that it would be only the concept of fault broadly. To exercise a right, in order to commit a loss means a tort negligence characterized by ill-intent and desire to cause injury.

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[108] Schwarze. European administrative Droit. Vol I. Bruylant, 1994. P. 274-294. Apud: L. Nedelcu, A. Nicu. Legality and power in European public administrations. http/ drept.ucv.ro/RSJ/(visited 2/20/13).

[109] Ibid. p. 136.

[110] L. Josserand. The lesprit de droit et des leur relativity. Theoriedite of Labus de droit. Paris. Ed Dalloz, 1939. p 345.

[111] T. Grad. Exercise of civil rights according to their economic and social purpose and rules of coexistence. PhD thesis, Faculty of Law. Cluj-Napoca, 1991.

This theory of assimilation abuse with tort law is not sheltered from criticism[112]. L. Deleanu support the author's opinion that between tort law and abuse are significant distinctions: a) civil offense has anything to do with the existence or exercise of an individual right, just in case abuse is committed, b) if not civil crime has any relevance legitimate existence, and if the abuse is not a legitimate exercise, c) abuse and other measures as may attract civil penalty in only the (disciplinary, administrative, criminal, which we'll talk later, d) for abuse of law, no person shall be liable only for damages to the victim, the court may decide to return to the previous situation, solutions are rare in civil matters[113]. In addition, abuse of rights is subjective right diversion feature of its social and economic order, and could speak a distinct abuse of an illicit act[114].

Abuse of rights is not only the existence of contractual liability (abuse of rights can attract other forms of liability) as there is no abuse of the subjective right - right in itself, can't be so - but, in the exercise or non-exercise to abusive, so the diversion from the purpose for which it was recognized in the exercise of bad faith (in the legal sense) by the owner, which means that it has exceeded limits, legally lost its rights, the individual right.

Exceeding the limits of his right holder subjective means deviation from the purpose of which was recognized by law and always commit mistake. This overflow - limit how limiting an individual right is limited to the subjective right of another - in sight subjective intent to injure the right of another, citing exercising their individual right taken as absolute. One's right to listen to music in his apartment is the right of individuals to privacy, when the music volume exceeds normal when the machine touches subjective exercise of the right to privacy, tranquility, rest, etc.. the neighbors lodger, of now there is an abuse of law made by the holder as absolutely subjective.

Abuse of rights may result in legal liability under the following conditions:

- The existence of a subjective right determined (using the radio in his room block at maximum sound volume subjectively determined adversely affecting the exercise of a right neighbors subjective abusing his right to privacy);
- Committing an illegal act by the exercise or non-exercise of a subjective right (boundary between two properties costs fall equally owners of the two funds, if one of the owners refuse to exercise this right, then the owner can do fund neighbor forcing him by justice, mid expenditure);
- Material or moral damage;
- The causal link between the wrongful act and injury;

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[112] H. Constantin Palade. Referenced publications. p. 84.
[113]I. Deleanu. Individual rights and abuse of law. Cluj-Napoca: Dacia Publishing House, 1988. p. 83.
[114] H. Constantin Palade. Referenced publications. p. 84.

- Culpability of author of illegal act[115].

Although the existence of subjective right is one of the conditions of abuse of rights - along with committing an illegal act, moral or patrimonial injury, causation and fault report so - this does not mean that any individual right would be susceptible of abuse by some individual rights by nature, the holder can't abused: the right to life, the right to dignity, the right to a name, etc.

Hence, we conclude that abuse of rights foundation is subjective right there. Subjective right was taken more data definitions. An operational definition tells us that "active subject to possible liability claims subject undertaking imposed or proposed action or refrain from doing something, as the parties have understood that it should behave when they entered the legal relationship is called as - as subjective[116].

So subjective right allows the holder:

a) have a certain attitude towards his right, for example, to use it;

b) provide appropriate attitude of the subject required;

c) may appeal to the state to defend its right path[117].

But what is the measure of subjective right, which is its limit?

It is considered a "measure" a "limit" of subjective right, obligation. Obligation is subjective and is right opposite the satisfaction or, where applicable, the performance credentials that involves the rights of another holder of subjective rights. By giving, doing, or not doing something[118].

There are some occasions when some individual rights are identified with the obligation to exercise them, as if the public authority's right to challenge the one who committed the illegal act. There is, therefore, an absolute correlation between the right and obligation. Wherever there is an individual right, we understand that there must be a duty and an obligation wherever we mean that there must be an individual right.

Authors Gh. Mihai and I. Sabau, in an article published in the Annals of West University of Timisoara give us a definition of subjective right to begin exploring "all abstract subjective rights, both recognized by the state and the set of generic objective law in force, which it (the state) gives them protection and guarantee, so that their owners can exercise them freely is subjective right"[119]. As we see, the subjective right can be viewed as a right of a person's actual concrete and a set of individual rights. In this definition there is a basic feature of the

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[115] Gh. Mihai. Fundamentals of law. Vol IV. Bucharest: All Beck, 2005. P. 208.

[116] D. Baltag. General Theory of Law. Chisinau: Center editorial FIUM 2010. p 332.

[117] B. Black. General Theory of Law and State. Chisinau: Bons Offices, 2006. p.454.

[118] Gh. Avornic. Treaty general theory of law. (2 volumes). Vol II. Chisinau: Central Printing, 2010. p. 151.

[119] Gheorghe Mihai, I. Sabau. Contributions to the theory of subjective rights. The. Annals of West University of Timisoara, Series Law, Vol II. 2004. p.4.

subjective right that is limiting him. However, at the end of the article, the authors, would like to clarify that the law does not give individual exercise unlimited power, enshrines freedom of all, however, does not confer and illegitimate exercise of its unlimited or by each "Overcoming the law or violating their purpose is abuse The subjective right, sanctioned by the law in force"[120]. This approach is insufficient to distinguish between internal limits applicable law (real abuse of rights) and external case illegal act[121].

From the definitions of subjective right that this law is a legal possibility, while exercise is right, just, legal opportunity materialized. Exercise - recovery by the owner of the right that lies - takes place in light of principles that defines the use of abuse of rights:

- The principle of the right to subjectively according to its lawful owner;

From this principle shows that recognition and protection of a subjective right is justified by certain objective, the destination's social, on the one hand and, on the other hand, the holder is directed to assert his right subjectively if and only if an agreement is in the interest of law. Conversely, disregarding purpose included in applicable law by a right holder subjective thus satisfy their personal interests constitute abuse of rights.

- The principle of the right by the holder with respect to subjective morality;

Moral norm customize behavior, it evens legal norm. The latter does not prohibit all acts of vicious, nor obliges all virtuous acts, but prohibits acts vicious and virtuous acts require into the scope and general interest[122]. From this it appears that the right subjective principle is realized not only with the law and public order, and morality. Subjective right is exercised within its data and objective norms of morality. About this speaks and art. 9 para. (1) CC RM "natural and legal persons involved in legal relations must fulfill the obligations of good faith in accordance with the law, to contract with public order and good morals" This means that "good" manners have the same value significant other performance conditions. "Morals" are a continuation of the law.

Although Moldovan law would allow gay marriage, it would be contrary to morality, and, then, execution subjectively by two gay rights would not respect moral Romanian concrete [123].

- The principle of good faith exercise by the holder of the subjective right.

This principle tells us that only "good faith" should underpin exercise all civil rights in the sense that it must be exercised with the right intent, loyalty, diligence and prudence.

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[120] Ibid. p. 16.
[121] H. Paladi Constantine. Referenced publications. p. 72.
[122] Gh. Mihai. Referenced publications. p. 205.
[123] Ibid. p. 206.

Article 55 of the Moldovan Constitution provides that "any person exercising their rights and freedoms in good faith without infringing the rights and freedoms of others.

About good faith we learn from Cicero, that is unity between sincerity in words (veritas) and fidelity to commitments (Constantia), or, fidelity to commitments can't exist without their taking and taking is determined by sincerity. This principle, its content indicates the subjective element of abuse of rights, born of the subjective theory about it, that is based on the existence of error in the forms of intention or negligence. Exceeding the limits of his right holder subjective means deviation from the purpose for which it was recognized by law and always commit mistake. This overflow - how limited, which limits an individual right is limited to the subjective right of another - in sight intention to injure another's subjective right, exercising their individual right invoking taken as absolute[124].

Based on the above we can conclude that abuse exists, regardless of the subjective nature of the right:

- Abuse of constitutional law, state or citizen;
- Report of criminal law, from any part of the report criminal justice, abuse of civil law from individuals and businesses, civil disorder as subjective;
- Abuse of administrative law, the public administration;
- Abuse of tax law, the tax authorities;
- Abuse of procedural law, the participants in it;
- Report of family law, the spouses etc.[125].

So any abuse of subjective right (constitutional, criminal, civil, administrative, fiscal, etc.). Involves two elements: 1) subjective element consisting in the exercise in bad faith, morals, public order or law; 2) objective element, which is the matter right diversion from economic and social purpose of which was recognized as legal finality.

In a complex vision of abuse of rights concept, we believe that these two elements should be combined, imposing a synthesis between theory subjective and objective theory of abuse of rights. Abnormal and excessive use of intentional or negligent, or easily a subjective right, by overcoming its internal limits, includes implicitly subjective right diversion from its social and economic order.

There is no doubt that you can exploit only a subjective right, which not only understand the rights and freedoms of the person and the exercise of certain rights of public authorities, which are sometimes used unscrupulously to the detriment of citizens. Therefore subjects of abuse of rights can be:

1) constitutional rights and freedoms holders (citizens, political parties, media) Note that if all individual rights are fundamental constitutional rights, not

[124] Ibid. p. 207.
[125] Ibid. p. 202.

all individual rights are constitutional rights. Whether a constitutional right depends on subjective value judgments own an epoch and a given society. Protects fundamental subjective human rights beyond constitutional requirements. However, the current Constitution includes, in addition to fundamental individual rights and the constitutional own citizens statutes of each state[126].

2) institutions, enterprises, organizations (eg monopolistic enterprise abusing the dominant market position);

3) State bodies and its officials;

Generic subjective rights (existing objective law, the law in force) are possibilities for virtual subjects, while their exercise existing legal possibilities, verified by specific subjects capable (citizens, political figures, media, institutions, enterprises organizations, state bodies, civil servants). Topics which the law permits the exercise of subjective rights are required, also by law, to assume and exercise the corresponding obligations as they are provided and limits. If a representative of the media exceeds the limits set out in the exercise of its subjective opinion, he falls in abuse of right to an opinion.

Research the law governing the behavior of subjects in the exercise of subjective rights allows us to classify abuse of rights into three categories:

1) abuse as legitimate;

2) abuse as limited by law;

3) abuse as illegal.

If abuse as legitimate, the right subject is directed primarily against morality, but not against the law or public order. In other words, within the limits provided by law, the owner can do any kind of subjective acts, even if the harm they cause to others. Someone, who is accused enriched in immoral ways can answer "I do not say that I morally rich, but respecting the ways established by law, legal" if coverage is legal acts, morality does not matter.

Another example: neighbor builds a house so high, that totally obscures the neighbor's garden. A driver who only lifted to permit subjective exercise their right to travel by car on the streets, we practice with, and with fear of accident, moving only 20 cm / hour, making the move to a congestion, it does not violate the other driver subjective right to move with a speed of 50 cm / hour, but temporarily restrict the individual right.

As examples we may refer to the Roman law, namely the Roman law was beautiful and just *adajiu qui suo iure utitur reminem laedit*- who uses his right injures no one. In other words, as mentioned above, within the limits set by law, the owner can do any kind of subjective acts, even if the harm they cause to others.

[126] Ibid. p. 204.

Example, significant concerns as legitimate abuse by the exercise of social rights and freedoms, brings French scientist P. Sandevuar[127]. According to the author, misuse legitimate exercise of the right to strike, the right to work is difficult to achieve by other matters (if that were occupied by strikers some areas where workers want to work) or the establishment of pickets (it is impossible to go to work for those not participating in the strike).

A similar situation may be blocking ports, refusing to unload some perishable goods.

Abuse as legitimate harm the social relations regulated by law, for these reasons, depending on the concrete situation, can be described as immoral or irrational.

Subject immoral acts when, do not coordinate their actions with concrete historical representations of good and evil, just and unjust, the social values governing relations between individuals, family, society, state.

Subject moral act within such time as the emoticon you do or say not deliberately cause suffering to others. Morality is equivalent to goodwill, immorality ill-will. Here, we would like to emphasize, intentional aspect of the suffering caused. We absolutely free, and whenever we act at will, accepting the absurdity of the situation, but at the same time, freedom means responsibility. We are aware of the consequences of their actions and are the product of past actions. As a result, the freedom that we take every choice made involves voluntary and conscious acceptance of certain limitations that come with the election. Action horizon shrinks depending on the chosen limits.

Subject acting irrationally if economic and social order, required by law, can be achieved by using other legal means.

Lack of money to pay judges in Moldova, in late 2012, is the result of irrational bonuses court presidents. At least this is claimed Minister of Justice, who said that only during 2012, employees of judicial institutions have raised premiums of over 2.5 million. lions payroll. While legal rules provide that such payments can be made only from domestic savings[128]. As we see, this is the event of abuse licit, in fact irrational exercise of individual rights. Thus, speaking of abuse as legitimate, the subject realizes the rights, using the prescriptions of the law. given that subjects comply prohibitive, it does not violate law and can't be held legally responsible.

The second category of abuse is abuse as limited by law.

In this case, can use in bad faith law is limited to prescriptions legal norms, which do not contain sanctions (due at the abuse of a right can't be held responsible), but are intended to:

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[127] P. Sandevuar. Introduction to Law (translated from French). M.. 1994. with. 303, 326.
[128] http//w.w.w.md/rosocialministruljustitiei(visited 2/22/13).

1) preventing abuse of the concrete sphere of social relations. For example, art. 1 para. (3) CC RM "Civil Rights may be limited only by the organic law on the grounds set out in the Constitution of the Republic of Moldova;

2) to exclude the possibility of law subject to abuse his right, Art. 53 para. (5) RM Family Code says that if abuse of parental rights, the child may apply to the guardianship authorities for their legitimate rights;

3) to limit abuse of law deliberately. Article 41 para. (1) Constitution stipulates that citizens may freely associate in parties and other social-political organizations.

Litigation of parties will also consider other circumstances ..., the party's actions endanger the functioning of state institutions or the rights to freedoms of others art. 11 of the European Convention, it prevents the state to exercise its function of protecting those institutions and individuals[129] (from the abusive exercise of this right - Ed).

Another example, the German Constitution art. 18 states "who abuse the freedom of assembly, opinion, press, freedom of conscience, association ... against bases of a democratic state is deprived of these rights".

As we see abuse as the second category are recognized by the state as undesirable because they can cause harm social relations protected by the state. Legal consequences of thus depriving rights abuses are concrete, specific persons or refusing to defend his rights.

The third category of abuse as abuse of law are illegal or considered illicit and sanctioned actions, if their liability occurs. Topics such actions usually are law enforcement officers, persons in charge, journalists etc. In other words, people who are competent state special rights or powers to conduct public functions.

Conditions as unlawful abuse and accountability that engages are:

- The existence of a subjective right determined using the radio in his room block at maximum sound volume subjectively determined adversely affecting the exercise of a right of neighbors subjective abusing his right to privacy.

- Committing an illegal act by exercise or non-exercise of rights subjective Granitu costs between two properties, properties fall equally on the two funds, one fund if the owner refuses to exercise Granitu subjective right, then the owner can do next fund delegating it through mid justice expenditure;

- Economic or moral damage;

- The causal link between the wrongful act and injury;

- Culpability illegal act[130].

Although the existence of subjective right is one of the conditions of abuse of rights - with committing a willful material or moral injury, a causal relationship

[129] w.w.w.csj.md / admin / public. (Visited 2/22/13).
[130] Gheorghe Mihai. Referenced publications. p.208.

and guilt - this does not mean that any individual right would be followed by abuse: some subjective rights by their nature, can't abuse holder: the right to life, the right to dignity, the right to name etc.. It is also noticeable as many types of abuse of illicit, each with its specificity: the abuse of constitutional, civil, criminal, administrative, commercial, tax etc. Liability thus action can be established both in law (eg, art. 327 hp RM "abuse of power or abuse of office") and the law subordinate legislation (regulations, instructions, etc.) .

However, Article normative act, not always, can be summed up one way or another abuse of law. Often the abuse of rights is a way to commit other crimes or misdemeanors. So, for example, in the opinion of the author FM Resetnikov[131], concrete forms of abuse of rights can't be qualified as crimes committed by persons directly in charge, but the attacks on the rights of citizens (art. 178 hp RM "violation of the right correspondents secret" art. 180 hp RM" deliberate violation of the law on access to information", Art. 183 hp RM" violation of labor protection "crimes against justice (art. 308 CP RM" illegal arrest; art. 307 hp RM "Pronouncing a judgment, decision, conclusion or judgment against the law) or against property (art. 194 HP RM" Causing damage to property by deception or abuse of trust ").

It also refers to other subjects. For example, journalist and media abuse. Journalist card not trigger any immunity or any status. But sometimes, we are witnessing the manipulation, lies and non-words, we see daily on most screens, which are dangerous for the press and hygiene Moldovan society. Thus, abuse of illicit as may be specified in Article normative act, which is punishable, and by committing other violations of law (for example, by abusing the freedom of speech, the speaker calls for mass events and disobedience).

Assimilation abuse of rights with responsibility is the most popular and acceptable way of abuse of rights. Exercise a right to commit damage, is a violation, a misdemeanor, characterized by ill-intent and desire to cause injury. Even in ordinary language[132] (the term "abuse" means breaking the law, as without the use of a thing, and in that of "abuse of rights"[133], that crime which consists in the exercise of a right to ignoring its social and economic purpose.

"Abuse of law" would be subjective rights, equivalent to that which is "fraud in law" for the right purpose: a correction, which highlights, among other things, influence moral rule on legal rules. It is noteworthy, however, that the doctrine and jurisprudence has developed, often a much broader concept "abuse of rights", considering that this area falls not only intent to harm, but any

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[131] Fyodor Reshetnikov. Responsibility for malfeasance in foreign countries. M.. 1994. with.7.
[132] Explanatory Dictionary of the Romanian Language. Bucharest, 1998. p.4.
[133] I. P Pitulescu, P. Abraham, I. Ranet. Dictionary of Legal Terms. Bucharest: National Publishing House, 1997. p. 13.

unreasonable exercise a right that any diversion of objective finality, one that has a normal use for which the right was recognized. Introducing "finality" as a standard of measure for the exercise of rights is the core of the famous doctrines, including that of Louis Josserand. Such doctrine requires the discovery of "other coherent" theory of abuse of rights, in this perspective, becoming really impossible to accept that the abuse of the right to remain outside the law itself, being able to ask the question whether a right unreasonably can be considered as[134].

So we need to remember another vision of individual rights, recognition for the government and litigants of legal powers is an expression of the fundamental concepts on law exercised at a certain time and a certain place. According to these concepts may undoubtedly authorize the formulation of rights and freedoms, but their beneficiary must not lose sight that you can't use them, but fairly, justly and certainly justified in terms rational. Thus is created, by the concept of "abuse" as an effective tool not only legislative pedagogy, but also to prevent and punish any deviation from this principle.

Of course, that judges are responsible delicate but crucial to determine whether, in this or that case, there is or there is abuse of rights, but it no longer appears only as a cautionary note, never-ending practice and to both less as an end of it, but rather it is an essential task to, that of ensuring that the correct (honest) law, enforced with determination and rigor any attempt to bypass or diversion of law from purposes for which it was created[135].

In conclusion we would like to formulate a definition that includes all modes of abuse of rights, accepted contemporary legal doctrine[136] that Cantonese is not a single theory or criterion. So we can define as abuse as performance, subjective exercise of a right in violation of its principles. The above principles are arising, so that whenever a right is exercised: the disregard of law and morality, in bad faith, to overcome its internal limits, or disregard of economic or social purpose for which it was recognized equivalent abusive exercise of subjective right. In our country, the theory of abuse of rights is regarded with suspicion because the negative spectrum of the Communist regime and socialist mentality still hanging over them. After being used as a means of imposing ideologies and totalitarian regimes, it is difficult to get an instrument for the protection of the oppressed. We must remember that not only this institution was diverted from its purpose, but the whole legal system was messed up in the past criminalization of analogy in criminal law against the defendant, the fictional status of civil servants

[134] V. Patulea. Abuse of procedural law and procedures. Its legal and sentencing regime. In: Romanian Pandect no. April 2010. p. 61.
[135] Ibid.
[136] V. Patulea. Abuse of law and contract work. Bucharest: Ed WoltersKluwer, 2007. p. 12; L. Pop. The general theory of obligations. Bucharest: Lumina Lex, 2000. p. 366.

and judges up today case "Royal Forest" or illegal abuse of tax bodies, "the case Vicol".

Abuse of rights theory has merit limited by the need for specific regulations, allowing judges greater freedom because, as stated and Neitzche "then, when an empire is about to perish, has many laws"[137] - *summum ius, summa injuria*- (with the more laws, the more wrong call).

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22. w.w.w.csj.md / admin / public. (Visited 2/22/13).

[137] F. Neitzche. Aphorisms. Bucharest: EdHumanitas, 2007. p. 149.

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THE PHENOMENON OF OPPOSITION TO CRIMINAL INVESTIGATION –AN IMPORTANT FACTOR IN CRIME INVESTIGATION

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Abstract

Knowing the event that took place in the past is always based on the facts in present. These can be identified and established by different operative investigation measures and procedural actions. Knowledge gathering includes also a practical activity of gathering, checking and evaluating evidence. The amount of information, efficiency and possibility to gather it depend very much on the investigation process environment and on the criminal investigation officer's professionalism, of his/her civic position.

Taking into consideration the fact that criminal investigation is performed by criminal investigation officer or prosecutor, we can say that resistance against this activity means creating impediments to above mentioned persons to do their job properly. Sometimes these impediments may be oriented not only against the case but also against the criminal investigation officer or prosecutor. In these cases a conflict is noticed that may serve the interested persons, that resist case investigation.

Key-words*: investigation measures, criminal investigation, prosecution, procedural actions.*

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Certain persons or groups of people are against criminal investigation activity. It's well known that no person that committed something harmful, does not want to be prosecuted for committed deeds. Everybody tries to avoid criminal liability or at least to endure a smaller punishment, that's why, even if the criminal is retained in the moment of committing the crime or immediately after, the majority of suspects try to hide some circumstances of crime, or to diminish their implication in preparing or committing the illicit act. In other cases these persons choose active forms of resistance –like declaring a false alibi or influencing the representative of criminal investigation body, by different methods and forces.

The theory of fighting resistance against criminal investigation appeared in the beginning of '90s of the XXth century. It is related to criminalistics and is included in this science like a special theory. Many Russian criminalists (like R. Belkin, A.Custov, V.Culicov, V.Caragodin, A. Volynskii etc.) contributed to the establishment of this theory.[138]

Opposition to criminal investigation became lately a relevant problem. This is connected to increase of illegal deeds of criminal organizations, protection of criminal activities by some employees of police, prosecution, special services, also involvement of state officials, members of parliament etc.

The essence of resistance against criminal investigation, as E.Babaeva mentions, is organizing and creating of certain impediments and obstacles during the investigation and examination of a criminal case [139].

The main reason that leads to resistance against criminal investigation is the desire to shirk criminal liability or to help somebody to do it. This desire may be determined by criminals for different reasons. First of all it is the fear of the punishment, in other cases- shame, fear of compromising confession, publicity of crimes against relatives or of the ones with sexual character etc.[140]

In other cases resistance against criminal investigation is based on the belief in lack of honesty and principles of some representatives of special and legal bodies. This is the case of fraudulent criminals (repeated offenders, members of organized criminal structures).

So, criminal investigation is performed in good and bad situations and conditions. Unfavourable situation of criminal investigation is created in case of interested persons' opposition. These may be from inside or outside the authority. This kind of unfavourable situation may occur before the initiation of criminal investigation, during the investigation or at the hearing in court.

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[138] Бабаева Э.У. Проблемы теории и практики преодоления противодействия уголовному преследованию. М.:Юрлитинформ, 2006, с.36-38

[139] Ibidem, p.65

[140] Аверианова Т.В., Белкин Р.С., Корухов Ю.Г., Россинская Е.Р. Криминалистика. Учебник для вузов. М.: НОРМА, 2007, с.465

Opposition to investigation from inside, that may occur from a person or other, character of the investigation, may be expressed by: suspect, accused, witnesses, victim, specialist, expert, defence lawyer. For all of them it is characteristic to have certain information regarding the committed crime and try to hide, modify, destroy this information or it's support.

The most interested in this situation is the criminal, who usually resists the criminal investigation officer in the most active way, taking efforts of opposition to examination, trying a huge amount of juggleries like: craftiness, blackmail, lying, fraud, slander, provocation, forgery, bribery, threat etc. But it is mandatory for the criminal investigation officer to act according to law and morality. He/she has the right to use certain tactical procedures or operative measures to verify the evidence over the case, including the suspect's or accused testimonies, to take all the measures to establish the truth and to prosecute all guilty persons.

The characters of the case, being interested in the investigation's results of the discovered crime, may use the following methods of deceit: hiding information that has criminalistic meaning; destroying information and its supports; masking crime's data; falsifying data regarding the committed deed; offering alibi; crime setup. etc

In achieving the purpose of resistance against criminal investigation, offenders, usually use three ways, 1) commit offences at a very high professional level without leaving traces (material or ideal). To this end they are trained by former workers of law enforcement, performance specialists, 2) physical destruction of traces that appeared after the offence. This can be made by the offender after committing the unlawful act or certain people, groups, who usually work in the organized criminal groups and do this job, including physical removal of victims, witnesses, etc.: 3) influencing the prosecution, prosecutors in various ways and forms so that the case isn't opened, and should it be opened – have it stopped.

The victim is customary to resist prosecution in two cases: a) when the offence finds some defamatory aspects, compromising him/her and b) if solving the case can lead to his/her prosecution.

Witnesses concerned may oppose investigation for various reasons: pressure, suspect's, lawyer's, relatives' influence, extortion, bribery, mercy, etc.

It is s known that the investigator almost never has all the information at the start of the investigation. He is forced to make decisions in conditions that are characterized by a lesser or greater uncertainty. Often the investigators lack information and in such situations they can be easily influenced by some leaders of these bodies, which are intended for specific purposes to put opposition to prosecution in the particular case.

Opposition from outside, involves activity of some individuals who are not related to criminal event, but have some interest and levers (administrative,

procedural and other relationships) on the personality of the investigating officer (prosecutor). These can be: leaders or special or law enforcement bodies, prosecutors, work colleagues, relatives, acquaintances of offenders, officials of state bodies, etc..

When resistance in the investigation of the case is arranged by persons in charge of the prosecution, empowered with certain procedural rights and influencing the investigation process, it is based on the difference in the position the subject of investigation has and his/her chief. The last one, according to the status of the function and its procedural and administrative powers, has the ability to create real obstacles and influence the prosecution. This service of the head of the involved body by the offender or other stakeholders, allows to certain dignitary to create on the cause certain obstacles and coating (camouflage) such as "legal requirements". To this end it masks sabotage activities under the guise of strict enforcement "law rudiments" formal performance requirements of the law, departmental orders and instructions, hiding their own incentives and arranging artificial barriers prosecution.

The essence of the organizational obstacles from leaders of law enforcement bodies, is to create the feeling of distrust in the position, condition of service, to arouse distrust in the possibility of aid and support from management, colleagues to the operative officer, to the investigator or prosecutor. These states can be reached from lack of normal work conditions, assignment of operative worker or investigating officer with other activities which don't allow them to deal directly with criminal detected case, clarification, etc.

And if subjects of opposition from inside can achieve their goals through concealment, falsification, alteration of the circumstances of the committed crime, than outside subjects of opposition- through influence, pressure on the investigator, prosecutor, creating the conditions for them to commit violations, deviations, or crimes and then be removed from the investigation.

A special form of resistance prosecution is refusal of representatives legislative power bodies to deprive the suspect of MP immunity.

Experience shows us that resistance to prosecution is carried out in two forms: active and passive

As an active form of resistance the following can be considered criminal: giving false testimony, inciting others to giving false testimony, concealment and destruction of all, objects and documents which may be of importance in the studied case, the creation of false evidence, staged crime, resisting representative criminal prosecution body, evading prosecution, etc.

Passive form of resistance has the character of inaction and shall be deduced from failure to help the investigator in certain difficult situations by operative investigation authorities, subdivision management, organ, its failure to fulfil legal requirements, failure data requested relevant documents, delayed

fulfilment of interpellations on time representation subpoena authority, refusal to testify, etc.

Depending on the information available to the investigator (DA) regarding opposition to investigation, the possibilities to distinguish and correctly assess the situation, the resistance can be differentiated: latent and open, direct and indirect,

Direct form of resistance prosecution is expressed by direct influence of the investigator (prosecutor) and may be exercised as by the suspect, the accused so by others in their interests, through: corruption, blackmail, threat, challenge, causing property damage, physical force, kidnapping of family members, physical liquidation of witnesses, victims or their relatives etc..

Indirect influence on the investigator or prosecutor can be made from the heads of law enforcement bodies where they are operating, heads of prosecution subdivisions, colleagues, prosecutors at various levels, representatives of the executive and legislative body, etc. In these cases the nominees are not interested in researching and establishing objective truth on unlawful act but want to cover up information, evidence about the crime detected. Prosecution indirect measures of resistance usually are expressed by:

• Unfounded delayed start of the prosecution under the pretext of shortage of primary materials;

• carrying out pressure on the investigator, operative workers to finish checking or research materials over the specific case as unimportant, outdated;

• Refusal to agree to start a criminal case;

• set aside the order to start the criminal case;

• making materials (case on) and distributing them to another body;

• giving oral instructions to terminate the prosecution;

• transmission without any reason the criminal case from one officer to another with the purpose of removal from the file the evidence and subsequent termination of prosecution;

• knowingly giving undue indications regarding performing tasks that require more time and in this way to deviate from the basic activity - investigation the criminal case;

• sending letters to rogatory operational investigative bodies with specific inadmissible tasks to be executed:

• refusal to deprive of immunity a concrete person that has it or give permission to perform the search, arrest the suspect;

• refusal to extend the period for conducting the prosecution and the setting for dismissing a criminal case;

• unofficial consultation of suspects, accused and informing them about the investigator plans on file;

• creating opportunities for certain offenders to have telephone connection or otherwise with his accomplices, including the freedom to arrange some false evidence;

- refusal to establish or confirm the indictment and send the case to trial;
- order discontinuing prosecution by unmotivated order or poorly motivated;
- unfounded repeatedly postponing the consideration of the case for trial;
- unfounded removal of certain heads of the indictment charges the offense and enforcement easier;
- unfounded return the case to the prosecutor who led the prosecution or exercised, to forward an accusation, which is different from the primary key;
- revocation or modification of a preventive measure chosen country Ternate above;
- amend the list of persons unfounded to be cited in court;
- unfounded accusation of the investigator, the prosecutor in violation of law, removing him from investigating the case, including starting an investigation on his own initiative or criminal;
- adopting harsher sentence for defendants who's guilty has not been proven with conclusive evidence in the court of Law and gentle acquittal or conviction of defendants whose guilt was fully proved so.[141]

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As mentioned by S. Juravleov the offense investigation is an eternal conflict, overcoming the resistance of human and material things. Sometimes resist all, witnesses and victims, suspects and accused. He also emphasizes that resistance indices can be noticed since the moment of the infraction intention.[142] However, taken together, criminal investigation sometimes has a character battle between the investigator (prosecutor) and others, which often take forms quite acute and

[141] Журавлев С.Ю. Расследование экономических преступлений. М., 2005, с.459-452
[142] Журавлев С.Ю. Расследование экономических преступлений. М., 2005, с.459-452

dangerous. Need to overcome dangerous situations and to remove obstacles deliberately putted on the path of the investigator; this provokes various emotional reactions, demanding continuous efforts of will and intellectual and active professional activity.

In investigation activity it is necessary to overcome the resistance from people who are not interested in the efficient prosecution. Possibly, there is not another kind of human activity against which precludes so much resistance from certain people or groups of people. We must therefore take into account that organized resistance, sometimes opposed to the investigator (prosecutor) by certain people in positions of responsibility, suspects, accused and so on, could create serious difficulties or even investigation the safety of people entrusted with the investigation of crimes.

One of the tasks of the investigator (prosecutor) to any criminal investigation is a clear assessment of the situation in which they operate, investigating crime. This can be done only by studying and analysing permanent systematically all the information gathered, behaviours extras concerned colleagues and management attitudes towards investigation. You have to take into account the possible contracts aimed countering investigation objectives.

Resistance to criminal prosecution body is a system of actions (inaction) directed to concealing criminal act or its circumstances by restricting the use of all the evidence in criminal proceedings and their subsequent use as evidence in court.

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THE RESTRICTIONS ON THE RIGHT TO PRIVATE LIFE. THE ROMANIAN AND THE EUROPEAN REGULATION

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Abstract

The right to private life is part of the personality rights. It is a complex right designed to ensure the privacy of personal and family life. At the same time, like any other right, it may be restricted by law only if the measure is necessary in a democratic society. The measure must be proportionate to the situation that caused it and must be applied without discrimination and without prejudice to the existence of the right or freedom. The most common interferences in the private life done by the authorities under the law conditions are realized during the criminal process by entering the domicile, by keeping the private life under observation, by wiretapping or by intercepting the correspondence.

On the other hand, the right holder himself may agree to limit the right to private life in certain aspects.

Keywords: *the personality rights, the right to private life, the right to dispose of himself, correspondence, interceptions, recordings*.

1. PRELIMINARIES.

The right to private life is part of the personality rights. They are inherent for individuals, because they are directly attached to the real human and inseparable from it, so that they were also called "the primordial rights of the human being"[143]. Unlike the real and claim rights, these rights are not acquired as a result of human actions[144], their purpose being to protect the very existence of the human being in all its components, biological, physiological, mental, moral and even in some social aspects[145]. The personality rights juridical nature is that of personal non-patrimonial right and in the international law they are part of the human rights.

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[143]G. Cornu, *Droit Civil. Introduction. Les personnes. Les biens*, 12-e édition, Montchrestien, Paris, 2005, p. 238

[144] Ph. Malaurie, L. Aynès, *Les personnes. Les incapacités*, Cujas, Paris, 1999, p. 113

[145] For a summary of the various points of view on the rights that are part of the personality rights see O. Ungureanu, C. Munteanu, *Drept civil.Persoanele*, 2nd ed., Hamangiu Publishing House, Bucharest, 2013, p. 46-52

At European level, the legal instrument most articulate for human rights protection, category which includes the right to private life[146], which has the largest coverage area, is the European Convention on the Protection of Human Rights and Fundamental Freedoms, drawn up under the Council of Europe aegis.

Initially, the European Union was not equipped with a legal instrument for the personality rights protection. In the first instance, the European Union Court of Justice refused to exercise the judicial review of European acts, in terms of fundamental rights which were guaranteed only by the constitutions of the Member States, and didn't have correspondent in the constitutive acts, considering that the Union has only an economic dimension[147]. Gradually, the European courts have changed their view, saying that the Union must be based on a community of values and they have created a real jurisprudential law on the protection of human rights, resulting from the interpretation of the constitutive treaties[148]. This increased the awareness of the need for the rights and fundamental freedoms codification, the operation that was performed by adopting the Charter of Fundamental Rights of the European Union by the European Council Summit in Nice, on the 7th of December 2000.

The Charter of Fundamental Rights of the European Union had obtain legal power only after the adoption of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), signed on 13th of December 2007. Thus, following its amendment by the Lisbon Treaty, art. 6 paragraph 1 of the Treaty on European Union (TEU) regulates that the "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as it was adopted on December 12, 2007, which has the same legal value as the Treaties". The consequence is that both the institutions, bodies and agencies of the European Union and of the Member States will be obliged to comply with the Charter when implementing EU law (the principle of subsidiarity) and the citizens and the undertakings will be able to directly invoke its provisions before the European Courts[149].

[146] Regarding the personality rights covered by the European Convention on Human Rights, see Ph. Malaurie, L. Aynès, *work cited*, pp. 114-115
[147] We cite, as an example, the *Storck* case, 1959
[148] See J.-M.Favert, *Droit et pratique de l'Union européenne*, Gualino Editeur, Paris, 2005, pp. 373-378
[149] See J-L. Sauron, *Comprendre le Traité de Lisbone*, Gualino éditeur, Paris, 2008, p. 39

2. THE RIGHT TO PRIVATE LIFE REGULATION AND CONTENT.

The European Convention on Human Rights regulates the right to private and family life through Article 8, paragraph 1, according to which "Everyone has the right to respect for his private and family life, his home and his correspondence". This right content was determined by reference to a rich case law of the European Court of Human Rights (ECHR). It held that the concept of private life includes physical and moral integrity of the person, the intimate sphere of the individual (including the right to image, the right to name, the confidentiality of information relating to a person's health, the right to good moral reputation, the sexual freedom, the protection of personal data); the right of individuals to establish and develop relationships with others, including trade and professional activities; combining private and social life of the individual; the right to correspondence; the right to a home; the right to a healthy environment. In turn, the notion of "family life" includes relationships that are formed as a result of marriage and those that are the "family-type" and are the result of *de facto* unions; the relations between children and parents; the adoption, the child custody committing to care institutions; the right to meetings; the expulsion measure of stranger who has founded a family in a certain state; the succession[150].

In turn, the Charter of Fundamental Rights of the European Union regulates through art. 7, the respect for private and family life, as follows: "Everyone has the right to respect for his private and family life". The Charter determines the right to private and family life by reference to the European Convention on Human Rights and Fundamental Freedoms.

The Romanian regulation of private life is contained in the Constitution and in the provisions of the new Civil Code[151].

The Constitution, through art. 26 paragraph (1) requires the authorities to respect and protect intimate, family and private life and in art. 27 enshrines the inviolability of the home, that is the space that in which is consumed the most part of the private life. In turn, the new Civil Code (NCC) regulates the private life through art. 71.

Compared with the European Convention on Human Rights, the art. 71 of NCC gives the private life concept a narrower meaning. The Romanian legislator intended to protect, through the quoted legal provisions the intimate, personal and family life, the residence, the correspondence, the manuscripts and other personal documents as well as the private life's information of a person. It is also included

[150] See C. Bîrsan, C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, 2 ed., C.H. Beck Publishing House, Bucharest, 2010, pp. 602-605 and pp. 645-658
[151] Law no. 287/2009, which entered into force on October 1, 2011

the family life, a concept which has the same meaning as that given by the ECHR when applying the Convention.

Apparently, we are in the presence of a violation of art. 20 of the Constitution, which enshrines the rule of the super eminence of the conventions and treaties provisions on fundamental human rights to which Romania is a party, in relation to the law. In reality, these provisions are not violated because, on the one hand, art. 4 NCC establishes the same principle and requires the interpretation and application of its provisions relating to the rights and freedoms in accordance with the Constitution, the Universal Declaration of Human Rights, the pacts and other treaties that Romania is a party, and on the other hand, for methodological reasons, the legislator sought to regulate some components of the right to privacy as distinct rights. Thus, the new Civil Code regulates distinctly the right to physical and mental integrity of persons (art. 62-68), the right to dignity (art. 72), the right to image and the right to voice (art. 73) and the right to protection of personal data (art. 77).

To have a complete picture of the concept's content in question is necessary to relate also to art. 74 NCC, which, by regulating the violations of the private life, presents also the aspects of the person's life considered to have private character. The quoted text prohibits: the right to enter or to remain without right in the home or taking any object without the consent of the person that legally occupies the place; the interception without right of a private conversation, committed by any technical means, or the use of such interception; the capture or the use of the image or voice of a person in a private place without consent; the dissemination of images of the interior of a private space without the person's who lawfully occupies it consent; keeping private life under observation by any means, excepting the cases provided expressly by law; the dissemination of news, debates, surveys or written or audiovisual reports regarding intimate, personal or familial life without the consent of the person concerned; dissemination of materials containing images of a person in treatment in medical facilities, as well as personal data concerning health, issues of diagnosis, prognosis, treatment, circumstances related to illness and other related facts, including autopsy results, without the consent of the person concerned, and if the person is dead without the consent of the family or persons entitled; the use in bad faith of the name, image, voice or likeness to another person; the distribution or the use of correspondence, manuscripts or other personal documents, including the data concerning the domicile, residence, and telephone numbers of a person or family members without the consent of the person to whom they belong or, where applicable, is entitled to dispose of them[152].

[152] To analyze these prohibitions see E. Chelaru, the collective work *Noul Cod civil. Comentariu pe articole*, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, CH Beck Publishing House, Bucharest, 2012, pp. 82-85

The right to privacy has a corresponding obligation which rests with the authorities and individuals to refrain from any interference in the affairs of another and from any intrusion into a person's privacy.

3. THE RESTRICTIONS` RIGHT TO PRIVATE LIFE'S NOTION AND REGULATION

Generally, there are no rights that can be exercised unlimited. These restrictions are imposed by the need to allow the state authorities to remove the threats to public order and national security, or by the existence of other individuals similar rights which require a harmonization of the competing interests.

The right to private life limitations are thus restrictions on its scope and in certain circumstances the holder is obliged to bear facts which in normal circumstances would constitute violations of the right, punishable by law.

The European Convention on Human Rights, through art. 8, paragraph 2, provides that the interference of the public authorities with the right to respect for private and family life, which is likely to restrict this right, is allowed only "to the extent that this interference is required by law and that is a measure that, in a democratic society, it is necessary for national security, public safety or for the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". In interpreting these provisions, it had been showed that the interference of the public authorities with the rights guaranteed by the first paragraph of the quoted text must meet the following requirements: to be provided by law; to meet a legitimate aim; to be necessary in a democratic society; to be proportionate to the pursued aim[153].

Similarly, the Charter of Fundamental Rights of the European Union, through art. 52, paragraph 2, states that the recognized rights are exercised under the conditions and restrictions which it defines. Regarding the exercise's restrictions of these rights, the Charter adds that they can be provided only by law and must respect the essence of the rights they restrict. "In compliance with the principle of proportionality, limitations may be made only if necessary and if genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others" (art. 52 par. 1, second thesis).

In the domestic law, the possibility of establishing limitations of some rights and freedoms and the conditions they must comply with find their foundation in the provisions of art. 53 of the Constitution. According to this article, the exercise of certain rights or freedoms may only be restricted by law and only if necessary, as appropriate, for: the defence of national security, of public order, health or morals, of the citizens` rights and freedoms; conducting criminal

[153] See C. Bîrsan, *work cited*, p. 694

instruction; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster.

The quoted constitutional text provides that the restrictions may be imposed only if it is necessary in a democratic society. The measure must be proportionate to the situation that caused it, it must be applied without discrimination and without prejudice to the existence of the right or freedom.

When referring to the personality rights, the possibility of establishing such limitations is recognized by the provisions of art. 75 NCC. However, the legislator chose an indirect regulation of this subject. Thus, the limitations are not properly regulated, but the situations where violations of such rights do not represent an infringement, in the view of the legislator, are specified. According to the quoted legal text, it does not constitute infringements of the personality rights, the violations that are permitted by law or by international conventions and pacts on human rights to which Romania is a party. Meanwhile, neither the exercise in good faith of constitutional rights and freedoms does not represent an infringement of the personality rights[154].

Two observations are appropriate.

First, the Romanian legislator was inspired, when regulating the limitations that may be imposed to the personality rights, by the European Convention on Human Rights.

Secondly, the quoted text distinguishes between two categories of limitations: those that are materialized by violations of the rights of personality, if the law provisions or international conventions and pacts on human rights are respected and those that are the result of the exercise in good faith of such other rights. The first category of limitations is the result of state authorities' interferences, justified by the public interest existence and the need to respect public order, while the second is the natural result of man's social existence, his rights may come into collision with the rights of the same kind of others.

The exercise of their rights in bad faith can not lead to limiting the rights of others, but will constitute a breach of law, punishable under art. 15 NCC[155].

Given that most of the damage that individuals may bring to the right to private life of other persons is done when exercising the right to freedom of expression, we must remember that the text of art. 10 paragraph (2) of the European Convention on Human Rights refers to "duties and responsibilities" incumbent upon those who exercise the freedoms that form the freedom of

[154] For the categories of personality rights limitations resulting from the regulations contained in art. 75 NCC, see O. Ungureanu, C. Munteanu, *work cited*, pp. 82-87.

[155] According to art. 15 NCC, "No right shall be exercised in order to injure or defraud another or in an excessive and unreasonable way, contrary to good faith".

expression. The quoted provision represents the justification for applying sanctions when exercising the rights in a "irresponsible" way[156].

The same idea is generated by the provisions of art. 30 paragraph (6) of the Constitution, which aim to prevent the misuse of the freedom of expression, but also by those of paragraph (8) of the quoted constitutional text, which refers to the responsibility of the press.

4. SELF-LIMITATION OF THE RIGHT TO PRIVATE LIFE.

Article 60 NCC regulates a right of a very special kind called the right to dispose of himself. According to the quoted legal provision "the natural person has the right to dispose of himself, if doesn't violate the rights and freedoms of others, the public order or morals"[157].

First, the right to dispose of himself allows the holder to agree to restrict the right to physical and mental integrity or to engage in actions that threaten his integrity. However, the provisions of art. 60 NCC represents a basis to restrict any right of personality, such as the right to private life (the case of stars that consent to make public aspects of their private life) or the right to his own image (the image's reproduction of a person in an advertising poster), the consent that a person's name appears in a company trade name.

In such cases, to the legal limitations is added the general obligation to not violate the rights and freedoms of others or the morals.

With respect to the violations of private life, art. 74 NCC makes numerous references to the fact that the consent of the right holder removes the unlawful character of some intrusions into his privacy. It follows from these references that the holder may grant: capturing his image or voice in a private space and the use of the capture; the dissemination of the inside images of his private space; the dissemination of news, debates, surveys or written or audiovisual reports regarding intimate, personal or family life; the dissemination of materials containing images of a person in medical treatment facilities as well as personal data concerning his health; the dissemination or the use of correspondence, manuscripts and other data and personal information.

Moreover, the legislator establishes an absolute presumption of consent for publishing information and materials such as those mentioned above, which eliminates the need to obtain a written agreement from the holder of the right to private life. This presumption is functional if the person that the information or

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[156] See B. Selejan-Guţan, *Protecţia europeană a drepturilor omului*, 2 ed., C.H. Beck Publishing House, Bucharest, 2006, p. 166

[157] For the presentation of this right see also E. Chelaru *Drepturile civil. Persoanele*,3 Ed., C.H. Beck Publishing House, Bucharest, 2012, pp. 41-42.

material refers to makes them available to a natural or legal person that works in the field of public information.

The information considered by the legislator are narrations made by word of mouth about the actions or inactions of the person who made the narrations, and about his intimate, personal or family life.

The materials may include documents, photographs, drawings, sound or video recordings, which refers to the same circumstances as the information.

5. LIMITATIONS REQUIRED BY PUBLIC INTEREST. The public interest and in particular the need to ensure respect for the rule of law can lead to restriction of the right to private life, by the interferences of the competent authorities in their various components. The most common interferences are present in the criminal proceedings made by entering the home, keeping under observation the private life and the by intercepting the correspondence.

The interception of correspondence has taken a special scale, in all its manifestations. At least two reasons generated this situation: first, by intercepting private conversations or correspondence are obtained essential information that can serve as evidence in criminal proceedings, and secondly, the technological progress has facilitated an unprecedented extent of such interferences.

The interception of private conversations is considered by art. 74, section b) NCC to be a breach of privacy, regardless of the technical means and where the conversation takes place, if it is committed "without right". The intercepted conversation can take place by word of mouth between interlocutors that are face to face or through the use of technical means, as appropriate for telephone conversations. Closely related to the interception of private conversations is capturing the image or voice of a person in a private space, regardless of the technology used (photographing, filming, recording), interference sanctioned by section c) of art. 74 NCC and keeping under observation the private life, provided by section e) of the same article. The latter interference may consists in the surveillance from outside the person's home, in actions realized for this purpose in the home, in following the person in public to determine who the person meets etc. Finally, the individual correspondence, as part of his private life, is protected by art. 74, section i) NCC, and by art. 71 paragraph 3 of the Code. The "correspondence" means any written message, regardless of the holder. The messages can be written on paper or sent by telex, fax, pager, SMS, MMS, e-mail and other similar ones.

The basic regulation of these interference is contained in Chapter II "Evidence" section V / 1 "Interceptions and audio or video recordings" of the Criminal Procedure Code. The legal texts that make up this section regulates the circumstances in which the interception is allowed, the authorization procedure and its accomplish, the records certification, the intercepting and recording authorities

and the procedural guarantees in favour of the pursued person, subject to interception or audio or video recording .

According to art. 91/1 paragraph 1 of the Criminal Procedure Code, "The interception and the recording of conversations or communications by telephone or by any electronic means of communication are realized with the motivated authorization of the judge, at the request of the prosecutor who performs or supervises the prosecution, as provided by law, if there are solid data or clues regarding an offence for which the prosecution shall be engaged ex officio, and the interception and recording are required to establish the facts or because the identification or location of the participants can not be made by other means or the investigation would be delayed".

The interception and recording of conversations or communications made by telephone or by any electronic means of communication may be authorized in case of very serious offences` investigation, specified by the legislator, of which we exemplify crimes against national security, drug trafficking offences, acts of terrorism, corruption offences and others. The authorisation is given in the Council Chamber by the competent judge, according to law, for the time required for the interception and recording, but not more than 30 days. In duly justified cases, the authorisation may be extended for the same period, but the total duration of the interception or recording may not exceed 120 days.

In urgent cases, the prosecutor who performs or supervises the prosecution may order the interception and recording of conversations or communications, for a period of 48 hours, subject to subsequent confirmation of the judge. If the confirmation was not obtained, the records will be deleted.

The intercepted and recorded conversations or communications that do not relate to the fact that represents the investigation's subject or that help identify or locate participants are archived at the prosecutor's office, in a special place in a sealed envelope to ensure confidentiality, and can be sent to the judge at his request. When the case is closed, they will be removed or, if necessary, destroyed by the prosecutor and that have to be mentioned in a report.

Also, the Criminal Procedure Code provides other procedural guarantees designed to prevent or remedy, if applicable, violations of the right to private life of the persons who have been intercepted or audio or video recorded, contrary to the law. This is not the place where this can be mentioned. We mention just that, in essence, the sanction of legal regulations infringement is focused on removing from the trial the evidence thus obtained, in accordance with art. 64 paragraph 2 Criminal Procedure Code[158].

In terms of these guarantees, to the regulation contained in the Criminal Procedure Code may be made at least two critics.

[158] See, for example H.C.C.J, criminal s., criminal.dec. No. 1470 of 22 April 2008

The first one concerns the regulation regarding the records of the conversations between the lawyer and his client.

The ECHR case law has established that any correspondence between the lawyer and his client, whether made in writing or by modern means of communication, has the protection of art. 8 of the Convention, which regulates the right to respect for private and family life[159]. An increased protection in such situations is essential, given the fact that the lawyer is obliged by law to professional secrecy. The Member States of the Council of Europe can still decide to control the correspondence between the client and his lawyer if it is necessary to prove serious crimes, regulated by law, under the condition that the interception is conducted under the control of an independent magistrate, who is not involved in the investigation and prosecution and who is obliged to keep the secret of the information gathered, and through this measure the client's right to personal contact with his lawyer is not obstructed[160].

The Romanian regulation is contained in art. 91/1 paragraph 6 of the Criminal Procedure Code, and according to the regulation mentioned "recording the conversations between the lawyer and the person he represents or assists in the process can not be used as evidence unless the resulting data or information are conclusive and useful regarding the preparation or commission of an offence by a lawyer, referred to in paragraph 1 and 2"[161].

This is open to criticism, primarily because it is only limited to the relationship between the lawyer and the client that he assists or represents during the process, without covering the conversations between the lawyer and the client that he assists without representing him. Therefore, in these latter cases, recording can be done under the common law, and not under the restrictive ones regulated by the quoted legal text[162]. The issue is beyond the right to private life respect (for the lawyer is about the private aspect of his professional activity) as it may therefore prejudice the client's right to a fair trial guaranteed by art. 6 of the Convention, regarding the equality of arms (the prosecutor conducting or supervising the prosecution will be able to know, in advance, all the elements regarding the defence strategy agreed by the lawyer and the defendant, regardless of the nature of the offence for which the latter is pursued).

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[159] For the analysis of this case law, see C. Bîrsan, *work cited*, p 677-679

[160] See ECHR, March 25, 1983, *Silver and Others v. the United Kingdom*. This case was about the interception of the correspondence between prisoners suspected of belonging to terrorist organizations and their lawyer

[161] Paragraphs 1 and 2 of the law quoted text lists the serious offences to which we have referred above (offences against national security, drug trafficking offences etc.)

[162] In this regard see M.V. Tudoran, *Teoria și pratica interceptărilor și înregistrărilor audio sau video judiciare*,Universul Juridic Publishing House, Bucharest, 2012, p. 259.

Secondly, the law doesn't clearly states who and under what conditions can distinguish between the part of the lawyer's activity that is suspected to be spent on preparing or committing one of the offences provided by the law and the ones related to other activities which include an exclusive confidential relationship between the lawyer and his clients[163].

Finally, the law is silent in relation to the obligation to notify the lawyer on the fact that his conversations were intercepted and recorded, in the cases where such operations are not followed by submission to the court.

The second criticism that we bring to the mentioned regulation relates to the absence of provisions that can ensure the material and moral damages repair that may occur to a person due to conversations, correspondence or images interception or recording. The person mentioned may be the person under investigation (if he is not sent to court) or a third party, which came in contact with that person accidentally. The regulations in force mention that the only way to repair such damages is to start a lawsuit that would have been based on the provisions enshrined in the new Civil Code regarding the non-patrimonial rights (art. 252-257).

The most serious problem, however, is the abundance of special regulations adopted in the matter of interceptions or recordings. Also this operations are governed by the following regulations: Law no. 51/1991 on Romania's national security, Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service, Law no. 191/1998 on the organization and functioning of the Protection and Security Service, Law no. 535/2004 on preventing and combating terrorism; Law. 78/2000 on preventing, discovering and sanctioning corruption; Law no. 143/2000 on preventing and combating illicit drug trafficking and consumption, Law no. 678/2001 on preventing and combating the persons traffic, Law no. 656/2002 on preventing and sanctioning money laundering and regarding the measures to prevent and combat terrorist act financing; Law no. 39/2003 on preventing and combating organized crime; GEO no. 43/2002 on the National Anti-Corruption Direction; Law no. 508/2004 regarding the organization and functioning of the Directorate for Investigating Organized Crime and Terrorism within the Public Ministry[164].

The abundance of these regulations represents a threat to the respect for privacy and is likely to create confusion and impede the law enforcement regarding the recordings and the interceptions` authorization.

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[163] ECHR, 25 March 1998, *Kopp v. Switzerland*

[164] For the relevant regulations` presentation from the cited legislation, see M.V. Tudoran, *Considerații referitoare la nerespectarea dispozițiilor legale privind autorizarea interceptării și înregistrării de sunete și imagini*, Dreptul no. 12/2010, p. 223, text and note no. 2.

In particular, the procedure governed by art. 13-15 of the Law on Romania's the national security, creates the premises to commit serious abuses in this area.

The law defines the situations considered to be threats to national security that justify the interception of communications and the use of other special investigative techniques. All operations provided by law may take place with the authorization of the prosecutor. The warrant period may not exceed 6 months. In justified cases, the General Attorney may extend the warrant period, without being able to overcome each time, 3 months. In the situations that require the removal of imminent danger to national security can be undertaken activities referred to in art. 13, even without the authorization required by law, and this should be requested as soon as is possible, but not later than 48 hours.

The most pertinent criticism of this procedure was made by the ECHR, as a result of the complaints made by a Romanian citizen[165]. The Court held that the applicant, whose telephone conversations were intercepted under the law on national security, did not receive the necessary protection required by the rule of law in a democratic society, because:

a) the interference was not authorized by an independent authority, but by the prosecutor, which, in the Romanian judicial system is hierarchically subordinate (the prosecutor's office activity is under the authority of the Minister of Justice);

b) any a priori control of the authorization issued by the prosecutor was missing (at that time, the prosecutor's decision to issue the mandate could not be challenged in court, but only by a higher prosecutor complaint);

c) any subsequent control of the interception that had to be conducted by an independent and impartial authority was missing (on the one hand, the prosecutor is not obliged to submit to the file containing the document of arraignment, brought before the court, the documentation under which was authorized the interception, on the other hand, the person can only notify the Parliament's defence and public order committees, without existing a sanction provided by the law);

d) the guarantees to protect the intact and complete character of the records and the possibility to destroy them were missing;

e) the competent authority able to certify the reality and reliability of the records was the Romanian Intelligence Service, the same authority that conducted the interceptions.

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[165] ECHR, 26 April 2007, *Dumitru Popescu v. Romania.* For an analysis of this decision, see M. Udroiu, R. Slavoiu, O. Predescu, Tehnici speciale de investigare în justiția penală, CH Beck Publishing House, Bucharest, 2009, pp. 556-559.

Although national security law refers to the Criminal Procedure Code's regulations that concern the authorization and the implementation of interceptions, the ECHR found that they do not apply to the surveillance measures carried out in presumed cases of attacks on national security, measures that seem to continue to be conducted by the prosecutor's office under the procedure laid down in art. 13 of the quoted law, which was not repealed yet[166].

In our opinion, this procedure can be criticized in at least three respects.

Thus, on the one hand, the law makes no distinction between the collection of information on national security, by using interceptions and other such processes and the gathering of evidence that will be used during the criminal trial. On the other hand, there are no provisions regarding the obtained information about certain crimes unrelated to national security. Thus, it is opened the way for the misuse of records made under the guise of the crimes investigation related to national security in the criminal trials in which the defendants are accused of crimes of a different kind. Finally, the criminal investigation body's legal obligation to inform the person concerned that has undergone such processes of investigation, in the circumstances where the prosecution is not materialized by his submission to the court, is not regulated.

[166] See M.V. Tudoran, *work cited*, p. 317

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BRIEF CONSIDERATIONS ON THE IMPROVEMENT OF THE REGULATORY FRAMEWORK INSTITUTED IN THE HARMONIZATION PROCESS WITHIN THE MEMBER STATES OF THE EUROPEAN UNION

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Abstract

This paper especially emphasizes the fact that having in view the national legislation with the community aquis is made by considering the reality of the fact that the relations between the community law and the national law are not reduced to a unique model, but are concretized in four essential ways: substitution, harmonization, coordination and co-existence. In the broader context of the improvement of the legislative framework instituted in the process of harmonization the "Strategy for better regulation at the level of central public administration 2008- 2013" underlines that the harmonization of the national legislation with the community aquis has as main purpose the insurance of a full compatibility of the domestic laws with the community legislation by the modification or amendment of the national normative acts, by adjusting them to the requirements of the aquis, after which the community legal norms become component of the national law.

Key words: *community aquis, legislative framework, better regulation, smart regulation, legislative harmonization process*

I. INTRODUCTION

The analysis of the aspects regarding the "improvement" of the regulatory framework created in the legislative harmonization process at the level of the EU Member States is very important both theoretically, as well as practically.

The approach of the Member States regarding the legislative harmonization and regulation must promote the interests of the citizens and to insure the achievement of all public policy objectives, from the insurance of a financial stability to the combat of climatic changes.

Briefly, it is essential for an adequate legislation to be insured, if we want to achieve the ambitious objectives in the area of intelligent, ecologic and favorable growth for inclusion, established by the European Union.

The improvement of the regulatory framework instituted in the legislative harmonization process in the EU Member States is based on the idea that the European regulations must contribute to the competitiveness of enterprises, by

supporting the single market, by eliminating the costly fragmentation of the national market because of different national regulations.

The legislative harmonization is the process in which the legislations of the Member States who aim joining the European Union are placed in line with the community law. This process is necessary for the function of the Single European Market, of the European policies, of the Member States' economy and for putting into practice the principles of democracy and the state of law, representing the base of the community construction.

From the approach of this theme we can appreciate that also for Romania the legislative harmonization is a necessity, stemming primarily from its fundamental option for reformation and the establishment of a market economy. The harmonization with the community aquis firstly requires detailed knowledge about it, its adjustment with the Romanian realities and coherence of the new harmonized legislation.

II. INTRODUCTIVE ASPECTS ON THE INSTITUTIONAL FRAMEWORK OF THE LEGISLATIVE HARMONIZATION PROCESS

The Ministry of European Affairs, by its judicial direction, insures a permanent filter of compatibility between the domestic and the European legislation and, in this regard, it contributes to the achievement of the obligations arising from the quality of Romania as EU Member State, namely of the one regarding the legislative harmonization and creation of an appropriate legislative framework for the application of the community law. In the fulfillment of this general objective, the Ministry of European Affais aims and complies with the requirements of a better regulation (*Better Regulation*), priority step of the European Commission, which involves impact studies conducted before the promotion of the legislative measurements, transparency and consulting those who are interested, in the conditions of reducing administrative tasks. The fulfillment of these objectives has as main effect the insurance of a legislative framework which will allow for the Romanian citizens and business environment to enjoy all the rights and opportunities offered by the internal market of the European Union.

The activities of this direction are based on the Government Emergency Injunction No 78/2011 on the organization and function of the Ministry of European Affairs, corroborated with Art 20 Para 6 of the Government Decision No 561/2009 approving the Regulation for procedures, applicable at Government level, for elaboration, approval and presentation of draft project documents of public policy, draft projects of normative acts, as well as other documents for adoption and approval.

Thus, according to the Government Emergency Injunction No 78/2011 on the establishment of certain measures for the organization of the European affairs area,

- The Ministry of European Affairs, together with the Ministry of Foreign Affairs coordinates the management of foreign affairs, for the insurance of the efficient participation of Romania in the decision-making process in the European Union.
- The Ministry of European Affairs coordinates the insurance of the compatibility between the national and the European legislative documents, insuring, in its own areas of competence, the representation of Romania in the Court of Justice of the European Union and in other European institutions, monitors and supports the fulfillment of the engagements resulted from national strategies and programs adopted in the context of the European policies.
- The Ministry of European Affairs is the coordinating authority for the structural instruments, having the responsibility of coordinating the preparation, development, harmonization and functioning of the legislative, institutional, procedural and programmatic framework for the management of structural instruments.
- For the purpose of insuring the inter-ministerial coordination of the process of establishing a national position regarding European legislative or non-legislative initiatives, in the Ministry of European Affairs there is a Committee for the coordination of European affairs, organism without legal personality and with a discretionary feature, established by Government Decision. The establishment, as well as the functioning and organization of the Committee for European affairs are established by Government Decision.

III. DIRECTIONS OF ACTION FOR THE CREATION OF THE DOMESTIC LEGISLATIVE FRAMEWORK COMPATIBLE WITH THE EUROPEAN LAW

The main activity of the European Law and Legislative Harmonization Direction considers the concrete, complete and on-time transposition of the directives and the creation of the regulatory framework necessary for the direct application of the European regulations and decisions.

Legislative harmonization must not be seen as integration from a legal point of view, but more likely as a political cooperation. It does not mean legislative identity, but aim the harmonization of the principles of law and national legal norms, organized on specialized areas. In a narrow sense, the adoption of the community aquis assumes more steps, such as: transposition, implementation, application and control of its application.

In this respect, the directions of action are:

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1. The examination and approval of draft legislation with Community relevance and the examination of the legislative proposals of the Parliament:

It mandatory approves draft legislation aiming the transposition in the national legislation of the Community regulatory acts, creating the legal framework necessary for their application or with having relevance for the Community.

It also approves and monitors the stage of adopting the proposals for modification, amendment or repeal of the national legislation in force. At the request of the Department for the relation with the Parliament – the Romanian Government examines all legislative proposals under the aspect of their compatibility with the Community regulations, in order to state the Government's position regarding them. It also presents the Ministry of European Affairs standpoint for the parliamentary commissions, when on the agenda of these commissions are drafts for regulatory acts or legislative proposals with Community relevance regarding which the Ministry of European Affairs, by the Direction for European Law and Legislative Harmonization, has stated his point of view.

2. Organization and/or participation in inter-ministerial working groups for the elaboration of regulatory acts compatible with the European law:

The Ministry of European Affairs has the obligation to organize inter-ministerial working groups for the transposition of certain European directives having a high degree of complexity. Thus, it can be mentioned: the working group created for the transposition and implementation of the Directive 2006/123/EC on services in the internal market; the working group for the transposition of the Directive 2007/2/EC establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) or the working group created for the re-transposition of the Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

Likewise, together with the General Secretariat of the Government, it coordinates the working group for the improvement of the regulatory framework. By its special service, the Ministry of European Affairs coordinates all working groups having as purpose the establishment of the legislative framework necessary for the direct application of the European regulations and decisions.

In this context, the Ministry, by its special direction, elaborates, updates and monitors the National Program for the Transposition and Notification of Directives, an electronic instrument consisting of the directives which must be transposed in the current year, based on which the authorized European institutions represented in the inter-ministerial network on the notification, assume the transposition of those documents from their area of responsibility and terms for communication to the ministry.

3. *The coordination of the efforts on the creation of the legislative framework necessary for the application of the European regulations, decisions and framework-decisions*

4. The coordination of the process of evaluation of the degree of compatibility between the national legislation in force and the Community regulatory acts

For this purpose, the special direction of the Ministry of European Affairs submits proposals for the acceleration of the transposition and implementation process.

These proposals are sent to the institutions competent for the elaboration of the necessary regulatory acts.

5. The participation in the national measure on the Improvement of the Regulatory Framework (Better Regulation)

Starting from the idea that regulatory acts have a key role in the general evolution of every society, the European Strategy for Growth and Jobs (Revised Lisbon Strategy – RLS) places among its key elements the objective of the "improvement of the regulatory framework", as well as the sine qua non condition for the European Union to become "the most competitive and dynamic economy in the world, based on knowledge, able for a sustainable growth, for the creation of numerous and better workplaces and growth of the social cohesion".

According to the Community regulations in this area, the Strategy for the "improvement of the regulatory framework" considers three essential elements:

- Promoting the design and application of better regulation tools at the EU level, notably simplification, reduction of administrative burdens and impact assessment;
- Working more closely with Member States to ensure that better regulation principles are applied consistently throughout the EU by all regulators; Reinforcing the constructive dialogue between stakeholders and all regulators at the EU and national levels;
- Reinforcing the constructive dialogue between stakeholders and all regulators at the EU and national levels.

The Brochure "*Better Regulation – simply explained*" gives a short overview of the Better Regulation strategy.

In the context of the special attention that the Community institutions, especially the European Commission, pay to the "improvement of the regulatory framework", together with the General Secretariat of the Government and the Direction for European Law and Legislative Harmonization and the Direction for EU Strategies and Post-adhesion Monitoring has coordinated the inter-ministerial working group for the implementation of the Community programmatic documents regarding the improvement of the regulatory framework and identification of better practices in this area, step finalized by the adoption of the Strategy for better

regulation at the level of central public administration 2008- 2013 and of its Action Plan.

IV. SMART REGULATION – INSTITUTIONAL CONSTRUCTIVE DIALOGUE ON THE LEGISLATIVE SIMPLIFICATION

Starting from the idea that regulatory acts have a key role in the general evolution of every society, the European Strategy for Growth and Jobs (Revised Lisbon Strategy – RLS) places among its key elements the objective of the "improvement of the regulatory framework", as well as the sine qua non condition for the European Union to become "the most competitive and dynamic economy in the world, based on knowledge, able for a sustainable growth, for the creation of numerous and better workplaces and growth of the social cohesion".

According to the community documents in this area, the Strategy for the "improvement of the regulatory framework" considers three key aspects:

- Promoting the design and application of better regulation tools at the EU level, notably simplification, reduction of administrative burdens and impact assessment;
- Working more closely with Member States to ensure that better regulation principles are applied consistently throughout the EU by all regulators; Reinforcing the constructive dialogue between stakeholders and all regulators at the EU and national levels;
- Reinforcing the constructive dialogue between stakeholders and all regulators at the EU and national levels.

In the context of the special attention paid by the Community institutions, especially by the European Commission, to the "improvement of the regulatory framework", in February 2007, under the coordination of the Department for European Affairs it was created a permanent inter-ministerial working group with the purpose of gathering when necessary, but at least once a month. The main obligation of the group was the elaboration of a national strategy in this area.

Thus, at the initiative of the Department for European Affairs and of the General Secretariat of the Government, the working group has periodical meetings in 2007 and in the first half of 2008, for that in February 2008 to present a first version of the Strategy. In the elaboration of the strategy the following institutions participated: General Secretariat of the Government, Department for European Affairs, General Direction for Business and Liberal Professions from the Ministry for SMEs, Commerce, Tourism and Liberal Professions, Legislative Council, National Commission for Prognosis from the Ministry of Home Affairs and Administrative Reform.

We must state that, in the broader context of the improvement of the regulatory framework both at community, as well as national levels, in the autumn

of 2007, the Department for European Affairs has coordinated a project of peer review, at the initiative of the European Commission in collaboration with the Organization for Economic Cooperation and Development (OECD), created to conduct a study on the regulatory framework in Romania, more precisely its institutional abilities of management in the legislative area and the stage of the introduction of better practices for the improvement of the national regulatory framework. The project for Strategy has essentially considered the recommendations made according to the study above mentioned.

The Department for European Affairs represents a national contact for the Action Plan of the European Commission on the reduction of administrative burdens in the European Union. Thus, the DEA supports the exercise of the European Commission of measuring the administrative costs generates by the national measures of transposing and implementing the Community legislation. In this context, in 2008, the DEA and the European Commission have organized the international conference "The reduction of administrative burdens for the business environment". The conference, which enjoyed the participation of public servants of the European Commission, from the national administrations, but also of business representatives, had the role of drawing attention on the needs to reduce the administrative burdens, bureaucracy, as an obstacle for economic growth and innovation.

Conclusions

As a consequence, the harmonization of the national legislation with the community aquis attracts numerous internal benefices, materialized in a dynamic and progressive legislative framework, promoting the principles and values of market economy and of a state of law, representing preconditions necessary for the development of a modern European state.

We conclude that the initiation of this process of regulatory and legislative harmonization marks a new stage for the Romanian diplomacy, defined by the progressive assumption of a new paradigm of expression and action in this issue, based on the anticipative analysis, consistent construction, integration initiative, institutional balance and strategic vision.

Romania's strategic objective is to act for the consolidation and protection of social and economic interests of its citizens, as well as the promotion and protection of economic, political and military interests of our state, in relation with other international players.

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DES ASPECTS FONDAMENTAUX CONCERNANT L'ADMINISTRATION PUBLIQUE

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Résumé

Dans cet article, l'auteur présente quelques aspects fondamentaux sur la problématique complexe de l'administration publique, comme : la fonction administrative de l'Etat ; l'intérêt public général ; l'action administrative ; la notion d'administration et le concept d'administration publique – la définition de l'administration publique ; autorité de l'administration publique ; organes de l'administration publique ; autorité publique ; institution publique ; service public ; pouvoir public ; pouvoir discrétionnaire ; fait administratif et phénomène administratif.

Mots-cléfs: *la fonction administrative de l'Etat ; l'intérêt public général ; l'action administrative*.

1. LA FONCTION ADMINISTRATIVE DE L'ETAT ET L'INTERET PUBLIC GENERAL

Une caractéristique essentielle du rôle de l'Etat, est d'exprimer et de réaliser comme volonté générale, obligatoire, la volonté du peuple, à travers les moyens prévus par la Constitution, dans le but d'assurer « l'intérêt général ou public », «du bien commun».

Comme institution, l'Etat s'auto légitime[167] fonctionnant sur des objectifs communs de toute la collectivité, appelés des intérêts généraux ou publics.

Le suivi et la réalisation concrète des intérêts généraux ou publics se réalisent à travers la fonction administrative (ou d'exécution) de l'Etat, dans le cadre de l'action administrative.

L'action administrative comprend dans son essence : les moyens juridiques de réalisation de la fonction administrative ; les règles d'organisation et de fonctionnement des institutions administratives ; les formes concrètes lesquelles prend cette action.

L'action administrative dérive de la nécessité objective concernant l'existence même des hommes c'est à dire satisfaire les besoins au sein de la communauté ou iles vivent, dans laquelle sont des membres qui conduisent pendant

[167] Bara Voicu – « Drept administrative si institutii politico-administrative », Edition Transilvania 1998, p. 41-57

que la majorité bénéficie des services crées, services qui sont vitales à l'entière communauté. Comme une condition obligatoire, l'action administrative impose le principe de l'application et le respect de la loi, tant par ceux qui administrent que par ceux administrés, un principe garantit par la loi fondamentale.

L'activité d'administration est caractéristique aux autorités qui réalisent des services publics demandés par la pouvoir politique en fonction des besoins sociaux, par l'entremise de L'ADMINISTRATION PUBLIQUE agissant désintéressé, le seul but étant de réaliser l'intérêt général ou, autrement dit, l'utilité publique.

L'activité d'administration est caractéristique aux particuliers aussi, qui par l'entremise des administrateurs, par sa propre force, mais sous le contrôle des autorités publiques, agit pour satisfaire des buts, des intérêts personales, privés. Ce type d'administration est nommé ADMINISTRATION PRIVÉE.

Outre les deux formes d'administration, dans le cadre de l'Etat se réalise aussi L'ADMINISTRATION SUBSIDIAIRE, réalisée par des autres autorités, selon la Constitution et les lois organiques qui réglementent leur activité spécifique. L'administration subsidiaire ne crée pas des services publics, mais se manifeste par des actes administratifs. Dans cette catégorie sont comprends les organes administratifs du Parlement, du Président, des instances juridiques, etc.

2. LE CONCEPT D'ADMINISTRATION

Le mot « administration » vient du mot latin « minister » qui signifie serviteur. Le mot « administer » composé par la préposition « ad » = « à, vers » et « minister »signifie « aide de quelqu'un », « serviteur », « asservi », « exécutant ». Donc, la signification de la notion d'administration est « une activité qui sert à quelque chose et une personne qui exerce cette activité ».[168]

Dans l'acception courante, par l'administration on peut comprendre une activité- l'action d'administrer aussi que des organes qui réalisent cette activité. L'activité administrative est complexe parce qu'il s'agit de l'action des hommes qui, par rapport aux autres, dans le cadre d'une collectivité, en vue de satisfaire des besoins sociales et comprend des actions d'organisation, coordination et contrôle, la prise des décisions et la réalisation des objectifs sociaux établis par une autorité supérieure.

Dans la doctrine, dans la législation et la jurisprudence de notre pays, pendant la période de l'Etat totalitaire a été utilise exclusivement la notion d'administration d'Etat, consacrée par les Constitution socialistes et la législation de l'époque[169], pendant que dans la période antérieure au régime communiste, a été utilise la notion d'administration publique, au quelle on a revenu depuis 1990.

[168] Idem 1, p. 42
[169] Dana Apostol Tofan – « Drept administrativ », vol. 1, 2e Edition, Edition C.H.Beck, Bucuresti 2008, p. 4

Pratiquement, par la notion d'administration publique on a en vue, l'activité de l'administration centrale aussi que celle de l'administration locale, cette dernière étant caractérisée par l'autonomie locale, comme résultat de décentralisation administrative, principes de base de l'organisation de l'administration publique locale.[170] La notion d'administration publique couvre ainsi, l'activité de l'administration d'Etat et l'activité de l'administration locale, la sphère de l'administration publique étant plus large que celle de l'administration d'Etat, par l'inclusion de l'administration publique locale, en précisant que pendant le régime communiste, la notion d'administration publique s'identifie avec la notion d'administration d'Etat, dans l'absence d'une administration spécifique aux autorités autonomes, élus au niveau des unités administratives – territoriales, distincte de l'administration d'Etat.[171] Ainsi, entre l'administration publique et l'administration d'Etat il existe un rapport de l'ensemble à la partie, l'administration d'Etat représentant une component de l'administration publique, à coté de l'administration locale.[172]

3. LE CONCEPT D'ADMINISTRATION PUBLIQUE

Dans la littérature de spécialité, l'administration publique est définie tant du point de vue matériel, que du point de vue organique.[173]

Du point de vue matériel ou fonctionnel, l'administration publique désigne l'ensemble des activités juridiques et matérielles, réalisées sous un régime de pouvoir public, pour satisfaire les intérêts généraux de la société. Donc, on utilise le sens matériel (fonctionnel), quand l'administration publique a le sens d'activité déroulée par des certaines structures administratives.

Du point de vue organique (organisationnel), l'administration publique comprend l'ensemble des moyens institutionnels, humains et matériels, mises en service de l'administration publique. En conséquence, on utilise le terme organique, quand on fait référence aux organes qui exécutent l'activité d'administration publique, c'est à dire les autorités de l'administration publique.

Comme le montre E. Forsthoff, l'administration publique ne peut être définie vaste parce qu'elle est dans une évolution continue. En conséquence, du point de vue subjectif et objectif, l'administration publique est protéiforme, ce caractère découlant de ces considérations :

-les autorités de l'administration publique ont des prérogatives multiples et complexes, qui déterminent des actions administratives diverses, et un régime juridique complexe des actes qu'elles mettent en œuvre ;

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[170] idem
[171] idem
[172] idem
[173] J. Rivero, P. Waline – « Droit Administratif », 14e édition, Dallaz, Paris, 1992, p. 10

-outre la fonction essentielle – la fonction administrative, l'administration publique exerce d'autres fonctions dérivées : la fonction de liaison entre l'activité politique et celle administrative ; la fonction organisatrice – par l'entremise des actes normatifs « secundum legem » ; la fonction de suivi (concrète et immédiate) de la réalisation (par l'entremise des actes administratifs et ceux du droit privé) aux intérêts publics (prédéterminés de la pouvoir législative).

En conclusion, du point de vue matériel ou fonctionnel, l'administration publique représente l'activité d'organisation de l'exécution et de l'exécution en concret des lois, visant l'intérêt public par l'assurance du bon fonctionnement des services publics et par l'exécution d'une prestation pour les privés.

Du point de vue organique (organisationnel), l'administration publique consiste en un ensemble d'autorités publiques par lesquelles, dans le régime de pouvoir public, se réalisent les lois ou, dans la limite de la loi, sont fournis des services publics.[174]

L'administration publique est une composante de l'activité d'administration étant une forme de la fonction administrative de l'Etat.

En étroite liaison avec la notion d'administration publique, sont les notions d'autorité de l'administration publique, organe de l'administration publique, autorité publique, institution publique, pouvoir public, intérêt public, service public[175] et pouvoir discrétionnaire[176].

En ce qui concerne les premiers deux notions – autorité de l'administration publique et organe de l'administration publique – sont pratiquement identiques, étant donnée la même catégorie juridique, qui désigne les structures qui font l'activité d'administration. La première notion (autorité de l'administration publique) est utilisé surtout après la période du régime communiste (depuis 1990 et dans la Constitution et la législation actuelle), pendant que la deuxième – organe de l'administration publique a été utilise surtout dans la période communiste, dans les Constitutions des années 1948, 1952 et 1965 et dans la législation du cette période.

La notion d'autorité publique fait référence à l'organe public, c'est-à-dire un collective organise des hommes qui exercent des prérogatives de pouvoir public au niveau d'Etat ou locale, ou autrement dit, une structure organisatrice qui agit en régime de pouvoir public, pour la réalisation d'un intérêt public[177]. Voila donc, que cette notion est identique aux premiers deux.

Dans l'actuelle Constitution de la Roumanie (la forme révisée en 2003), dans le Titre troisième sont présentées les autorités publiques (1er Chapitre - Le Parlement, les art. 61-79 ; 2eme Chapitre – Le Président de la Roumanie , les art. 80-101 ; 3eme Chapitre – Le Gouvernement, les art. 102-110 ; 5eme Chapitre -

[174] Dana Apostol Tofan, op. cit. p. 5
[175] Idem, p.5
[176] Bara Voicu, op. cit.,p.6
[177] Dana Apostol Tofan, op. cit., p. 6

l'Administration publique - Section 1 l'Administration publique centrale de spécialité, les art. 116-119 ; Section 2 l'Administration publique locale, les art. 120-123 ; 6eme Chapitre – l'Autorité judiciaire – Section 1 les Instances judiciaires, les art. 124-130 ; Section 2 le Ministère Public, les art. 131-132 ; Section 3 le Conseil Supérieur de la Magistrature, les art. 133-134).

La notion d'institution publique concerne les structures subordonnées aux autorités de l'administration publique, qui sont financés par des sources budgétaires ou extrabudgétaires, conformément à la législation en vigueur. Des exemples classiques des institutions publiques sont les institutions de l'enseignement d'Etat, l'Académie Roumaine et les instituts de recherche, les bibliothèques publiques.

Les institutions publiques se trouvent dans une relation de subordination hiérarchique à l'autorité qui les a créés et qui va exercer le pouvoir d'instruction et de contrôle. Certaines institutions sont d'intérêt national et autres sont d'intérêt locale, ainsi comme le service public qu'elles fournies sert la collectivité nationale ou une collectivité locale. Les institutions publiques sont diversifiées du point de vue de leur objet d'activité, assurant une multitude des services[178].

On devrait mentionner que parfois, dans la législation, même dans la loi fondamentale, apparaît le syntagme « d'institution ». Par exemple, dans la Constitution non révisée du 1991, dans l'art. 151, était utilisée la notion « les institutions de la République » relative à certaines autorités publiques réglementées constitutionnellement, et dans la Constitution révisée du 2003, par l'art. 155, deuxième alinéa, la notion « les institutions de la République »est remplacée avec la simple notion « institutions », en référence aux « institutions prévues par la Constitution, existantes à la date d'entrée en vigueur de la loi de révision, restent en fonction jusqu'à la mise en place de nouvelles »[179]. Également, « La loi concernant l'organisation et le fonctionnement de l'institution l'Avocat du Peuple, utilise même dans son titre la notion « d'institution » mais on a en vue une loi organique qui réglemente une autorité publique. Dans aucun des cas ci-dessus, le législateur n'utilise la syntagme « institution publique »dans son ensemble mais seulement le mot « institution » »[180].

Généralement, toutes les autorités publiques / organes publics, sont, génériquement des institutions mais, contrairement à la notion d'autorité publique (définie ci-dessous), la notion d'institution publique (aussi définie ci-dessous), a en vue les structures subordonnées aux autorités de l'administration publique/

[178] Dana Apostol Tofan, op. cit., p. 6-7, cite de E. Balan, « Institutii administrative », Edition C. H. Beck, Colectia Master, Bucuresti, 2008, p. 74

[179] L'art. 155, al. 2, de la Constitution de la Roumanie, révisée par la Loi de révision no. 429/2003 approuvée par référendum national du 18-19 octobre 2003, en vigueur à la date de 29 oct. 2003

[180] Dana Apostol Tofan, op. cit., p. 6

autorités publiques ou organes publics, qui fonctionnent sur la base d'une allocation budgétaire ou extrabudgétaire (comme prévue la loi en vigueur).

Dans la doctrine et la législation entre-deux-guerres, à la place de la notion actuelle de l'institution publique, a été utilisée la notion d'établissement public, qui était définie comme « un procédé technique conçu pour donner une meilleur satisfaction à l'intérêt général, comme une personne juridique de droit public qui exerce certaines prérogatives de pouvoir public, crée à l'initiative de l'Etat, du département ou de la commune, avec des moyens publics »[181]. Dans cette période, la législation et la doctrine ont imposé une autre notion, celle d'établissement d'utilité publique, définie comme «cette personne juridique privée autorisée par l'administration publique à fournir un service public par l'exercice d'une activité d'intérêt général, le correspondent de la notion actuelle de l'institution d'utilité publique »[182]. Les établissements publics et les établissements d'utilité publique étaient considérés au cours de cette période (entre-deux-guerres), comme des personnes morales et juridiques de droit administratif[183]. À leur tour, les personnes morales étaient regardées comme « des associations des personnes physiques, ayant une existence et une volonté juridique distincte de celle de chacun des membres, dotés de la faculté d'être des sujets de droits que toute personne »[184].

La notion de pouvoir public fait référence à l'ensemble des prérogatives dont jouisse l'administration publique, pour la réalisation de l'intérêt public général – donc l'exercice de ses attributions – par la création et l'application des normes juridiques, qui en cas de besoin, peuvent être appliquées par la force de contrainte de l'Etat. Dans le contexte de pouvoir public, ne sont pas exclues les voies de recours que ceux qui sont administrés ont à la disposition pour défendre leurs intérêts par rapport à ceux qui administrent. L'exemple concret dans ce cas est le contentieux administratif, institution qui, à côté d'autres leviers de contrôle, représente une forme de garantir les droits et les libertés civiques.

La notion d'intérêt public (général) représente l'ensemble des intérêts économiques, politiques, religieux, ethniques ou nationaux (c'est-à-dire les besoins matériels et spirituels des citoyens à un moment donné), envisagés dans leur ensemble et mises à la disposition de la communauté, ayant la qualité de représenter une motivation et l'importance fondamentale pour l'entière notion, à exprimer les aspirations vitales du celle-ci, être durables.

La notion d'intérêt public désigne les besoins matériels et spirituels des citoyens à un moment donné, indiquant que, cette syntagme, comme par exemple :

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[181] Dana Apostol Tofan, op. cit., p. 7, cite Paul negulescu « Tratat de drept administrativ. Principii generale », vol. 1, 4e Edition, Institutul de Arte Grafice « E. Marvan »,
[182] Dana Apostol Tofan, *op. cit.*, p. 7
[183] Idem, p.7
[184] Dana Apostol Tofan, op. cit., p. 7, cite Marin Vararu – « Tratat de drept administrativ roman », Edition Libraria Socec&Co, Societatea Anonima, Bucuresti, 1928

service public, ordre public, bien public etc., est un concept qui dépend des objectifs politiques, son sens peut être modifié avec le changement des conceptions politiques, c'est le cas de l'alternance de pouvoir[185].

Le service public représente l'activité à caractère continu et régulier, déroulée ou autorisée par une autorité publique en vue de satisfaire un besoin d'intérêt général (public). En conséquence, la notion de service public inclut tant la prestation (d'intérêt général), que l'autorité qui la fait. Avec le développement de l'Etat et la diversification de ses fonctions, la société se sent plus aiguë de la nécessité de créer de nouveaux services publics. La nécessité de la réglementation unitaire des rapports entre les membres de la société se réalise par l'activité législative, déroulée par le Sénat et la Chambre des Députés. L'activité normative de l'administration publique trouve son accomplissement en « secundum legem »et « praeter legem ». Les litiges entre membres de la société et la punition des coupables sont résolus par le service public judiciaire (le system des instances juridiques) et les litiges entre l'administration et les administrés sont résolus par l'administration publique, par les organes avec l'activité juridictionnelle. Ainsi, « les services publics (administratifs) sont créés pour satisfaire les intérêts généraux, de défense de l'ordre public et de la sécurité publique, d'assurance des besoins de culture et de santé du peuple, et aussi l'assurance des conditions matériels de vie des citoyens dans un régime de droit public, par une activité d'organisation de l'exécution et de l'exécution en concret des lois »[186].

L'Organisation d'un service public n'exclut pas le déroulement d'une activité privée, ayant le même but. Également, à l'occasion de l'organisation d'un service public, doit avoir en vue les principes suivantes qui doivent être respectés :

-le principe de la continuité, selon lequel le service public doit fonctionner continu, sans interruption.

-le principe de l'adaptation, selon lequel le service public doit être adapté aux changements survenus dans la vie quotidienne, selon les intérêts généraux ;

- le principe de neutralité et d'égalité de traitement, selon lequel, devant les services publics, tous les citoyens sont égaux, et en général, ces services sont gratuits.

La problématique du service public est une composante fondamentale dans la construction du droit administratif, d'autant plus que le concept de service public, par les modalités d'organisation mais aussi par son contenu, représente la quintessence de l'administration publique[187].

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[185] Dana Apostol Tofan, op. cit., p. 7, cite A. Iorgovan, « Tratat de drept administrativ », vol. 1, « Introducere. Organizarea administrativa. Functia publica », 4e Edition, Edition All Beck, Bucuresti, 2005

[186] Bara Voicu, op. cit., p. 43

[187] Dana Apostol Tofan, op. cit., p. 8, cite Ioan Alexandru, Mihaela Carausan, Sorin Bucur – « Drept administrativ » , Edition Lumina Lex, Bucuresti, 2005, p. 168

Grâce à l'importance des services publics, pendant la période entre-deux-guerres a été établie la règle selon laquelle les services publics pourraient être créés et abolis uniquement par la loi[188].

Maintenant, cette notion a acquis un caractère constitutionnel, en retournant actuelle et ayant une signification spéciale pour le droit administratif.[189]

Une série des notions qu'on rencontre dans les textes constitutionnels et la législation d'une série des pays, des notions comme ordre publique, sécurité publique, intérêt public, situation d'urgence, péril grave, cas exceptionnel, etc. ont déterminé l'apparition de la théorie des concepts juridiques indéterminés, selon lesquelles ces notions ont un sens large et relatif déterminé, leurs interprétation étant laissé à la libre choix du fonctionnaire appelé à appliquer la norme juridique, la loi dont le texte vient la notion en question. Cet aspect permet le développement d'une autre théorie, la théorie du pouvoir discrétionnaire de l'administration, respectivement l'établissement de la limite de l'appréciation du fonctionnaire public dans l'interprétation de la notion, limite qui une fois dépassé, conduit au l'abus de pouvoir.[190]

Le droit d'appréciation ou de pouvoir discrétionnaire représente cette marge de liberté laissée à la discrétion d'une autorité ainsi que, pour atteindre le but énoncé par le législateur, pour on peut recourir à tous les moyens d'action dans les limites de ses compétences. Au-delà de ces limites, l'autorité respective actionnera à l'abus de pouvoir, qui peut être censuré dans l'instance.[191]

En conséquence, l'administration publique est mise en pratique par le facteur humain, respectivement par le personnel administratif – les fonctionnaires publics ou personnel contractuel. Leur rôle est de donner vie au fait administratif et au phénomène administratif. Tout fait administratif implique une activité d'organisation, de direction ou de combinaison des moyens pour la réalisation, jusqu'à les faits matériels concrets, des objectifs établis par des structures organisatrices supérieurs, l'activité d'administration étant par définition une activité subordonnée.[192] Le phénomène administratif n'est rien mais une somme des faits administratifs, ayant une nature complexe, sociale – politique et juridique, son étude impliquant les sciences juridiques et d'autres sciences sur la société comme les sciences économiques, la sociologie, les sciences politiques etc. Un rôle important dans l'étude du phénomène administratif l'occupent ses relations avec la société en général, respectivement avec le milieu social, avec le pouvoir politique, en particulier avec la gouvernance.

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[188] Idem, p. 8 cite Rodica Narcisa Petrescu – « Drept administrativ », Edition Accent, Cluj-Napoca, 2004, p.24
[189] Dana Apostol Tofan, op. cit., p. 7
[190] Idem
[191] Idem, p. 8-9
[192] Idem, cite Antonie Iorgovan, 2005,op. cit. p. 6

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LEGISLATION

1. La Constitution de la Roumanie révisée, republiée en MOR no. 767 31 octobre 2003
2. La loi de l'administration publique locale no. 215/2001, révisée à ce jour
3. La loi- cadre de décentralisation nr. 195/2006, révisée à ce jour
4. La loi de finances publiques locales nr. 273/2006, révisée à ce jour
5. La loi des services communautaires des utilités publiques no. 51/2006, révisée à ce jour
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LIFE IMPRISONMENT AND ITS REPLACEMENT WITH IMPRISONMENT ACCORDING TO THE NEW AND FUTURE CRIMINAL CODE

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Abstract

For the penalties applied for offences of violence, arousing horror and terror in the community such as first degree murder with multiple victims, would be necessary the introduction in the New Criminal Code of the specification that life imprisonment should be replaced with imprisonment only in special cases.

In this way, the penalty corresponds to the retributive and social protection conception marked especially by the role of the penalty, namely to prevent new offences from being committed.

Key words*: life imprisonment, penalty, imprisonment, New Criminal Code*

Penalty is one of the three fundamental institutions of the criminal law, together with the offence and the criminal liability.

It represents a sufferance for the person who has disobeyed the law. In essence, the "damage" consisting in the victim's sufferance must be "rewarded" with "damage" caused for the perpetrator, who must suffer for the victim's sufferance.

In other words, this is the reward, the retribution as an equivalent of the offence and of the offender's guilt supports what is the fundament of the retributive conception. About the penalties, the old ones used to say that are nothing more but the repayment of the offence[193].

This sufferance caused by the penalty must not be seen as revenge, as it was seen in the old times, but must be seen as a correction, with a generous ethical function, being a "medicine for the soul", as Aristotle used to say.

To this retributive conception, as a fundament and purpose based on its affiliation feature, can be added the conception of social protection, susceptible to generate numerous debates or meanings, some of them being common with the

[193] George Antoniu (coord.) *et al.*, *Explicaţii preliminare ale noului cod penal*, 2nd Volume, Universul juridic Publishing-house, Bucharest, 2011, p.14.

doctrine of totalitarian states, protection seen as a purpose of the penalty, in the light of its social utility[194].

More precisely, the application of a penalty for the person who has disobeyed the law must lead to the prevention of other offences from being committed by the perpetrator – special prevention – such as the discouragement of other persons from the community in committing offences – general prevention, thus protecting the state against internal "aggressions" affecting the state of law. Thus, by applying a penalty, the retribution is pointed towards the last offence committed, while the social protection aims future behaviors, in the meaning that the offences which can be committed must be foreseen and removed.

The idea of using the penalty is also found in Antiquity, in the Roman society. Thus, Cicero stated that any penalty applied is for the good of the Republic, and Seneca stated that "the perpetrators are not punished because they committed a wrong, but for they will not commit it again".

Also, Vintilă Dongoroz stated that: "The Penalty has the following functions: a general *intimidation*, *correction* of the perpetrator (redress or amendment), *prevention* from committing new offences (it can be *morally* achieved by correction, and *physically*, by temporal *isolation* or by definitive *elimination*), the *general reintegration* of the judicial order (towards the collectivity) and *specifically* (towards the victim and the persons surrounding it), showing an example for the offender and for the social group"[195].

Starting from the penalty, as it was analyzed in the light of the retributive conception completed with that of the social protection, seen especially for its general and special prevention, it is necessary that in the present Romanian society the penalty of life imprisonment no longer be replaced with imprisonment, such replacement being made only in exceptional situations.

I am trying to argue this statement:

We are living in a time in which, based on poverty, sometimes generalized, the criminality is increasing, violence is without limits, and the criminal after taking a man's life and have "served his penalty" is free, and the husband or wife, father or son, mother or daughter, brother or sister – depending on who's life he took – can met him on the street, at his workplace, in the daily life of the community.

I am considering the most serious offences, such as the murder of two or more persons or first degree murder, committed by a serial killer stirring up fear, fright and terror in the community, sanctioned by both the actual and the new Criminal Code with life imprisonment or with imprisonment from 15 to 25 years.

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[194] George Antoniu, *Contribuţii la studiul esenţei, scopului şi funcţiilor pedepsei*, Penal Law Review, Anul V, No 2, 1998, p.16

[195] Vintilă Dongoroz, *Drept penal*, Bucharest, 1939, p.584

The actual and the future Code states that after 20 years of imprisonment, if he had a good behavior, fulfilling the conditions and the obligations imposed, especially referring to his behavior and attitude for labor in all this period can enjoy a release on parole.

Let us assume that such criminal committed murder such as the above mentioned ones, at the age of 18, so that after serving a penalty of 20 years, precisely at the age of 38, can be released, because he enjoys a parole.

Even more, regardless of his age when he commits such offences, if at the moment the decision of conviction is irrevocable or during the service of the penalty the offender has turned 60 years old according to the actual Criminal Code or 65 years old according to the new Criminal Code, then life imprisonment is replaced by imprisonment for 25 years according to the actual Code, namely 30 years according to the new Code.

Such replacement is made automatically, without any appreciation from the administration of the place of detention or from the judge, as stated in the actual Code, the new Code stating a filter of appreciation from the judicial organ, especially referring to his behavior during imprisonment.

It comes that when he turns the age of 60 – actual Code – and of 65 – the future Code – the convicts who have already served 25 years of imprisonment – actual Code – or 30 years – the future Code – must be released automatically, without any appreciation, because he has served his penalty or even more.

Then it becomes natural the question:

It is normal for an adult of 38 years old, when he is released on parole, at the age of 60 according to the actual Code, or at the age of 65 according to the future Code, of course with the condition that he has served at least 25 years of imprisonment according to the new Code, namely 30 years according to the old Code, to be placed in freedom?

Those who have committed such offences and have begun the serving of their penalty until the age of 35 years shall automatically be released because at this age of 60, namely 65 have already served the penalty of 25 years, namely the replaced one of 30 years.

In this respect, a simple mathematical calculus can be made: 60 years old turned – 25 years of penalty served = 35 years old, age when he began his penalty (the actual Code) and 65 years old – 30 years of penalty served = 35 years old, age when he began his penalty (the future Code).

For all those shown I do not think it is normal that at such ages the criminals be released!

I am considering the support of the public opinion, from which not few voices are emerging, because such extreme violence having as consequence the death of the victim or of multiple victims, according to which the penalty of death would be required.

The death penalty cannot be disposed being prohibited according to Art 22 Para 3 of the Romanian Constitution, Protocol 13 and Art 1 of the Additional Protocol No 6 of the European Convention on Human Rights, Art 22 Para 2 of the Charter of Fundamental Rights of the European Union.

On the other hand, though I am not a supporter of the law of Talien, I cannot accept that the defendant guilty for the death of one or more persons, such as the above mentioned examples, must not suffer as much as the victim's family who survived.

Such as the criminal took away any hope for life of the victim, neither he must hope for a free life again.

This is why, I consider that in special situations, such as the ones in which the judge decides for life imprisonment, or to only for some of them, by eliminating the possibility for the convicted one to replace this penalty with imprisonment for 25 years according to the actual Code, and for 30 years according to the new Code, or if it is replaced, to not state a possibility, under no condition, for him to be released.

One may say that such extreme positioning is in contradiction with the humanist execution of the penalty[196] and does not consider the correction of the convicted, who has accepted his condition, to be re-socialized, but I consider that in actual conditions when poverty leads to numerous offences, especially violent ones when the detention places offer much better conditions that the convict has in his home, when the victim is the one who suffers, and the offender does not, in such conditions, the convicted shall endure life imprisonment, ending his life in a detention place.

Such position has support in the French Code of Criminal Procedure which shows that in the case of a murder (Art 221-3), murder against a minor who has not turned 15 years (Art 221-4 Para 1) accompanied by rape, torture or acts of barbarity there is the possibility that, if life imprisonment was decided in which the convicted is subjected to a period of continuous safety shall end his life in the penitentiary, the convicted shall not enjoy release on parole or other measures or means to reduce his penalty or to change his way of serving it.

This situation was considered contrary to the fundamental principles of the French state of law, but when the Constitutional Council was notified he tried to censor the debated text of law, concluding that such situations are not "contrary to the principle of the need for penalty"[197].

This is also a pattern.

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[196] Ilie Pascu et al. *Despre umanismul măsurii înlocuirii pedepsei detenţiunii pe viaţă* in the Noul Cod Penal comentat. Partea generală, 1st Volume, Universul Juridic Publishing-House, Bucharest, 2012, p.406

[197] George Antoniu (coord.) *et al.*, *op.cit.*, p.99

If I had considered so many models, why should not I adopt it under the analyzed aspects aiming the exclusion of any form of freedom for the penalty of life imprisonment of the French code?

I must make a final observation.

Exceptional derogations stated by the law can intervene in these situations, as results also from the French Criminal Procedure Code.

According to Art 720-4 in the case in which the court applied a penalty of life imprisonment and simultaneously decided for a period of safety for the entire time of the penalty, there is the possibility of revision for this situation after serving 30 years of penalty. In this regard, the judge in charge with the supervision of the penalty has the possibility to notify a college of 3 medical experts appointed by the Bureau of the Court of Cassation. These experts shall decide on the degree of danger of the convicted. Their standpoint is subjected to examination from a commission of 5 magistrates from the Court of Cassation, who will appreciate, if the period of continuous safety decided by the Court of Jury which decided for the penalty of life imprisonment must stop[198].

Also this exception must stop.

It is very important the rule, as I see it, identified in this last title, namely that life imprisonment be replaced, only in exceptional situations, with imprisonment for 25 years, namely 30 years, as stated in the actual and in the new Criminal Code.

Would be the middle solution, between the solution issued by the public opinion, in which numerous voices consider necessary the introduction of the death penalty and the solutions issued by the actual and new Code, in which some criminals who in their youth took the life of other people, can live happily ever after.

This would be an equilibrated solution!

It would be!

[198] George Antoniu (coord.) *et al.*, *op.cit.*, p.243

THE INTERNATIONAL CONFERENCE
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THE ISSUE OF IMMGRANTS COMING FROM ROMANIA AND THE REPUBLIC OF MOLDOVA, THE IMPACT AND EFFECTS OF THE EUROPEAN AND NATIONAL LEVEL

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Abstract
The factors that determine immigration are different and may consist either in economic, demographic, and political development. Amid the economic crisis in recent years, has registered an increase of immigrants coming from Romania and Republic of Moldova but also to crimes related to this immigration, legal or illegal. They all have a decisive impact and produce significant effects both at European level and at national level, not only citizens, but also over the public authorities of the States involved.

Key-words: *immigrants, impact, effects, citizens, overnments*

1. TERMINOLOGY

Causes of the most diverse and complex producing population movements took on an unprecedented scale. In the last decade, migration flows towards developed countries a lot better than the country of origin had a variety of causes and factors, the primary ones being economic factors, political and social as well as spiritual or ignorance of the affair. Knowledge of this phenomenon which is often accompanied by many acts and facts of criminal nature, determined to act for the knowledge States and combating it.

The term comes from the French-migration and Latin-migration, and means the phenomenon migratio of mass displacement of populations on a territory to another, determined by economic factors, social, or political. Talking about migration make reference to two of its components: emigration and immigration. To migrate is to leave the homeland and settling permanently or temporarily, in another country and comes from French émigrer. Immigrating is to come from a foreign country to settle down here and comes from French immigrer.

Emigration for the purpose of human migration, legal or illegal, the other States is a major factor for the source State and its institutions. The interest of the

State is keenly as it needs a knowledge as accurately as people who emigrate, causes that promote or hinder this.

The departure of many people working abroad has created demographic gaps in some areas. There are entire villages in Romania and Moldova have not left than the elderly, due to the departure abroad of the working population, the villages at risk of disappearing, with all the consequences that arise from here. In Moldova this phenomenon is felt not only in villages, towns and cities are the ones that are suffering enormously. For example, in Chisinau, the capital city, an overwhelming majority of men is left to work abroad, women being the leading house, household and brunt of children. Almost every family, one of the parents is gone to work abroad.

Immigration is considering foreign citizens who, for various reasons, are migrating to other States. It is a factor to be taken into account by the local authorities whereas the number of those who want to come to the State of destination comes from underdeveloped or developing countries.

Legal migration is widely accepted by all the States of the world, because it can be monitored as the numbers of people, places and areas of work and both can be determined over time. In doing so, they conclude, agreements, treaties or conventions by providing facilities for workers who migrate legally and undertake to comply with the legal conditions of work and social protection as well as for their own nationals. The rights and obligations stipulated in the agreements shall ensure that representatives of those States which, by virtue of the powers with which they are invested, can intervene to advise authorities of the receiving State in order to remedy the situation. In this way, the migration can be easily controlled by the beneficiary State of work because it provides only the jobs that its citizens have not occupied or not wished to occupy them for various reasons[199]. Legal migration enables us to collect fees and taxes associated with prize money made by their own workers abroad and to quantify these gains to set them justly in relation to the budget deficit.

Illegal migration is the alternative commonly used by people who cannot use the legal path to travel abroad. Component of trafficking in human beings[200], illegal migration is a scourge of the increasingly extensive and harder still under the criminal networks involved, thanks to the ingenuity of criminals. All these differences are added in relation to the law of the source country, transit or target which make it difficult to fight the authorities to combat this phenomenon. Should not be forgotten that migrant intake, the purposes to which they aspire, or threats or indications traffickers prefer to keep quiet, or to deny any connection with

[199] ori.mai.gov.ro
[200] Popescu Ilie, Rădulescu Nicolae, Popescu Nicolae, *Terorismul internațional – flagel al lumii contemporane*, Publishing house MAI, Bucharest, România, 2003, p.27

individuals or criminal groups that help them. Statistics of the United Nations[201] reveals that profits from international traffic in human beings are much bigger than the winnings of international traffic in stolen cars and drugs.

2. ILLEGAL MIGRATION AND HUMAN TRAFFICKING

Illegal migrants may threaten the stability of the socio-economic and even peace and security through the demographic balance disorder, ethnically, culturally, by the inability of social protection mechanisms or public health, by overcoming market absorption capacity of the labour and implicitly through bulversarea between the structures of forces ratio control of legality and public order and criminal activities channelled population. Trafficking in migrants, both legally and in terms of the offences included in this concept is clearly separated into two major components: human trafficking and trafficking in human beings.

Through traffic of migrants means[202] he provision of illegal entry into the territory of a State to a person who does not have the nationality of that State, or do not reside in the territory of that State. target Countries for migration are United Kingdom, Netherlands, France and Italy, Spain, Portugal, Greece, Czech Republic, Sweden, Finland, and Norway, Germany and Austria.

This has led to the radicalization of public opinion in the countries concerned and from other Member States of the European Union against illegal migration, a fact highlighted by the electoral performance of parties of Austria's anti-migration, France, Netherlands and United Kingdom, which has required the adoption of tougher positions against this phenomenon. The trend of opinion is replenished and the large number of migrants who, misusing some legislative gaps, working in the black economy, form criminal networks which have as their object the theft, prostitution and begging, pointing out the media usually gypsz ethnic origin of many of the culprits. Negative media presentation of some examples of such works is becoming more and more common[203].

We cannot omit the fact that not all those who emigrate are Gypsy ethnicity, many of those who go to seek a job abroad have higher qualification or education, take home country suffers a great loss in this regard. In the medical system feels this, many healthcare professionals leaving the system and emigrating.

With a view to preventing and curbing the smuggling of migrants, States concerned had lined up the relevant international legislation by developing and

[201] www.onuinfo.ro
[202] The Protocol against the smuggling of migrants to land, air and sea, supplementing the Convention against transnational crime Naţiuniolor, Palermo, Italy.
[203]Gheorghe Mateuţ (coord), *Traficul de fiinţe umane*, Publishing house Iaşi, Iaşi, România, 2005, p. 41.

promoting normative acts[204] that commitment means that government institutions and non-governmental organizations in this regard. After Romania's accession to the European Union and NATO, Romania, source and transit country, has become a target country, being subject to pressure from becoming larger. To change the input area in Romania, for example, from the eastern border to the South and the predominant movement of migrants the route Turkey-Bulgaria, Moscow-Chisinau.

Among the factors influencing pregnant illegal migration are population growth, uncontrolled, economic situation, foreign policy, armed conflicts. The migration phenomenon has several negative consequences:

-presence on the national territory of foreign communities heterogeneous ethnically, linguistically, religiously and educationally, which implies major adjustment difficulties in relations with the locals and are sources of conflict;

-involvement of the mafia type structures in illicit traffic in persons, the possibility that migrants, determine their citică situation, be easily recruited by the structures of organized crime, to be used in other forms of traffic;

-the tendency of many foreigners, destitute, and obtain them by committing crimes, often in collusion with local criminal elements;

-the emergence of a number of companies with bogus locations, screens for illegal activities;

-the possibility of the transmission of the specific disease to migrant geographical areas where they come from;

-some of the migrants are supporters or even members of the extremist-terrorist organizations;

-workes burdensome to national budget, in relation to the return of illegal migrants to the countries of origin, as well as for accommodation, maintenance and assistance.

Trafficking in human beings has experienced steady growth in recent years, becoming a national and international issue. The phenomenon is not episodic, involving a large number of people, knowing the profound connotations of social and economic order, demonstrating the violation of fundamental human rights and becoming a problem that worsens steadily.

Discrimination on the labour market is reflected in high rates of unemployment combined with poverty, motivated by the poor remuneration of labour and with opportunities to emigrate have prompted consideration of emigration in more developed countries, as the only solution. Corruption may be the authorities and she a factor that allows the development of the phenomenon of trafficking in persons. Trafficking in human beings and corruption complement each other, in that it creates multiple traffic opportunities that have the purpose of

[204]The United Nations Convention against Transnational Organised crime and its two additional protocols, Palermo, Italy.

corrupting public officials and the creation of preconditions for undermining the whole effort of other factors in order to combat this phenomenon[205].

Interpol has described human trafficking as a crime with the fastest rising in the world, and the United Nations emphasize that human trafficking has become a global business with a turnover of over US $ 7 billion [206]. Factors relating to market realities – low or standard of living in countries of destination, the actual possibilities in employment abroad, the consequences of labor to black causes incorrect appreciation of the real chances of success, encouraging trafficking. Trafficking in human beings for sexual exploitation remains the largest and most important form of trafficking in human beings, simply because it will always represent the most important source of profits for traffickers.

Poverty, unemployment, labour market discrimination, domestic violence and substance abuse causes for women and young, in general, the birth of a desire to escape to a better world, so misleading offers of traffickers are accepted easily.

The definition of trafficking contained in the Protocol to prevent, Suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime[207], nd the forms in which this offence shall be determined in relation to the characteristics of trafficked persons and traffickers, the purpose and the interests involved, the nature of the subject that generated the phenomenonthe social implications but also the specificity of the social values of the injured[208].

Aware that the victims were sold when they are deprived of, acts that took place in isolated places and supervised where they are deprived of any means of communication, are not allowed to come into contact with other people and are subject to inhuman treatments amid which become very vulnerable. The means used by traffickers for smuggling operations are: the threat, violence, other forms of coercion, abduction, fraud, deception or abuse of authority, squeezing a person's inability to defend themselves or to express his will, giving, soliciting, accepting or receiving money or other benefits to a person's consent[209]. In some instances, kidnapping is carried out by low young women by traffickers with false promises

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[205] Diaconescu H., *Infracţiunile de corupţie şi cele asimilate sau în legătură cu acestea*, Publishing house All Beck, Bucharest, Romania, 2005, p.38.

[206] www.migraţie.md

[207] The United Nations Convention, the Protocol to prevent, Suppress and punish trafficking in persons, especially women and children, Palermo, Italy.

[208] The United Nations Convention against transnational organized crime; Protocol to prevent, Suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime, the Protocol against the smuggling of migrants to land, air and sea, adopted in New York.

[209]Ungureanu Ricu (coord)., *Traficul de fiinţe umane*, Publishing house Prouniversitaria, Bucharest, Romania, 2006, p.56

of marriage abroad, where once, are used even by those who had captured the confidence or are sold like commodities.

Fraud as a means of achieving material element of the crime of trafficking in persons means the Act or acts committed by bad faith făptuitor, usually to gain an advantage through material violation of the rights of another person. According to the definition used in most jurisdictions, criminal fraud is a narrower term or more specific and may be included in the notion of deception[210].

Phishing is a technique often used by traffickers to convince victims to accept their proposals, and materializes in inducing them into error by presenting as a true facts lying or lying to a true facts, as for example the victim through deception, false promises of jobs abroad very well paid and that do not require special training. Most of the times, the victim's assurances that the trafficker will facilitate getting a job abroad, will deal with transport, accommodation and to obtain the necessary travel documents. The trafficker offers including financial assistance to the victim, agreeing with her that the money to be returned after recruitment. Once you are in the country of destination, the victim is trapped in a chain of debts, being forced to work in all conditions other than those promised by the dealer or forced to prostitution, where it is not transmitted to other persons for use.

Romania, as a State entity in Europe, it is primarily a country of origin for victims of trafficking in human beings [211]. Romania is a country of origin and transit, especially for women and girls trafficked to Bosnia, Serbia, Macedonia, Kosovo, Albania, Greece, Italy and Turkey for the purpose of sexual exploitation.

Romania and Moldova is positioned between the former Soviet bloc and countries of the former Yugoslavia who have suffered not only the negative effects of the transition, but also the consequences of the war. Due to its geographical position, Romania is a major route (transit country) for trafficking victims from Moldova[212], Ukraine and, sometimes, in some Asian countries.

Social factors, namely the family situation, the lack of information concerning the origin, the institutions involved in the migration process and the possibilities of obtaining legal employment abroad, the lack of information concerning the rights of employees, the lack of information on the country in which you wish to migrate for work, are the primary factors in children's vulnerability to trafficking. Also, general economic factors of poverty and extreme poverty, high unemployment, low for unskilled labor remunerations, insecurity of employment, increase traffic sensitive points.

In the case of trafficking in children for purposes of exploitation through work, the child's family is involved in a way directly or indirectly in the process. In

[210] Popescu Ilie, Rădulescu Nicolae, Popescu Nicolae, *op.cit.*, p.49.
[211] Trafficking in Human Beings in Southeastern Europe – www.unicef.org
[212] www.iatp.md

many cases it is the migration of the entire family in another country, usually with Western European destination. This process is seen as the only way to lead a far better life, sometimes as the only chance of survival. Most of the times the children are used in the country of destination to ensure the required family income through various ways, the most common being begging and stealing, and sexual exploitation. Sometimes the adults of these families returning home, children are left to figure out who sent the families a monthly explotatorilor certain amounts of money. In other cases, parents give consent for minors to leave the country to work abroad, being accompanied by relatives or acquaintances, thus facilitating the process of moving the children to the country of destination. In these cases, the children have no objection, being convinced that it is their duty to help his family and that they will have a better future.

Influenced by the Group of friends, staying in the country by charging as a life devoid of perspective, a significant part of unaccompanied minors abroad are leaving on their own, most of them being boys. And in those cases but there are adults that facilitate at least. Without protection, without money and without housing, these children enter into the network of thieves or beggars or are sexually exploited.

In conclusion, the phenomenon of emigration is particularly extensive and devastating effects of the products involved, both in Romania and Moldova as countries of origin and the countries where these immigrants come. According to official data, in July 2012, were recorded in the United Kingdom by 94,000 people born in Romania. This number is immense. In the U.K. expect that the number of Romanian immigrants to lie between 150,000 and 200,000 were serious discussions over the crime rate which, accordingly, greatly increases until 2014. Several European countries increasingly take stand against immigrants that arrive in their States, being greatly affected negatively in terms of State e. There are no complete statistical data on emigrated. Neither Romania nor Moldova is not known the exactly number of those who have emigrated, irrespective of the reason of emigration, and the phenomenon is growing, in both States. This is alarming, with negative effects both nationally and at european level.

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CONSIDERATIONS ON THE RETRANSMISSION OF THE RIGHT TO ACCEPT OR DISCLAIM AN INHERITANCE AND ITS APPLICATIONS

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Summary

As a novelty element, the Civil Code in force regulates the retransmission of the right to accept or disclaim an inheritance, at article 1105. Consequently the heirs of the person who dies without exerting his or her right to accept or disclaim an inheritance, can exert this right separately, each for the share to which is entitled, within the term applicable to the right of choosing to accept or disclaim an inheritance.

The heirs of the deceased, on behalf of whom retransmission operates, can therefore accept or disclaim the retransmitted inheritance. The share of those who give up to inheritance shall be taken over by the other heirs. In relation to the legal provisions mentioned above, the present work will make a few critical observations, there being possible for some improvements of the provisions in question to be made.

The retransmission of the right to accept or disclaim an inheritance, which is different from representation to inheritance (a confront which we aim to carry out in the present work), has applications also in other fields of succession law, for instance those regarding the capacity to inherit, report of donations and reduction of excessive liberalities.

Consequently, the present work aims to analyze the issues related to the retransmission of the right to accept or disclaim an inheritance, under all the aspects that it involves, and to assess the justness and appropriateness of the regulations related to this legal institution.

Key words*: right to accept or disclaim an inheritance; acceptance of inheritance; disclaim of inheritance; author; inheritance worthy; representation to inheritance.*

1. GENERAL CONSIDERATIONS IN CONNECTION WITH THE RETRANSMISSION OF THE RIGHT OF SUCCESIONAL OPTION[213]

1.1. The concept and legal regulation of the retransmission of the right of successional option

As a novelty, the Civil Code in force[214] regulates in art.1105, the retransmission of the right of successional option. Thus, according to the legal provisions listed „The heirs of the one who died without exercising their successional option, they exercise separately, each for its part, within the applicable right of option on their author's legacy. In the case referred to paragraph 1, the part of the succesor that renounces is in the favour of the others heirs oh his author".

So, to be able to apply the retransmission of the right of successional option, it is necessary that the heir of *de cuius* to be alive at the opening of inheritance, but to have died, before the deadline for exercising the right of successional option (1 year) and to have chosen about the legacy in question. As a result, retransmission will not operate if the heir before he died, he gave up the inheritance. The right of inheritance of the latter deceased is retransmitted to his own heirs.

Please note however, that retransmission of the right of successional option, does not imply the obligation of the heirs to accept it, whereas according to art. 1106 Civil Code (with the marginal name "Freedom of acceptance the inheritance"), "No one can be forced to accept a legacy due to him". Consequently, each successor has a choice regarding the inheritance from which he has this capacity, either in the sense of accepting it or repudiate it, within applicable law regarding the successional option of their author's legacy. Moreover, the Civil Code, art.1105 par.(2) regulates, as we have shown, that the part of the successor

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[213] Regarding the inheritance's retransmission, in the regulation of the Civil Code from 1864, see as an example: D. Cimpoieru, *Moştenirea prin retransmitere*, in „Dreptul" Magazine no. 4/1995, pp. 28-30; Fr. Deak, *Tratat de drept succesoral*, second edition, updated and completed, Universul Juridic Publishing House, Bucharest, 2002, pp. 91-96. As for the retransmission of the successional option right, in the regulation of the Civil Code, see: C. Macovei, M.C. Dobrilă, *Cartea a IV-a. Despre moştenire şi liberalităţi,* in „Noul Cod civil. Comentariu pe articole", by Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), C.H. Beck Publishing House, Bucharest, 2012, pp. 1147-1148; D.M. Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil,* Universul Juridic Publishing House, Bucharest, 2012, pp. 204-2009; I. Genoiu, *Dreptul la moştenire în Noul Cod civil,* C.H. Beck Publishing House, Bucharest, 2012, pp. 76-77 şi 336-338.

[214] We reffer to Law no. 287/2009 regarding the Civil Code, republished in the Official Gazette no. 505 from 15th of July 2011.

that benefits of the retransmission of the right of successional option and gives it up, will be in the favour of the others heirs of the author.

It is clear however that if the successor has taken a tacit acceptance of the inheritance, his right being exercised, is no longer capable for transmitting it to his own heirs. Only in the absence of such provisions, the successor's heirs have the opportunity to exercise two rights of option: the own right regarding the inheritance of the deceased successor, and the right of retransmission, aiming the inheritance previously opened. The second right of option may be exercised only if the inheritance of the deceased successor was accepted. The renunciation of the inheritance of the latter doesn't give him the right to accept the retransmitted inheritance. It is clear however that the successor to which the right of the successional option has been retransmitted, can give up the retransmitted inheritance and he can accept the inheritance oh his author. In conclusion, we mention that the option regarding the two types of inheritance doesn't need to be identical, but, for the retransmitted inheritance to be accepted, it is necessary that the renunciation of the inheritance of the deceased successor not take place[215].

Moreover, we mention that, regarding the retransmitted inheritance, the right of option must not be exercised by the joint heirs unitarily, the Civil Code regulating the possibility that one or more successors renounce to the retransmitted inheritance, the part of the renunciation ones going to the others heirs of their author.

Recall, however, that according to art. 693 of the Civil Code of 1864, successors who can not agree on the option, regarding the retransmitted inheritance, were considered to have accepted the inheritance under benefit of inventory. It is evident therefore the novelty consecrated, under this aspect, by the current Civil Code.

Continuing analysis of the retransmission of the right of successional option, we consider that, in our opinion, the text or art.1105 Civil Code is contradictory. In the first paragraph of the text of the law it is stated, as noted, that "the heirs of the deceased without exercising their right of successional option, they will exercise it separately, each for his part (s.n I.G.)..." to find out in the

[215] From the procedural point of view, National Union of Public Notaries from Romania recommends that, in the retransmission case of the successional option right, the successions of two or more deceases to be debated successively, by connecting the successional causes. In case the connection and the successive solving of the causes, it is recommended that the successions to be debated in the following order: first it must be debated the succession of the last deceased and after that the succession of the first deceased. The competence of solving the successional causes is the one of the public notary from the last residence of the person who died last. See in this regard Uniunea Naţională a Notarilor Publici din România, *Codul civil al României. Îndrumar notarial*, Monitorul Oficial Publishing House, Bucharest, 2011, pp. 417-418.

second paragraph, that the legislator is contradicting himself and that is regulating in the way that "...the part of the successor that is renouncing is in the favour of the others heirs of his author". Therefore needs an answer the following question: How can seize the part of the renunciation heir the other heirs of the author, if they chose (accepted) only their side, so if they only have a limited vocation, limited only to their share of the inheritance? For that the other heirs to profit of the share of the renunciation heir, should they have a universality vocation to inheritance, i.e. to choose (accept) the entire retransmitted inheritance, and not only a part of it[216].

We cannot, however, challenge the fact that this legal text presents some advantages. Thus, it enshrines the principle of freedom of the act of successional option and also the divisible character of the successional option. In conclusion, we believe that the text of the law in question is not worded properly, which is why we propose to the legislature to reconsider it and remove the obvious contradiction between the two paragraphs of its.

Finally, we provide an example of retransmission of the right of successional option. So: The deceased has three children, all living at the opening of inheritance. From each of them, the deceased has two grandchildren. Shortly after the opening of the inheritance of the deceased, the biggest of its children dies before he accepted his father's legacy. In this case, we meet two successive inheritances: that of the deceased, collected by his three sons alive (each collecting a share of 1/3) and that of his eldest sons, whose share of the estate also includes one third of the inheritance of the deceased. If the two grandchildren from the son, ulterior deceased, will accept their grandfather's legacy, they will collect the retransmission, each collecting a share of sixth.

1.2. The moment from which it starts to run the term of option in the case of retransmission

According to the final sentence of Para.(1) art.1105 Civil Code, the right of successional option must be exercised by the heirs of the one who died without exercising it "...in the term applicable to the right of option regarding the inheritance of their author". So, in the case of retransmission, the heirs must exercise their successional option right, in the time left, that means in the time between the date of the death of the inherited and the date that concludes the term of one year. The heirs of the deceased successor, after the date of opening the succession, but before of exercising the right of successional option, can not benefit from a longer term than the one had by the deceased successor. For example, if the date of opening of the inheritance of the deceased is January 1, 2012, term expires

[216] See also B. Pătraşcu, *Continuitate şi discontinuitate în reglementarea opţiunii succesorale,* in "Noul Cod civil. Comentarii", by coordinator M. Uliescu, Universul Juridic Publishing House, Bucharest, 2010, p. 256.

on successional option from 1 January. The successor of the deceased dies on 1 April 2012, before he had the chance to exercise his right of successional option, regarding the open inheritance. The right of option of the deceased successor is forwarded to his own heirs. The latter have the right to choose about the retransmitted legacy within 9 months. Failure to exercise the right of option in the remaining time attracts its extinction, and also the extinction of the heir title.

2. THE APPLICATIONS OF RETRANSMISSION OF THE RIGHT OF SUCCESSIONAL OPTION

Retransmission of the right of successional option has applications also in the other areas of succession law, mainly in terms of capacity to inherit, forced acceptance of inheritance, the reduction of excessive liberalities and donations report. Therefore, in what follows, we aim to reveal the link between the retransmission of the right of succession option with these legal institutions.

2.1. The retransmission of the right of successional option and the capacity to inherit

The capacity to inherit is one of the general conditions of the right to inheritance. Therefore, in order to collect an inheritance, it must be proved the existence of the one that is claiming it, at the moment of the death of *de cuius.* As a rule, this evidence must be made directly by the person claiming the successional rights. In the case of retransmission the right of successional option, however, the existence of the one that's claiming the rights on inheritance must be proven by his successors in title. Therefore, they must prove that their author was alive at the time of the death of the testator, but died shortly before being exercised their option about the succession regarding the first opened inheritance..

In fact, they should produce a double proof:

a) Evidence that at the opening of the first deceased heritage, their author was alive;

b) the evidence that they are still alive at the time of opening of the two succession.

2.2. The retransmission of the right of successional option and the forced acceptance of the inheritance

Civil Code is governing the forced acceptance of inheritance by the provisions of article In 1119. Under these "The successor who, in bad faith, stole or hid a donation that was subject to the report or reduction is deemed to have accepted the inheritance, even if previously waived her ..."

In the following, we try to determine the influence that forced acceptance heritage exerts on retransmission the right for successional option. So where the successor who committed fraudulent acts provided by law died before exercising

his option rights to inherit, comes into place the retransmission of this right to his own heirs. As a result, they will be deemed to have accepted (forced) the retransmitted heritage, not having the opportunity to give it up.

Although, in general, the heirs of the one who died before having exercised his right for successional option have a choice of option regarding the retransmitted inheritance, however, in the event that their author has committed acts which, in the law, draw, as a punishment, forced acceptance of the inheritance, they do not have a choice, being forced to accept the inheritance in question. Consequently, the effects of the forced acceptance will regard the patrimony of the successor deceased before having exercised his right of successional option. Thus, into his estate will not go the rights regarding stolen or hidden goods and, if applicable, it will operate the reporting or the reduction of the hidden donation, without the involvement of the successor mentioned at the distribution of the donated goods. In addition, liabilities and duties of inheritance will be paid in proportion to its share of the inheritance, including with its own goods.

Therefore, there must not be understood that the effects of forced acceptance, in the case of retransmission of the right to successional option, is directly affecting the heirs of the successor deceased before having exercised his right of successional option. Conversely, the effects of forced acceptance heritage will cover them only indirectly, their author's patrimony being poor as a result of the influence on the patrimony of the effects of forced acceptance. Please note also that the heirs of the successor deceased before exercising his right of successional option are forced to accept only the retransmitted inheritance, regarding the inheritance of their author having right of successional option, so that they can accept or repudiate it.

We conclude therefore that the forced acceptance of inheritance operates also in the case of retransmission the right for successional option.

2.3. Retransmission of the right of successional option and the reduction of excessive liberalities

Under the provisions of art.1092 Civil Code: "... the liberalities infringing the successional reserve are subject to reduction on demand". Pursuant to art.1093 Civil Code: "The reduction of excessive liberalities can be requested only by the reserved heirs, their successors and by the unsecured creditors of the reserved heirs".

Regarding the incidence of retransmission the right of successional option on the matter of reduction of excessive liberalities, we state that, if the reserved heir dies, after the opening of the inheritance on which he has this quality, but before he had exercised his right of reduction, this right shall be forwarded to its heirs.

If the reserved heir has one heir, he has the choice to exercise or to waive the right of reduction. If there are several heirs, it is preferable, in order to avoid any difficulties that they choose unitarily regarding the right or reduction, either in the sense of renouncing to it either in the sense of exercising it. Difficulties arise only if the heirs of the reserved heir do not have the same option on the inherited right, some wanting the invocation of it, other renouncing to it. In all cases, whereas the right to reduction has an individual character, the renunciation of some of the heirs does not affect the right of others to exercise it[217].

2.4. Retransmission of the right of successional option and the report of donations

Under the provisions of art.1146 par.(1) Civil Code, "The report of the donations is the obligation they have between them the surviving spouse and the descendants of the deceased that come also together to the legal legacy, to bring the legacy assets that were donated to them without exemption from report by the inherited one".

Under the provisions of article 1148 Civil Code., the reporting of donations may be required only by the surviving spouse and their descendants, and, also by oblique way, by their personal creditors.

In the case of retransmission of the right of successional option, the right to demand the report of donations is belonging to the heirs of the successor deceased before having exercised his right of successional option. We appreciate; however, that the right to request the report of donations must be exercised by the ones on which it is transmitted unitarily, as in the case of the reduction of excessive liberalities.

3. RETRANSMISSION OF THE RIGHT OF SUCCESSIONAL OPTION AND THE SUCCESSIONAL REPRESENTATION

Retransmission of the right of successional option presents some similarities with the institution of the successional representation, which is why it is necessary to make a net distinction between them.

Thus, in the case of successional representation, the representative is deceased at the date of opening the inheritance or he is unworthy to the deceased. In the case of retransmission, however, the heir survives a short time after the opening of the inheritance, but he dies before having exercised his right of successional option. Therefore, the right of successional option of the one who died before having exercised it is transmitted to his successors, who will exercise it separately, each for its part, within applicable law regarding the author's inheritance.

[217] See Fr. Deak, *op. cit.*, p. 341.

Between these two legal institutions can be identified, however, sufficient elements of distinction, so as to remove any confusion. Such:

a) Only in the case of representation, the division of the inheritance is made on the stem, because in the case of retransmission it is made by ends.

b) Successional representation operates only in the case of legal inheritance, unlike retransmission that can operate equally in the case of testamentary inheritance.

c) In the event of retransmission, being about two or more inheritances, they must be considered separately, in all posed: composition, term of successional option, quotas entitled to the heirs.

d) In the case of retransmission, the territorial jurisdiction of the notary offices and respectively of the Court is determined by the place of opening of the latter legacy.

CONCLUSIONS

In our opinion, the regulation of the Civil Code of the retransmission of the right of successional option has, without a doubt, a great practical utility. We believe, however, that the formulation of the text of Art. 1105 is for the reasons given during our analysis, improper, which is why the legislator should revert to it and reword it.

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THE RIGHT TO A FAIR TRIAL AS A PRINCIPLE, WITHIN REASONABLE AND FORESEEABLE TIME, IN ACCORDANCE WITH THE NEW CODE OF CIVIL PROCEDURE

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Abstract

Inspired by article 6 from the European Convention of Human Rights, entitled "Right to a Fair Trial", the principle analysed here reflects the importance granted by the national lawmaker to the rules determined by the Convention and the jurisprudence of the European Court of Human Rights, and developed in the application of its text.

In the national legislation, this fundamental rule is stated in article 6 also, but of the New Code of Civil Procedure (NCPC), either by coincidence or in order to make the readers of procedural law more aware of the importance to protect this basic right, which is internationally sanctioned.

In reality, the right to a fair trial has more than one side to it, since it is a complex right including a series of requirements which the national legislator as well as those entrusted with the application of the law must respect.

Key-terms*: New Code of Civil Procedure, European Convention of Human Rights, the right to independent and impartial tribunal, a fair and public hearing within a reasonable time.*

1. INTRODUCTION

The European Convention of Human Rights regulates the right to a fair and public hearing within in a reasonable time, by an independent and impartial tribunal established by law, with the obligation of publicly pronouncing the decision.

By taking only part of the text of the convention, since a part of it is found in other principles (the principle of publicity), the New Code of Civil Procedure shows that every person has the right to fair judgement, within a reasonable and foreseeable timeframe, by an independent and impartial court of law, set up by law meaning that the court is obliged to make use of all lawfully granted procedure to ensure judgement in a swift fashion.

As a consequence of this distinction, we must deal with the aspects of the right to a fair trial in a comparative way. We must always take into consideration the rule sanctioned in the Constitution as well as the New Code of Civil Procedure,

stating that if there are inconsistencies between conventions and treaties on fundamental human rights, of which Romania is a cosignatory, the international texts take priority, unless the national ones have more favourable stipulations (article 3 of the NCPC and article of the Convention).

2. THE SCOPE OF APPLICATION OF THE PRINCIPLE

The scope of application of this principle is generically defined as common law, a notion which has several different meanings in the national law of member states of the Council of Europe and which has an autonomous legal meaning[218] within the jurisprudence of the Court.

In national legislation, article 2 from the New Code of Civil Procedure entitled "General Applicability of the Code of Civil Procedure", shows that the stipulations of the code constitute a procedure of common law and that legal matter in a procedural meaning comprises of any matter of private and public law, except those subject to criminal law, if not clearly stated by the law.

Corroborated by this, article 1 of the New Civil Code, entitled "Objective of Civil Code", shows that the stipulations of the code regulate the patrimonial and non-patrimonial relations between people, as a subject of the law.

The legislator in his monistic point of view simplifies the interpretation of the scope of the law, the Civil Code and the civil procedure, implicitly and he applies it to all private legal relations.

Therefore, in the New Civil Code article 3 states *that the code applies also to the relations between professionals as well as the relations between them and other civil law subjects. Professionals are all who capitalise on a company and this represents the systematic use by either one or several persons of an organised activity consisting in producing, administering or estranging goods or services, with or without the goal of profiting from it. As such, in the absence of a special regulation, all relation of a private juridical, non-patrimonial personal civil (i.e. the existence and identifying the person, intellectual property rights), familial, commercial, labour rights or transport relations are subject to the Civil Code and the Code of Civil Procedure.*

Given that European court jurisprudence is extremely elaborate, determining the meaning of the notion of "civil" requires us to summarise it.

Firstly, the court has decided that the restrictive interpretation of article 6 from the Convention does not correspond to its objective or to the purpose of its stipulations, pertaining to the effectiveness of the right to a fair trial. Thus, it contains all the guarantees stipulated by the text but also takes into consideration the possibilities of expanding its scope.

[218] Bîrsan, C., *Convenţia Europeană a Drepturilor* Omului, 2010, pp. 362-409.

By the word "civil", the court constantly understands that which has a patrimonial objective, is founded on non-patrimonial civil rights or pertains to the rights and obligations with a private quality. The concrete content, scope and ways of exercising these rights are stated by the national regulation of each cosignatory state of the Convention. The court jurisprudence has stated that the civil nature of a right is determined the moment when it finds its proper use, irrespective of the nature of the writ of execution which determines it[219].

In order to determine the civil sphere of rights subject to the Convention, the court has also taken into consideration defending the image of a right, thus proving sufficient for the holder of such a right to pretend to have it nationally[220], despite it not yet being stated[221].

The Court has also decided that article 6 does not only take into account the suits concerning a subjective right pertaining to private law, in the *classic* sense of the term. it concerns rights which constitute the goal of litigation between private parties but also between them and the state, when the latter acts based on private legal relations though not on the authority vested with *jure imperii*.

The appeal made in a commercial, administrative or financial case is also civil and falls under article 6 paragraph 1.

It does not fall under the notion of civil right as do political[222] and constitutional rights and obligations as well as procedures for expelling foreign nationals[223] which are thus considered in court jurisprudence.

Therefore, the following rights are considered as civil in court jurisprudence: personal non-patrimonial civil rights (the right to a good reputation, the right to reclaim the family honour of the convicted person[224], the right to obtain the capacity to associate – although it refers only to the future capacity, it has been acknowledged that the right of a group of people wanting to form an association was violated without there being any specific prohibition in the legislation[225], the right of the parents to visit, the right to keep contact with the child born out of

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[219] Perez de Rada Cavanilles contra Spaniei, CEDO, 28 octombrie 1998, în Bîrsan, C., *Convenţia Europeană a Drepturilor Omului, - Comentarii pe articole, vol. I, Drepturi şi libertăţi, 2005*, p. 402.

[220] Dincă, R., *Cereri în faţa C.E.D.O. Condiţii de admisibilitate*, 2001, p. 218 and the following.

[221] Baraona vs Portugal, ECHR 8 July 1987

[222] Pierre Bloch vs France, ECHR 21 October 1997.

[223] Protocol nr. 7 from the Convention does not take into consideration this procedure but only the institution of procedural guarantees in case of expulsionof foreigners, Bozano vs France – European Commission of Human Rights 15 May 1984, Maaouia vs France, 5 October 2000, Raf vs Spain, ECHR 21 November 2000.

[224] Kurzac vs Poland, ECHR – 25 May 2000.

[225] APEH Uldozotteinek Szovetsege et al. vs Hungary, ECHR – 5 October 2000.

wedlock, entrusting the child to one of the parents after the divorce, the right of the parents to the children entrusted to them by public authorities[226]) and patrimonial civil rights (the right to property[227], carrying out the lease[228], payment of damages resulting from an illicit act, damages for violations of property rights committed during political regimes, the right of victims to indemnifications for abusive confiscations or ill treatment applied by the authorities of the state[229]).

In the field of commercial relations, we have lawsuits concerning disloyal competition[230], bankruptcy procedure, the right to carry out a commercial activity in the private sector, the appeal of the decision of a bank to increase the share capital, all come under the influence of the legal text as rights with a civil quality *lato sensu*.

Fiscal relations can also determine the creation of certain rights which fall under article 6 paragraph 1, within the notion of a civil relation *lato sensu*, as a general rule, fiscal litigation are not subject to conventions, given that the patrimonial nature of the lawsuit is insufficient to call for its application[231]. It is similar to the procedure used to return funds to a company, even if it was based in fiscal legislation and led in the end to the payment of certain taxes. Also, in the filed of social insurance, the European courts have decided that article 6 paragraph 1 can be applied in the form of payment of indemnifications, benefits and pensions.

The access and exercise of liberal professions[232] also have a civil quality and fall under the same article. It does not concern the assessments of the admissions comity on the information and experiences necessary to the admission to the bar. Such an analysis is closer to a school or university exam and therefore article 6 paragraph 1 cannot be considered as applicable. In other words, this assessment is not subject tot the convention so long as the national judge does not have the possibility of ruling in such matters. This is completely justified given that assessing the necessary knowledge and experience may only be done persons who are themselves experienced and versed in the respective field[233].

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[226] W. and B. vs United Kingdom, ECHR 8 July 1987.
[227] Sporrong and Lonnroth vs Sweden, ECHR 23 September 1982.
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[233] Bîrsan, C., *Convenţia Europeană a Drepturilor Omului, - Comentarii pe articole, vol. I, Drepturi şi libertăţi*, 2005, p. 420.

Litigation concerning the exercise of a public function and of a career in public function also has to a certain extent a civil nature, if it pertains to exclusively patrimonial rights, when purely patrimonial rights are defended, derived from the exercise of the respective public function. In this case, article 6 applies[234]. According to court jurisprudence, article 6 no longer applies despite patrimonial aspects, if the claimants hold a public function involving the exercise of a state function, as part of the state government itself[235].

Concerning **the relations between the state and private individuals** the court has decided that article 6 paragraph 1 applies, given the pertinence of the notion of "civil right" when the procedure considered a "public right" in national law is however specified for the rights and obligations with a private characteristic, such as: the sale of land, granting administrative authorisation for the exercise of a commercial activity or a profession, the exploitation of a private clinic, compulsory purchase. Also subject to the text are legal procedures of certain administrative actions concerning the limited use of terrain by the claimant, the interdiction to build on a certain territory, maintaining the licence to continue the activity of the title holder.

Under a procedural aspect, the European administrative court has decided to include civil relations and to apply article 6 from the Convention in which an arbitrary decision is appealed, however the text does not apply when there is an emergency procedure because it does not concern the first as the presidential ordinance.

3. PRINCIPLES SANCTIONED BY ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1. Presentation

In order to establish the scope of application of article 6 paragraph 1 from the Convention implies the presentation of principles which constitute guarantees of a fair trial, i.e. the right to independent and impartial tribunal established by law and a fair and public hearing within a reasonable time[236].

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[234] Huber vs France, ECHR – 18 February 1998, Couez vs France, ECHR 24 August 1998.
[235] Pellegrin vs France, - 7 October 2003.
[236] Subsequently, through decision 830/2008, published in the Official Gazette of Romanian nr. 559 from 24 July 2008, The Constitutional Court reviewed, noticing that the stipulations of article I, 60 from Title I of Law 247/2005, through the repeal of the phrase "buildings seized without a valid title" from article 29, pragraph 1 from Law 10/2001, violates the stipulations of article 15 paragraph 2 and article 16 paragraph 1 from the Constitution. Then decision was delivered with a separate opinion in which it was stated that "This juridical operation (the reconstruction) must be done in time, or the quality of ownership is obtained at different moments. If by the time this law was amended, the persons have obtained ownership, the building will be returned to them in accordance with the current law at that

3.2. The right to a tribunal, referred to in article 6 of the convention, represents one of the practical aspects of the right, on which we will base one of our subsequent paragraphs and is the equivalent of the content of the principle of free access to justice sanctioned in the Constitution of Romania, article 21. In other words, any person must have the right to postpone possibly litigation which is connected to their civil rights (and criminal rights, however article 6 of the convention separately tackles the issue of rights pertaining to criminal law and in any case outside the civil procedure), to a tribunal and a judge vested by the state with the authority needed to rule. All actions put before the court must be admitted in all cases[237], apart from the permitted limitations, but in no case can it be admitted that a national ruling whereby the patrimonial rights of a person have been acknowledged, can be dismissed following the exercise of an extraordinary appeal, based on the fact that the respective person did not have the possibility to sue and had to wait for the special legal regulation[238].

It also cannot be admitted that a court vested with the resolution of a request refuse to examine it, by justifying the fact that the special law does not stipulate a means of appealing before the courts the decisions of a commission constituted for the application of a special law[239] or to subsequently reject this

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time. All other persons not having obtained ownership shall be compensated pursuant to the conditions of article I, 60 from Title I of Law 247/2005, in the sense that the payment of compensations subsequent to the abusive seizure of the buildings shall be done in accordance with the market value at that time. Therefore, the law is not retroactive, the quality of owner is obtained subsequent to its coming into force and therefore applies to all the individuals involved in that particular legal situation. This regulation supports the juridical relations created through legal privatisation of companies , in the peoperty of which there are buildings, some of which come into the civil circuit. For this reason, we consider that the amendment has not established a new deadline for the submission of notifications which would lead to upsetting the functioning of the private company."

[237] Tabacu, A., Moşneanu Comăneci, M., *Instituţii procesuale reglementate de Proiectul Noului Cod de Procedură Civilă, care asigură accesul liber la justiţie*, 2009, p. 179 and the following.

[238] Vasilescu vs Romania, ECHR 22 May 1998; Brumărescu vs Romania, ECHR 28 October 1999.

[239] Crişan vs Romnia published in the Official Gazette of Romania, nr. 1136 from 1 December 2004, in which it was stated that a part of the Committee formed exclusively of functionaries from the Department of employment and social protection and representatives of the Association of former political detainees and placed under the control of a central commission formed by the representatives of the Ministry of Justice and Ministry of Employment and Social Protection, based on art. 5 from Decree nr. 118/1990, does not meet the condition of independence from the executive branch and the parties and therefore does not meet the required role of "court", as stated by article 6 paragraph 1 from the Convention, so that it is necessary that the interested party subsequently submit the

request, given that the special law cannot be applied in that case[240]. The court has taken note that "the court's refusal to rule on the base of the claimants' request is contrary to the right of accessing the court, as guaranteed by article 21 from the Romanian Constitution and article 3 from the Romanian Civil Code, and in the presented situation, in the case of article 6 paragraph 1 form the Convention, this has the same legal consequences as the decision of the Supreme Court in the Brumărescu case cited before" – in paragraph 49 of the quotation.

The right to promote an action before the courts is not absolute, given the premises of limitations from the states, on the condition that these continue to pursue a legitimate aim and that there be a reasonable proportionality between the used means and the proposed goal[241].

Therefore, the main principle is connected to the existence of an impartial and independent tribunal stipulated by law.

3.3. The tribunal must be established by law, given that the law understand not only the legislation referring to the establishment of competent juridical authorities but also of any other internal stipulation which if violated would lead to an irregularity of member participating in the formation of the judgement in order to resolve a certain case (Bulut vs Austria, ECHR, 22 February 1996).

3.4. The independent tribunal as a notion aimed at several aspects connected by the duration of the mandate of tribunal members, the protection against external pressures, the verification of the apparent independence[242]. Therefore, the necessary instruments in order to ensure the appearance of independence are the immovability of the judges, granting independence from the executive, legislative powers and the trial parties.

3.5. The tribunal is impartial if both from a subjective as well as objective point of view there can be no shadow of doubt about its impartiality. Thus, the judge must rule only based on the information presented in the case and

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decisions made by the administrative body to the attention of a judicial body that has the required abilities.

[240] Canciovici and others vs Romania, published in the Official Gazette of Romanina, nr. 210 from 8 March 2006, in which, after the inadmissible rejection of the motion to revendicate, motivated by he existence of the possibility to regain a building, based on L. nr. 112/1995 the request to repay in kind a formulated within the rems of the law mentiona was rejected, the respective courts decided that the property did not meet the conditions required by L. nr. 112/1995, given that it could not be considred a "home" in order to have it returned to its owners.

[241] Bellet vs France, ECHR, 4 December 1995, Osman vs United Kingdom, ECHR, 28 October 1999, Garcia Manibardo vs Spain, 15 February 2000.

[242] Bîrsan, *Convenţia Europeană a Drepturilor Omului, - Comentarii pe articole, vol. I, Drepturi şi libertăţi*, 2005, p. 490.

in the hearings, without any exterior involvements, which could lead to the conclusion being influenced by either side. This is the reason why in member states interdictions were passed to prohibit that the judge sit on the panel of any trial that their spouse or any relative are representing as counsel or that a solution be given in a case in which he/she has acted as prosecutor. Therefore, court jurisprudence has rejected certain points of view connected to the impartiality of judges on the reason of their belonging to a secret organization (Kiiskinen vs Finland, ECHR, 1 June 1999).

3.6. Before the tribunal established by law, **the procedure must be fair, public and within a reasonable time.**

In order to achieve this, the tribunal must proceed to the careful examination of all demands formulated by the claimant, the requests of the examiner and to inform all parties of the conditions of each trial. Thus, no request may be arbitrarily rejected, without respecting the terms and formalities stipulated by law and without actually examining the request formulated[243]. It has been recorded that "regulating the formalities and terms which should be respected is meant to ensure a good administration of justice and the respect of the principle of legal security, the interested parties may expect that these rules be applied[244]". As the Convention does not propose to guarantee theoretical or imagined rights but concrete and actual ones[245], the right to a fair trial cannot be effectively considered unless the requests and observations are indeed "heard", meaning that the examination was in conformity with the procedural norms of the tribunal. Put otherwise, article 6 imposes that "the tribunal" have the obligation to proceed to an actual examination of the reasons, arguments and probationary requests of the parties, apart from assessing their pertinence.

The main means offered by the internal codes of the states, in order to protect and guarantee this principle in the civil sphere are the principle of contradictory, equality of means and motivation of decisions.

The equality of means implies maintaining an equal balance between the trial parties, which must benefit from the reasonable possibility of supporting the cause in conditions which does not put it at disadvantage in relation to its opponents[246].

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[243] Virgil Ionescu vs Romania published in the Official Gazette of Romanian, nr. 396 from 8 May 2006.

[244] Stone Court Shiping Company S.A. vs Spain, Request nr. 55.524/2000, paragraph 34, 28 October 2003.

[245] Artico vs Italy, Decision from 13 May 1980, series A nr. 37, p. 16, paragraph 33.

[246] Kress vs France, ECHR, 7 June 2001; Niderost -Huber vs Sweden, ECHR, 18 February 1997; Deleanu, *Egalitatea de arme în viitorul Cod de procedură civilă, din perspectiva jurisprudenţei CEDO şi a Curţii Constituţionale*, Pandectele Române nr. 6/2011, pp. 39-54.

Contradictory itself involves the possibility fro the parties to know all the pieces of evidence, which may influence the final decision, although the procedure has a certain importance in the resolution of the process.

The reason for certain decisions include a detailed response given by the judge to each of the arguments presented by the parties, being necessary to diversify the requests, the reasons for formulating them, the existing differences of legal sources in the states, i.e. the written law, custom, doctrine (X vs Belgium, the European Commission of Human Rights, 30 March 1992) etc. Thus, the judge must show the reasons on which he/she based the decision and actually analyse the essential problems put before the court, without accepting *de plano* the conclusions drawn by the lower jurisdiction (Van der Hurk vs the Netherlands, ECHR 19 April 1994).

However, this request linked to the right to a fair trial does not exclude the obligation of the parties to cooperate in the sense of clearly expressing demands, structuring them reasonably and unambiguously (Janquie and Ledun vs France, ECHR 28 March 2000).

The trial must also be *public*, apart from cases admitted by the national regulation on the ground of the stipulation of article 6 paragraph from the second part of the convention.

Procedure must develop within a reasonable time, national legislations having the possibility of stipulating the principle of accelerating the procedure, in the goal of defending this European request. Civil procedural right indirectly recognizes this principle, yet unlike criminal procedural law it does not expressly regulate it.

The scope of this European imperative is given by the procedures developed before the judiciary authorities, and in order to be of consequence this text and to entail the state's responsibility, it is necessary that any delay be imputed by the competent legal authority.

In any situation, the European situation will decide from case to case the reasons for the procedural delay in relation to the circumstances. Thus, it will analyse the complexity of rights and the cause, the behaviour of the parties and of the competent authorities (Wiesinger vs Austria, ECHR, 30 October 1991).

On the grounds of the principle of juridical availability, this European imperative must by closely respected, the civil procedure of this aspect being possible by virtue of the principle of the judges active role.

The European court has considered that in civil matters a reasonable term has a starting point the date when the court is entrusted with the respective procedure and as a deadline determined by the concrete execution of the decision (Poiss vs Austria, ECHR, 23 April 1987). The starting point is determined in relation to the foregoing procedural events which are mandatory by internal regulation, in the sense that it will be established at the moment when the

procedural request has been submitted. The period in which the case is presented before the Constitutional Court for resolving the exception of unconstitutionality, falls within this timeframe. However, it does not do so while the case is suspended before the national tribunal, because a request to give a preliminary ruling was formulated in accordance with article 234 of the Treaty on the Functioning of the European Union, before the European Court of Justice in Luxembourg.

Neither the claimant's nor the defendant's role to the principle of availability must be excluded from this procedural whole, in the sense that any action or step in order to extend their procedure in an unjustifiable or motivated by a particular interest, be it to prejudice the other party, must be thus appreciated, in order to avoid the culpability of the state authority in not respecting the reasonable time limit.

Law 51/1995[247] stipulates in article 2 paragraph 5 that in exercising his right to represent, a lawyer has the right and the obligation to request fervently for access to justice, for a fair trial within reasonable time. It is questionable however, in the current advocating system in Romania whether the activity of the lawyer with the goal of delaying the trial is or not justified. It can be claimed that the lawyer is bound however by the interests of the client, so that if these require expedient measures, the defense cannot be blamed for its action. The judge still has to apply the necessary measures in order to ensure the expediency of the procedure, all the more so given that the in the civil procedure there are a series of instruments which demand the application of this principle.

In European Court jurisprudence supplementary request have been stated relating to expediency in this field, i.e. the contamination of a person with an infectious disease due to the fault of the state authority (Henra vs France, ECHR, 29 April 1998), indemnification of victims of traffic accidents (Silva Pontes vs Portugal, ECHR, 23 March 1994), work disputes (Vocaturo vs Italy, ECHR, 24 May 1991), pensions (Nibbio vs Italy, ECHR, 26 February 1992), family relations (Paulsen – Medalen and Svensson vs Sweden, ECHR, 19 February 1998, in the sense that national courts must show exceptional diligence in order to guarantee no delay in procedure), the state and capacity of persons (Laino vs Italy, ECHR, 18 February1999), expropriation (Guillem vs France, ECHR, 2 September 1998).

The European courts have stated however that the certain reasons do not justify modifying the development within reasonable time, i.e. the overcrowding of the docket of the national courts, the adoption of reforms in the national courts of accounts in order to ration their activities.

[247] Re-edited in the Official Gazette of Romanian, part I, nr. 113 from 6 March 2001 modified.

4. APPEAL PROCEDURE IN CASE OF A DELAYED PROCESS

In order to ensure the speediness of the civil process, the New Code of Civil Procedure offers the *appeal procedure in case of delayed process*, showing that it is available to either side, as well as to the prosecutor taking part in the trial.

These persons may invoke the violation of the right to a trial within a reasonable and foreseeable time and may request that measures be taken to remedy the situation.

The law regulates cases in which this procedure may be used, given a lack of circumstances which could lead to appealing to the courts with such a matter and in cases in which there is no delay. Therefore, the appeal is possible if the law establishes a final term for the procedure, gives a reason for the decision if there is no result. The court has established the timetable within which the trial participants must fulfill a procedural act, and this term must be met without the court becoming aware of the person who did not fulfill their obligation. A person or an authority not involved in the trial has been forced to communicate a writ or information from its evidence to the court within a certain timeframe, which were necessary to the conclusion of the process and this time limit has ended without this person having come before the court. The court has not considered its obligation to resolve the case within an suitable and foreseeable term by not taking measures established by law or by not fulfilling its role when the law demanded it or any act of procedure necessary for resolving the case, although the time elapsed since the last act of procedure would have been sufficient for taking such measures or fulfilling such an act.

Although it seems that this last hypothesis is undetermined, compared to the fact that the appropriate and foreseeable term is not stipulated, the New Code of Civil Procedure suggests that the court has the possibility to estimate the duration of the investigation (article 238 New Code of Civil Procedure). Thus, the first date for trial on which the parties are convened, the judge after hearing the parties will estimate the necessary duration to conduct research by taking into consideration the circumstances, so that it be resolved within a reasonable and foreseeable time. The duration must be consigned at the end of the session and the judge may make future references to it in case of contradiction. In order to establish the duration, the court must consider the actual possibility of resolving the case, determined by an overcharged workload, the possibility of granting new timeframes, the material basis it has in order to organize the trial hearings in the trial hall (suspended until 01.01.2016). If the parties do not present themselves and do not communicate anything in this sense, the court can determine the necessary duration for the end of procedure, which they can revise depending on each particular situation.

An appeal due to a delayed trial is formulated in writing or verbally during the hearing and must be submitted to the court vested with resolving the matter in connection with the trial delay.

The appeal will be dealt with in parallel to the actual matter, which is not suspended.

The court will decide within no more than 5 days, without citing the parties and if it approves the request it is final, taking immediate steps to prevent any further delay. The decision is made know to the appellant only to inform.

If however, the appeal is unfounded, the court will reject it in its ruling, which can be attacked within three days after communication, which must be submitted to the court which will forward it to the superior court in the hierarchy. When the matter reaches The High Court of Cassation and Justice, the complaint is resolved by a separate section of the court.

The final decision either approving or rejecting the appeal must be given in writing within 5 days after ruling.

The court in question will be able to inform and give insight about problems of fact and law which could anticipate the resolving of the matter or harm the judge's ability to decide, in accordance with the law, in relation to the solution which must be given.

While this complaint is being dealt with so is the case, given that the law expressly stipulates that no suspension is possible in order to avoid any requests that could change the outcome of the request, i.e. the finalization of the trial within good and reasonable time.

If it is noticed that the request or appeal have been made in bad faith, either because it is clearly unfounded or made for another goal that the ones recognized by the law, its author will be obliged to pay court fines and upon the request of the interested parties, to the pay damages for prejudices caused by making a complaint.

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CONSIDERATIONS REGARDING THE NOTIFICATION OF THE HIGH COURT OF CASSATION AND JUSTICE FOR THE PRONOUNCEMENT OF A PRIOR JUDGEMENT FOR THE SOLVING OF LAW MATTERS IN LABOR DISPUTES

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Abstract

New Civil Code of Procedure, includes, of course, provision who are interested in labor jurisdiction, among them those on the situation provided by art. 519-521, when the High Court of Cassation and Justice is required to make a decision to be given the solving solution of the issue of law that was before it. Compared to the requirement of the text, labor disputes, ultimately solving concerns only cases judged by the Court of Appeal, as instanses of judicial review for the decisions rendered by courts of first instance. It is obvious the practical interest to ensure an unified practice of the courts who settle labour disputes, on the other hand you can create some drawbacks about the posibility of suspension of similar cases pending courts whether it is only the case of those who deal ultimately; compulsory rulings on points of law, which for other instances acquire this force from the date of publication of the decision in the Official Gazette; expressing their views only through the lawyer or legal counsel, etc..

Key-words*: prior judgment, settlement of the case ultimately, solving of principle a new law problem; mandatory rulings on points of law.*

New Code of Civil Procedure reprinted,[248] includes, of course, provisions interesting labour jurisdiction , among them, being those concerning the situation provided in art. 519-521, when the High Court of Cassation and Justice is required to issue a decision that would give basically solving the question of law which was before it.[249]

According to art. 519,,, If, during the trial, a panel of judges of the High Court of Cassation and Justice, the Court of Appeal or Court, hearing the case

[248] Law no. 134/2010 of the Civil Procedure Code, republished in the Official Gazette ", Part I, No. 545 of 3 August 2012 and came into force on 15 February 2013.
[249] C. Roşu, *Referral of the High Court of Cassation and Justice for a ruling prior to unraveling the issues of law,* in Judicial Courier "no. 9/2012, p 546-548.

ultimately finding as a matter of law, whose explanation depends resolution of the merits of the case, it is new and the High Court of Cassation and Justice has not held, not an appealed on points of law pending, may request the High Court of Cassation and Justice to give a ruling solution to give the principle question of law which was before it. "

These provisions are contained in Chapter II of Title III of ensuring a uniform judicial practice.

Held as" a unique legal institution in the Romanian legislation, which somehow finds its origins in the art. 267 of the Treaty on European Union "[250], we believe that the interests of ensuring a uniform practice of courts through this institution is not without critics.

First, it is argued that, „judges refer the matter to the High Court judges who are impelled not to make the slightest effort of thinking, reasoning, judgment to clarify a point of law which in substance and outcome of the case, pass "comprehensive particularly the High Court committed the mental effort ", and secondly, a resolution of," issues of law," that is, „new "can sometimes be conceived, initially, in a sense, because then after a while, to be resolved , either contrary or with many nuances, as *ab initio* could not be glimpsed some hidden sides (,, traps ") of texts, issues were revealed during times by confronting legal norms with some realities of life, highlighted *tractatu temporis* of legal casuistry."[251]

On the work of the courts that settle labor disputes can be seen other inconveniences associated with their particular employment litigation:

- some inconveniences related to the possible of suspension of similar cases pending before the courts, without mentioning which are courts that settle ultimately, those that remain definitive judgments can be appealed or only instances that are solved appeal and the judgment there is likely another ordinary appeal.

- the suspension of the brings an irreparable flaw to the celerity principle in labor disputes, not only in those in which a question was raised by the new law, which applies to art. 520 para. 2, which provides that" by signing under par. 1 trial will be suspended until the judgment prior to issue rulings of law ", and other similar cases in the first instance or on appeal, across the country, because after registering the case to the High Court of Cassation and Justice, the conclusion of notification shall be published on the website of the court (art. 520 paragraph 3),

[250] Serban Beligradeanu, *Critical Reflections on manifestled harmful regulation due course of justice in the New Civil code of procedure of the possibility of referral by some courts, the High Court of Cassation and Justice for a ruling prior to unraveling the issues of law*, in Law no. 3/2013, p 108-115.
[251] Ş. Beligradeanu, *art.quoted., Supra*

and similar cases pending before the courts, may be suspended, provides art. 520 para. 4 until the settlement referral.

Article 520 par. 12 provides that referral is tried without summoning the parties, within 3 months after the investiture "

- mandatory untying to the points of law that for the other courts acquire the force from the date of publication of the decision in the Official Gazette, creates a discriminatory situation for those who have pending cases that were not suspended and continued during the trial and those who enjoy benefit of suspension, first receiveing the possibility to obtain a judgment against the dispensation of law stated by the High Court of Cassation and Justice, because according to art. 521 para. 3, Untying the points of law is binding on the court sought absolution from the date of adjudication, and for other instances, the date of publication of the decision in the Official Gazette of Romania, Part I. "

- expressing their views only through the lawyer or legal adviser,

Article 520 par. 10 provides that „the report shall be communicated to the parties, within a maximum of 15 days from notification,they may, put in writing, by attorney or, where appropriate, by legal counsel, their views on the question of law subject to judgment. "

If when settling party which does not have a lawyer or legal adviser wishes to express her views she can only do through a lawyer or legal adviser, although according to art. 86 para. 3" only in drafting the application and the grounds of appeal, and the execution and support of the appeal, individuals will be assisted and, where appropriate, represented, under penalty of nullity, only by a lawyer, "and at first instance, and on appeal, *individuals can be represented* (sn) by attorney or other representative (art. 83 par. 1), which means that the party has no lawyer or legal counsel at the trial of the appeal, can not express her point of view than the conditions under which exercised an extraordinary remedy. It is no less true that in this case the law does not speak of absolute nullity, so that the view of the party is not assisted by a lawyer or legal adviser may be taken into consideration by the court.

We proposed [252] either the text of art 519-521 of the New Civil Procedure Code be repealed expressly direct and ensuring uniform interpretation of the law of other courts following to be realised a Supreme Court *to do an appeal on points of law* (Art. 514-518 of the New Civil Code of Procedures) *or another statutory*, similar to that in France, the country in which, by art. 441-1 by CODEL of the *state's judicial organization* (whose legislation not once was a model for the Romanian legislation) states that „before deciding on a new issue of *law, presenting a serious difficulty* which *arises in many disputes*, the courts in the

[252] Ş. Beligradeanu, *art.quoted., Supra*

judiciary may, by an insusceptible decision of an the appeal *seek the opinion of the Court of Cassation,* "a simple, opinion to debate the merits of that case.[253]

Another point of view can also be one that the provisions do not apply to disputes which settles labor disputes.

[253] I. Deleanu, *Look on the Code of Civil Procedure, approved by Law no. 134/2010* in,, Romanian Pandecte"no. 9/2010, p 22

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CRITICAL ANALYSIS REGARDING THE PROVISIONS OF ART. 195 OF LAW NR.62/2011RELATED TO THE SUSPENSION OF THE EMPLOYMENT CONTRACT

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Abstract

Individual employment contract execution is a process that takes place over time. In this range of time, certain circumstances, even stated by law, can occur that, temporarily prevent the achievement of the object and effect of the contract, and therefore the main obligations of the parties (eg work supply and wages). This situation is different from the termination of the employment contract, which involves the disappearance of its effects.

Key-terms*: employee, employer, employment legal relationship, suspension by law, suspension by employee initiative.*

Since ancient times, in any society, an important role was played by those social relations based on working activity, considered to be beneficial.

These relationships arise today, through individual employment contract by which a person, called the employee undertakes to perform a work for and under the authority of an employer, individual or legal entity, in exchange for a remuneration called salary[254]

It is easy to see that the subjects of the legal working relationship are the employer and the employee[255].

The framework law on individual labour relations that refers to the rights and obligations of the parties in this relationship are provided in the Labour Code in Title II, Chapter II "The exercise of individual labour contract."

Under the protection of the framework law and other regulations, the rights and obligations of contracting parties are established by individual and collective negotiation type, in the applicable collective agreements for the employment report and individual contracts of employment.[256]

The right to individual and collective negotiation of the employee is promoted and established by the Labour Code allowing such free expression of the

[254] Labour Code, art.10.
[255] Cosmin Cernat, *Labour Law-university course, 4th edition*, Universul Juridic, Bucharest, 2012, p.22.
[256] Labour Code, art.37

will of the Contracting Parties consenting to this end to establish rights and obligations during the existence of this legal relationship. Free expression of will of the parties during negotiation is "slightly controlled" by the Romanian legislature in order to protect the interests of both parties, and requires some minimal level of contractual rights and obligations. This legal control of the negotiation prevents all forms of abuse from the employer that enjoys a privileged position (dominant) face to the employee, in the employment relationship.

Individual employment contract execution is a process that takes place over time. In this range of time, certain circumstances can occur, even by the law, that temporarily prevent the achievement of the object and effect of the contract, so the main obligations of the parties (such as the work and the wages). Thus, it occurs its suspension.[257]

Suspension of the individual labour contract is a suspension of its main effects, namely: work performed by the employee and the employer paying it. It differs from termination of employment, involving the disappearance of its effects[258].

The suspension is the result determined by the application and operation of the two fundamental principles of labour law, namely: stability of employment and the nature of this contract sinalagmatic involving successive benefits, and when one side temporarily cease performing its obligations, the other to do symmetrically the same in the temporary suspension of duties[259]. In order for the failure to lead to suspension of benefits and not to stopping the contract, it is essential that the failure is temporary and is not culpable. If these conditions are not met, the contract will not be suspended, but it will cease.[260]

Temporary failure of performance of the services of the employee can be caused by various factors, some arising out of will of the parties, other acting independently, being outside their will. Similarly, one can distinguish cases where suspension is rooted only in the will of one part, or in circumstances determined by a third party.

As a result of suspensions can be: suspension by law, suspension at the initiative of the employee, the suspension at the initiative of the employer; suspension by agreement.

Suspension by law, ope legis, is enforced by law, because of the circumstances, beyond the control of the parties, make it impossible to work. The legislator identifies those cases where contractual obligations by either of the

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[257] Sanda Ghimpu, Alexandru Ticlea, *Labour Law*, 2nd edition, Lumina Lex, Bucharest, 2001, pag.290

[258] Ion Traian Stefănescu, *Theoretical and practical treaty of labour law,* Universul Juridic, Bucharest, 2010, p.367.

[259] Alexandru Ticlea, *Treaty of Labour Law,5th edition*, Universul Juridic, Bucharest, 2011

[260] Alexandru Ticlea, *Treaty of Labour Law,5th edition*, Universul Juridic, Bucharest, 2011

parties are impossible to be met, however, not due to the will or fault of the party[261].

According to article 50 of the Labour Code, contract law is suspended when: maternity leave, temporary disability leave, quarantine, holding a position in an executive, legislative or judicial authority throughout the term, unless the law otherwise states, the performance of a salaried management positions in the union, force majeure, if the employee is taken into custody, according to the code of criminal procedure, at the expiry of the period for which they were issued permits, authorizations or approvals required by the profession and in other cases provided by law.

Individual employment contract may be suspended on the *initiative of the employee* in the following circumstances: parental leave aged 2 years or a disabled child up to the age of 3 years, leave to care for sick children aged up 7 years or a child with disabilities, affections, until the age of 18, parental leave, leave for training, exercise of elective positions in professional bodies established at central or local level, throughout the term , participation in the strike, if the employee's unexcused absences, as determined by the applicable collective agreement, individual employment contract, and internal rules[262].

The suspension at the initiative of the[263] occurs in the following situations: during the prior disciplinary research, under the law, if the employer has filed a criminal complaint against the employee and he was prosecuted for criminal acts incompatible with his position until a final judgment, when temporary discontinuation or reduction of the activity without termination of employment for economic, technological, structural or similar reasons, during the relocation by the authorities, during the suspension of the permits, licenses or certificates required to practice.

Individual employment contract may be suspended *by agreement,* if unpaid leave for study or personal interests.

It is noted that the current Labour Code, Article 50 excludes as a reason to suspend by law the labour contract, the case when the employee participates in the strike, and insert it among cases of suspension of employee initiative.

The issue of the social dialogue law, Law nr.62/2011, gives birth not only to controversy, but also to a contradiction. This is because the art. 195 of Law

[261] Cosmin Cernat, *Labour Law-university course, 4th edition,* Universul Juridic, Bucharest, 2012, p. 244.
[262] Art. 51 Labour Code.
[263] Art. 52 Labour Code.

nr.62/2011 considers that the participation of the employee to strike is a ground for suspension of the employment contract by law[264].

In this sense it is required not only a formal aspect and procedural explanation regarding the application of a legal text or another but, a substantive analysis to fit this case of suspension in the normal legal area.

Based on the provisions of art. 1 of the Labour Code, according to which the provisions of this Code shall apply to all legal relationships of work and service of our country, if there are no other special laws, it, thus, must be analyzed in the antithesis with art. 50 of the Labour Code (suspension of the individual labour contract) in conjunction with Art. 51, letter f of the Labour Code with art. 195 of Law no. 62/2011- social dialogue law.

The strike is the most violent form of dispute resolution of labour relationship, which is achieved through termination, under the law, of the employee lucrative activity. In this respect the employee no longer meets his working activity and the nature of the mutually binding contract, the employer is not held or bound at his turn to fulfil the obligation to pay the employee's work[265].

The labour conflict is understood as a dispute between employees and employers regarding their economic, social or professional interests, or rights arising from employment relationships.

Under the Labour Code, the strike is voluntary and collective cessation of work by employees. Employees have the right to strike to defend the professional, economic and social interests, and participation is free to strike, so that no person shall be compelled to participate or not to strike. Limiting or prohibiting the right to strike may only intervene in cases and categories of employees prescribed by law.

The exercise of the right to strike, organization, initiation and conduct of the strike, strike procedures prior initiation, suspension and termination of the strike, and strike other issues are covered in the Law 62/2011 on social dialogue, Title VIII, Chapter V. Where employees meet these standards, participation in strike and its organization is not in breach of professional duties of employees and cannot have negative consequences on strikers and organizers.

Strike may be declared only if, first, were exhausted all the possibilities of collective settlement binding procedures provided by law 62/2011 (reconciliation - mandatory procedure, mediation and arbitration only where so agreed by the parties) and only after conducting strike warning and if the moment to start the

[264] see art. 195 alin. 1 law no. 62/2011 – social dialogue: "During the strike, the individual employment contract or service report, where applicable, is suspended the law. During the suspension, only the right to health insurance is kept"

[265] see art. 234 in Labour Code: "strike is voluntary and collective cessation of the work by the employees" and art. 181 law no.62/2011: "The strike means any form of collective and voluntary cessation of work in an organization"

strike was brought to the attention of employers by the organizers with at least two days before.

The decision to have the strike is taken by the representative of the unions participating in collective labour conflict, with the written consent of at least half of the members of that union, and in the case where there are no representative organized unions, the decision of declaring the strike is taken the employee representatives, with the written consent of at least a quarter of the unit employees, division or department.

Romanian legislation provides that strikes may be of warning, solidarity and full strikes[266].

Warning strike[267] cannot be longer than two hours, if it is made with stopping the work, and must, in all cases, precede with at least two working days the full strike.

Solidarity strike[268] may be declared to support the claims made by employees of other units within the same group or sector of units, it may not have a term longer than one working day and must be reported in writing to the management unit with at least two working days before the date of cessation of work.

During the period the claims made by employees are subject to mediation or arbitration, they cannot trigger strike or, if the strike is triggered, it is suspended, and in the event that, after the strike, more than half of the employees who declared the strike, now give up in writing the strike, than the strike ceases. The management unit is not allowed to recruit other workers to replace those on strike.

As for limiting the right to strike, the social dialogue law provides that cannot declare strike the following: prosecutors, judges, military personnel and staff with special status within the Ministry of Defence, Ministry of Interior, Ministry of Justice and the institutions and structures under their subordination or coordination, including the National Administration of Penitentiaries, the Romanian Intelligence Service, the foreign Intelligence Service, the Special Telecommunications Service, foreign armed forces personnel stationed in Romania and other employees who have this right is prohibited by law. Employees in aviation, marine, land transportation cannot declare any strike from departure until the mission completion. Merchant Navy personnel on Romanian board vessels may declare strike only with compliance of the rules established by international conventions ratified by the Romanian state.

In public health and social care, telecommunications, radio and public television in railway transport, the units providing transport and sanitation municipalities and public supply of gas, electricity, heat and water, the strike is

[266] See art. 184 law no.62/2011- Social dialogue law.
[267] See art. 185 law no.62/2011- Social dialogue law.
[268] See art. 186 law no.62/2011- Social dialogue law.

permitted provided that the strike organizers provide services, but not less than one third of normal activity.

Employees of the national energy system units in operational units at nuclear sectors in continuous fire units may declare a strike on the condition that at least one third of the activity is continued, so that does not endanger the lives and health of people and the operation of the facilities if kept safe.

Strike cannot pursue political goals. Also, under the current Romanian legal system, the right to strike is not likely premeditated.

Participation in strike without complying with the legal provisions is a violation of duties of employees and it can attract possible disciplinary sanction to them. If the employer believes that the strike was declared or conducted with a violation of the law, it may address the court in whose district the unit is said to strike with an application requesting the court to spot the strike, which is called action finding unlawful strike. Court sets deadline for the request for termination of the strike, which may not be less than two working days of the date of registration, and summon the parties. The Court examines the application to stop the strike and by emergency pronounce a judgment, where appropriate: reject the request or accepts the request of the employer and declares that strike should stop as illegal. The decision of the Court is final.

Where the Court decided the strike termination as unlawful, it can also, at the request of interested parties, force the organizers and the employees participating in the illegal strike to pay damages to the employer. If the abusive exercise of the right to strike, the employer has the right to dismiss the employee for reasons related to the employee in accordance with Article 61 of the Labour Code, because of serious misconduct[269].

Exercise the right to strike is considered abusive if the strike lead to the bankruptcy of the employer or was extended indefinitely, was declared in bad faith or was repeated at short intervals in order to disrupt to the employer's business.

In accordance with Article 51, paragraph f of the Labour Code, the employment contract for the duration of the strike can be suspended on the initiative of the employee. Instead, in the law of social dialogue occurs a legislative mismatch with Article 195 which provides that for the duration of the strike, the individual employment contract or service report, where applicable, is suspended by law, and for the period of suspension only the health insurance rights are kept.

At formal and procedural level, the applicability of the law, the conflict of two articles in the two different acts gives birth to the following discussion.

[269] Art.61, lit. a Labour Code: "The employer may order dismissal for reasons related to the employee if the employee has committed a serious or repeated violations of the rules of labour discipline or to the individual contract of employment or collective agreement, applicable internal rules, as a disciplinary sanction."

According to the legal value, the Labour Code takes precedence over the law of social dialogue, although the latter is more recent. Moreover since the first article of the Labour Code establishes the scope of its provisions: all legal labour reports, how to carry out enforcement of regulations in the field of employment and labour jurisdiction.

Therefore, a first formal conclusion would be that according to the superior legal value of a Code face to an ordinary law and the existence of a binding legal text in the Code regarding to its applicability, allows us to state that the Code applies also in the matters of the suspension and the participation of the employee to strikes is qualified as being at the initiative of the employee and not by law, as per the provisions of art. 195 of Law nr.62/2011.

But par. 2 of the same first article of the Labour Code leaves room of interpretation, stating: "this code applies to employment relationships governed by special laws only insofar as they do not contain conflicting provisions." It is only apparent obstacle to the application of special laws over the Labour Code, when the former provides conflicting provisions. The legislature, with finesse states the enforcement area of the special law, i.e. only when the employment relationship is governed by that special law. Or, the law no. 62/2011 does not provide for the conduct of special labour relationships, but regulates certain relationships related to them, especially reports of specific public social security. Moreover, the provisions of Article 1. 2 are interpreted and applied strictly and cannot be extended to other cases. Can be said that the provisions of art. 195 of the law of social dialogue refer to employment relationships that are ineffective during strike, by law. But beware, the law does not refer to special legal working relationships, but the common working relationships falling under the Labour Code, and only an unfortunate expression of the legislature establishes this case as one of the suspension by law.

In this respect, we certainly recognize the primacy of the provisions of the Labour Code to the law of social dialogue in this case, and affirm that the legislator clumsiness was seen again in the discrepancies of these laws, mainly the law of social dialogue was intended to be social code.

If from the strictly procedural and formal aspect we recognize the application of the Labour Code, it is also necessary to clarify whether in substance the "employee participation in the strike" is a case of suspension of the labour contract by law or at the employee initiative.

I believe that in case of an employee participation in strike we are talking about a manifestation of will on his part, he cannot be compelled to participate or not to strike. Any coercion of an employee by any interested person to participate

in the strike or not to, is consider a crime (art. 218 of the law 62/2011- social dialogue).[270].

The manifestation of the will of an employee to participate in the strike implies an immediately goal and also a mediated one. Although it is envisaged mediated goal, to obtain a series of work-related demands, social and pecuniary results of the deployment of legal work, the immediate goal is not insignificant. This goal is to cease the working activity and thus to compel the employer to give course to those claims[271].

In this respect of suspension of work from the employee part, shall deprive the employer to pay the employee for the work, considering that it has no object[272]. The employer did not receive the work contracted as a result of employee taking part to the strike, so, the employer does not have to pay him[273].

The case of suspension the individual employment contract provided by art. 51 f of the Labour Code is correctly described as a suspension of employment of employee initiative resulting not only in the manifestation of the will of the employee but also in the expression of the legislator "involvement in the strike." As the procedure for resolving collective labour conflict in deployment, the stages for the strike to be considered legal and initiated was fulfilled, and the employee expresses willingness to adopt a passive conduct under the law, i.e. to stop working. During the formalities to start the legal strike performed by union representative, or if it does not exist by employee representatives, any legal act or fact of dissatisfied employees will not materialize in stopping the work. Employees can sign adhesions, attend certain meetings, consult lists of claims, may submit amendments to the claims of leaders, etc.. but in no case, they can stop working. These are formal activities but also necessary for the fulfilment of the legal conditions in order to start the strike[274], but they are not lacking the employer of the skilled working force which he contracted, until the actual start of this form of conflict resolution.

Once the strike has legally started, by fulfilling all the conditions of substance and form, the employee is the one who, irrespective of his behaviour in

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[270] See art. 218 law no.62/2011-social dialogue law: "It is considered an offense and shall be punished by imprisonment from 6 months to 2 years or a fine of RON 20,000 to RON 50,000 the act of any person who, by threats or violence, prevent or require an employee or group of employees to participate in the strike or to work during strike".

[271] Alexandru Ticlea, *Treaty of Labour Law, 5th edition*, Universul Juridic, Bucharest, 2011, p. 385.

[272] Cosmin Cernat, *Labour Law-university course, 4th edition*, Universul Juridic, Bucharest, 2012, p. 180.

[273] Ion Traian Stefănescu, *Theoretical and practical treaty of labour law,* Universul Juridic, Bucharest, 2010, p. 227.

[274] See art. 182 and art. 183 law no. 62/2011- Social dialogue law

the period before the strike has started, consents or not to stop working for the reason of participating in this form of settlement of labour conflict.

The legislature does not relate the employee participation in strike to a certain prior conduct. Even though in the first instance (that collection of signatures) the employee didn't agree to participate in the strike, afterwards he may express his will for joining this movement. Also, if he adhered to this form of protest on preparing phase (gathering signatures) or on actual deployment stage of the strike (and stopped working), he can always change his opinion, by ending the strike and retaking his working activity with all the rights and obligations incumbent.

I appreciate, so, that only the manifestation of will can be used as a source of participation in the strike and thus suspending the individual employment contract.

In conclusion, during the strike, the labour contract is suspended differently for employees who find themselves on different situations: for those participating in the strike, the labour contract is suspended on the initiative of the employee, according to art. 51 letters. f) of the Labour Code, and for those not participating in the strike, but cannot actually work duty to objective reasons, the contract is suspended under art. 50 letter i) of the Labour Code.

In order to resolve the legislative gap, I propose amending Article 195 of the law of social dialogue which must reiterate the provisions of Article 51 paragraph f) of the Labour Code and should have the following content "for the entire period that an employee is participating to the strike, the employment contract or service report, where appropriate, is suspended at the initiative of the employee, and during the suspension only health insurance rights are kept."

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LEGAL PERSONALITY OF THE INDIVIDUAL, AS HOLDER OF THE SUBJECTIVE RIGHT IN A LEGAL RELATIONSHIP

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Abstract

The concept of subjective right is inseparable from that of subject of law. The idea of subjective rights has no place in a legal system except if it is mediated by the concept of legal person which determines it. On this occasion it should be marked the distinction between the concepts of "human person", "person in the legal sense" and "a matter of law", whereas there is no synonymy between them, but each has a special meaning. The concept of legal subject does not mean necessarily an ontological reality, for example the individual – the human person, but it is a qualification or recognition that positive law gives a person the legal sense. A person in the legal sense may be the human person or legal entity. A person should not be viewed in isolation from other concepts of law. Rather, it is an essential part of the concept of legal relationship which arises as holder of rights and obligations. As part of the legal relationship the person is subject to the rights and obligations.

Keywords*: subjective rights, subject of law, legal system, legal relationship, legal person.*

The human person becomes a person in legal sense, through the recognition of the human's ability to have legal personality, in general, can acquire rights and assume obligations. Was seen that in a technical sense, *legal concepts of legal capacity to use and exercise*. It is interesting to follow the temporal evolution of how a legal personality manifests itself, from its birth, any changes, if any, the end of legal personality.

As regards *the birth of legal personality*, the majority opinion and according to positive law binds this moment to the birth of the human person (but not always situation was like so and this is eloquent in ancient societies' right). The default condition is that the human person must be born alive, the presumption being of viability.

The concept of legal personality is understood as being the ability to be the holder, active or passive, of subjective rights or obligations, ability recognized as the objective right of each person in the legal sense. The notion of the subject of law distinguishes from the concept of person in the legal sense.

There is also the idea that the notion of subject of law is related to a single law, to a specific legal relationship in which each right corresponds to a topic, while the notion of person in the legal sense refers to a variety of rights, the individual is normally the holder of more rights. Unlike the concept of legal subject is the notion of individual is multi-valent[275].

Moreover, the concept of legal subject is present; it means the current holder of a right. The notion of a person is potential; it means the opportunity to be a matter of law. [276]

A second distinction to be made is between the person in legal sense and the human person. Person in the legal sense is a human being or an entity endowed with legal personality. Rights belong to individuals, ie to the human seen by the objective right in his social dimension, either individually or in various structures. The person[277] is the social role, of a man. It is an abstract concept, unmistakable with practical man, an essentiality, mostly simplistic, which operates with the transition from human being to social being.

The individuals and legal persons, including here and state, holders of rights and obligations, they can only hold rights or obligations or rights and obligations at the same time which form the content of legal report is represented by the legal rights and obligations of the parties.

It can be concluded that legal relationship represents a social relationship. Any legal relationship is a social relationship, but the reciprocal is not true because not any social relationship becomes legal relationship. But nevertheless, any social relationship is likely to become a legal relationship. In the absence of any incidence of regulation, it cannot be achieved the conversion needed by the social relation in a legal relationship. There are a number of political relations, religion, friendships, which remain "only" simple social relationships, because the legislature did not intend to regulate them. These relations of political, religious or political friendships or ethical standards are the result of human behavior, unlike the legal relations which arise under the action of law.[278]

Legal relationship involves the idea of obligation, correlative to subjective rights. Mircea Djuvara[279] stated that "wherever there is a right, was understood that

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[275] P.Pescatore, *Introduction a la science du droit*, Centre universitaire de l'Etat, Luxembourg, 1978, p. 245.
[276] J.M. Trigeaud, *Persona ou la justice au double visage*, Biblioteca di Filosofîa Oggi, t.I, Genes, 1990.
[277] M. Dvoracek**,** Gh. Lupu**,** *General Theory of Law,* Publishing House Foundation "Chemarea", Iasi, 1996, p. 280
[278] I. Huma, *Introduction in the study of law*, Publishing House Foundation "Chemarea", Iasi, 1993, p. 86.
[279] M. Djuvara, *The general theory of law. Legal Encyclopedia. Rational law, sources and positive law. Restitutio*, All, Bucharest, 1995, p. 229.

there must be a bond and wherever there is a bond there must be a right". The duty represents the liability of the passive subject to have a certain conduct corresponding to subjective correlative duty, conduct which may consist in giving, doing or not doing something and, if necessary, coercive force can be imposed by the state.[280]

The literature[281] has outlined the view that if the rule of law should not regulate a legal relationship, then it would be a dead letter. Thus, the legal relationship is the legal norm in action, the only form of realization of the right being to give rise to legal relationships.

Subjective law is the legal ability of the subject of law to have a certain conduct, to require the other subjects a certain conduct consistent with its authorization to use and, if necessary, to appeal to the coercive force of public authority to ensure its rights.

In the context of analyzing the concept of subjective right, a place and a major role goes to the holder of subjective right, subject of active or passive of law, because the concept of subjective right is inseparable from that of subject of law. "The idea of subjective rights has no place in a legal system except if it is mediated by the concept of legal person which determines it."[282] On this occasion it should be marked the distinction between the concepts of "human person", "person in the legal sense" and "a matter of law", whereas there is no synonymy between them, but each has a special meaning.[283] The concept of legal subject does not mean necessarily an ontological reality, eg. the individual - the human person, but it is a qualification or recognition that positive law gives a person the legal sense. A person in the legal sense may be the human person or legal entity. A person should not be viewed in isolation from other concepts of law. Rather, it is an essential part of the concept of legal relationship which arises as holder of rights and obligations. As part of the legal relationship the person is subject to the rights and obligations.

Thus, "subjects of the legal relationship can be both individuals as well as legal persons. In this context, the term "person" is broader than a technical understanding of everyday language, referring not only an individual but a social group. The word "person" indicates a feature that is common both to the individual and to the social group, namely, that of subject of rights and obligations."[284]

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[280] Gh. Beleiu, *Romanian Civil Law, Introduction in civil law. Subjects of civil law*, Juridical Universe Publishing House, Bucharest, 2004, p. 87.
[281] I. Genoiu, *Legal relationship*, C.H. Beck, Bucharest, 2007, pp.2-3.
[282] S. Goyard-Fabre, *Subjet de Droit et objet de Droit. Defense de l'hummanisme,* published in Cahiers de philosophie politique et juridique No. 22, Presses Universitaires de Caen, Caen 1992, p. 16.
[283] Gh. Mihai, *Fundamentals of law, Subjective right Sources of the subjective rights,* All Beck, Bucharest, 2005, p.277.
[284] S. Popescu, *The general theory of law,* Lumina Lex, Bucharest, 2000, p 228.

People in the legal sense are, after a main distinction, of two kinds: natural, ie human beings in their capacity as subjects of rights and obligations and legal persons, that are all social entities (communities, minorities, associations, groups, states) suitable as such, to be subjects of rights and obligations.[285]

"The individual is recognized his quality of the holder of rights and obligations, because he is a rational being endowed with will, able to recognize his rights and obligations, which he must pursue, by conduct, by actions"[286], which distinguishes between natural subjects of law, the case of individuals and artificial subjects of law, law creation. [287]

The individual is a human being, seen from the point of view of his fitness to be a matter of law. Although the concept seems to raise difficulties, some details must still be made as follows.

Firstly, only human beings viewed individually are individuals. It is therefore excluded in the present state of development of law, that the animals should enjoy legal personality, they are not able to be subjects of law. However, there was and still is the tendency to give animals legal personality, especially pets, by an apparent recognition of subjective rights[288], or according to the history of the law, through the defendant standing in animal trials. In reality, it is about obligations towards animals[289], obligations which belong to people. The fact that there are some limits in using animals (domestic or savage) does not mean that these animals acquire the quality of subject of law or a legal personality, that they are no longer an object of law(it's the case of hunting restrictions or protection of special natural environments or of endangered species).

Secondly, in modern times and in the context of a positive law of a democratic state, any human being has legal personality by the mere fact of birth.

In other words, it is conceivable that a man should be deprived of legal personality. It is questioned even full recognition of the quality of a legal subject of the human embryo and fetus. The theory of human rights in the context of the fourth generation of subjective rights emphasizes this theme.[290]

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[285] D.C. Danisor, I. Dogaru, Gh. Danisor, *General Theory of Law*, C.H. Beck, Bucharest, 2006, pp. 275 and the next.
[286] S. Popescu, *op.cit.*, p.229.
[287] O. Ionescu, *La notion de droit subjectif dans le droit prive*, 2nd edition revised and improved, Bruylant, Bruxelles, 1978, p. 190.
[288] The Animal Rights Declaration drafted under the aegis of UNESCO in October 15, 1978.
[289] L. Ponton, *Les devoir envers Ies animaux, lucrare publicata in Sujet de Droit et objet de Droit*, in the collection Cahiers de philosophie politique et juridique No. 22, Presses Universitaires de Caen, Caen 1992, p.141.
[290] C. Neirinck, *De la bioethique au bio-droit***,** Librairie Generale de Droit et de Jurisprudence, Paris, 1994.

Thirdly, all human beings have the same legal personality. This principle is implemented by rules of international law but also by internal rules with a constitutional state through the principle of equal rights, an abstract legal equality and not a concrete one.

"In modern society, the quality of a subject of law is recognized to any individual, without discrimination, legal capacity restrictions being allowed only exceptional and only as a measure of protection of the individual."[291]

Likewise the idea that "only people can be subjects of legal relationship individually, as individuals or organized into different groups as collective subjects of rights."[292]

Fourthly, it should be noted that the person in the legal sense, must be brought into relationship with the state and to citizenship. Thus, it distinguish in the individual the categories of citizens, foreigners and, ultimately, stateless.

In the history of law, the content of the legal personality of an individual, or the legal capacity of use, as it might say, was varied in relation to the quality of an individual of being a citizen or a foreigner. The category of foreigners had also differences, for example Christian alien status was clearly favorable to non-Christian alien status (and this depended on whether he was Muslim or Jew).

In principle, state citizens can participate in all legal relations, enjoying, in this sense, the general legal capacity.

Citizens can enter into legal relationships both among themselves as well as with the state, with state bodies, economic organizations or non-state organizations. Participation of a person in the legal relations bears the imprint of both the legal system as a whole, as well as of a specific branch of law.

From another perspective, the content of legal personality of the person, the link between the human person, the subject of law, rights and obligations are carried out by the concept of legal capacity.

In connection with the same subject, namely the relationship between natural and legal personality, although in the context of modern democracies the response should lead to an identity between the two concepts, "in reality, the individual and the subject of law are located on distinct levels: while the human being is a natural reality, the subject of law is an expression of legal abstractions; ... the individual accedes to the status of legal entity, so is destined to have rights and obligations by the *investing* with legal capacity, defined as the ability of *man* to have legal rights and legal obligations. ... the legal personality of a human and the capacity to use are synonymous. This single element is not enough to express the individual's quality of rights and obligations holder. These rights and duties make up the technical legal "property" of a natural person, as a legal person. It gives the

[291] S. Popescu, *op.cit*, p.229.
[292] I. Craiovan, *Elementary treaty on the general theory of law,* AII Beck, Bucharest, 2001, p. 246.

person's uniqueness and continuity, while heritage is the objective support and effective form exercise of legal personality."[293]

"The legal ability is equal and unlimited, rights and duties are differentiated and restricted in their exercise. The capacity is a constant of human personality, rights and duties are variable."[294]

Thus, in the technical sense, legal personality is expressed through the concepts of legal capacity, which may be of use or exercise. The first, without being equal and identical, tends towards legal personality, while the capacity of exercise appears as a mean of illustration or improvement of the functioning of the idea of legal personality applied to situations, circumstances or cases in which the human person can be found (minority, lack of discernment, social status, gender, etc.).

The individual appears as a distinct subject in the relations of law, where legal capacity is divided into *ability to use and capacity to exercise*. In romanian positive law, in art. 5, par. 2 of Decree no. 31/1954 it is given a legal definition: "capacity use is the ability to have rights and obligations", in the New Civil Code, regulated by art. 28-30.

From the definition of individual's capacity of use is mandatory forfeiture of two essential elements: the capacity of use of an individual is a part of the legal capacity of man; it is the human ability to have rights and obligations;

In this way, appears the link between the concept of subjective right, the notion of obligation, the person in the legal sense (the individual, in our case) and the human person.

Consisting in the human ability to be a holder of rights and civil obligations, the capacity of use expresses the essence of the quality of an human to be an individual subject of civil law.[295]

In terms of legal capacity, this "in its whole, expresses, thus, the effectiveness of both virtuality as well as the effectiveness of acquiring rights and assuming debts. It is intrinsically human. Denying it would transform the man into thing."[296]

The doctrine, and also positive law, created the concept of capacity to exercise, which in the system of law, along with the concept of legal capacity to use, comes to solve situations which for the old doctrinaire theory seemed irreconcilable with the theory of will: the case of the mad-man or of a child, as was seen.

According to art. 5 par. 3 of Decree no. 31/1954 regarding the individual and the legal person "is the ability to exercise rights and assume obligations,

[293] I. Deleanu, *Juridical fictions*, All Beck, Bucharest, 2006, p.411.
[294] I. Deleanu, *Subjective rights and law abuse*, Dacia, Cluj Napoca, 1988, p. 11.
[295] Gh. Beleiu, *op.cit*, pp.312-313.
[296] I. Deleanu, *Subjective rights and law abuse*, p.15.

committing legal acts." This notion of capacity to use makes the transition from the general and vocational opportunity of taking a right to the concrete action, to the fixed and materialized assumption through participation in a specific legal relationship.

The definition of *the capacity to exercise* of an individual should not omit essential aspects such as: correlation of the capacity to exercise capacity with the concept of gender, "legal capacity" of the person in the legal sense; the capacity to exercise involves closing legal documents (ie the source of subjective rights); closing of legal documents must relate not only to exercise rights and assume obligations, but also to the acquisition of subjective rights and execution of obligations.

Based on these assumptions, the capacity to exercise of an individual is defined as that part of the legal capacity of a person, in legal sense, which consists in his ability to acquire and exercise rights and assume and perform obligations by closing legal acts.

The premises of the capacity to exercise of an individual are, on the one hand, the existence of legal capacity to use and, secondly, the existence of discernment, ie the existence of individual power to properly represent the legal consequences of his manifestation of will (this assumption is assessed in relation to age, as well as state of mind).

The capacity to exercise of the individual, unlike the ability to use, suffers, in principle, certain restrictions. It can be full, restricted or be missing.

Regarding the end of legal personality of the individual, in the legal sense, it ceases by the death of the human person when the human person, the individual is extinguished, in the legal sense.

In conclusion, the issue of legal personality of a person in legal sense is more than relevant, because how we treat this topic is relevant to the issues the future will raise: let's ask ourselves, in a very seriously way, from a future perspective of which we are responsible in any way, what distinctions do we make – from the judicial point of view- between the fetus from a test tube and a fetus from the natural womb? Between a non-planetary being and a planetary one? Between an ethnic group that comes to life and another one located in history that it informally claims ?

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10. S. Popescu, *The general theory of law,* Lumina Lex, Bucharest, 2000.
11. D.C. Danisor, I. Dogaru, Gh. Danisor, *General Theory of Law,* Ed. C.H. Beck, Bucharest, 2006.
12. O. Ionescu, *La notion de droit subjectif dans le droit prive,* 2nd edition revised and improved, Bruylant, Bruxelles, 1978.
13. L. Ponton, *Les devoir envers Ies animaux, lucrare publicata in Sujet de Droit et objet de Droit*, in the collection Cahiers de philosophie politique et juridique No. 22, Presses Universitaires de Caen, Caen 1992.
14. C. Neirinck, *De la bioethique au bio-droit***,** Librairie Generale de Droit et de Jurisprudence, Paris, 1994.
15. I.Craiovan, *Elementary treaty on the general theory of law,* Ed. AII Beck, Bucharest, 2001.
16. I.Deleanu, *Juridical fictions,* All Beck, Bucharest, 2006.
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THE KNOW-HOW CONTRACT

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Abstract

Between the contracting parties, the transfer of know-how is done in different ways. Thus, it can provide material that contains technical updates can be submit plans, drawings, formulas, designs or can be send technicians for the specialized, etc.. The know – how contract shall contain clauses agreed upon by, the parties, so that any element of confusion to be excluded. Know-how contracts are classified according to the complexity of the operation and interfering with other operations. Depending on the complexity of the operations of conducted there: contracts by that to transfer a technology or a determined technical procedure and contracts having the same object transferred by successive and complex acts. Depending on the level of interference with other operations we have: pure know-how contracts, combined know-how contracts and complementary know-how contracts.

Keywords*: license, duration, elements, beneficiary, informations.*

Having as starting point the word etymology, the Explicative Dictionary of the Romanian Language clearly states the meaning of know-how[297], as an "ensemble of information and experience relating to a new technological process and to the mode of exploitation for new equipments". From the very beginning we should underline that the term derives from the English expression *know-how*.

Prof. Dumitru Mazilu[298] defines this contract as "the operation of transmitting from the supplier to the beneficiary of technical knowledge, information and documentations, inclusively of procedures and complex technologies, according to the terms and conditions convened upon by the parties", "to know-how to" or "to know in how to do it" being the expression that synthesizes the ensemble of non patented knowledge that defines the notion of know-how.

[297] Romanian Language - Explicative Dictionary, Ed. Univers Enciclopedic, Bucharest, 1998, p.554
[298] Dumitru Mazilu – Dreptul comerţului internaţional – partea specială, Ed.Lumina Lex, Bucharest, 2000, p.281-286

A legal definition of know-how can be found in the actual legislation in G.O. no. 52/1997 regarding the legal regime of franchise, as modified and approved by Law no.79/1998[299].

According to Art. 1 letter d from the aforementioned law, know-how means the ensemble of formulas, technical definitions, documents, drawings and models, recipes, procedures and other analogous elements that serve to the fabrication and commercialization of a product.

According to the Fiscal Code[300], know-how means "any information regarding the industrial, commercial or scientific experience, necessary for the fabrication of a product or for the enforcement of an existing process and whose disclosure by third parties is forbidden in the absence of an authorization from the person who provided the information, given that information derives from experience; the know-how stands for what a producer cannot know or discover from the basic product examination and from the basic conversance of the technical program".

We can also find definitions of the contract in the Regulation regarding the exception of technology transfers agreements from the application of art. 5 para. 1 from Competition Law no. 21/1996[301], that in Art. 2 para. 1 letter i states that "know-how is a package of non patented practical information, resulted from experience and testing, which is secret, substantial and identified". This definition is undertaken from European Commission Decision no. 4087/30.11.1988 and from Regulation no. 772/2004 regarding the application of Art. 85(3)of the EU Treaty for certain technology transfer agreements[302].

The European Commission defines know-how in this Regulation as "a package of technical information, that is secret, substantial and identified". In the French doctrine[303], know-how (savoir-faire) is defined as an ensemble of technical knowledge, transmissible, non patented and not immediately accessible to the public.

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[299] G.O. no. 52/1997 regarding the legal regime of franchise, as modified and approved by Law no.79/1998– Official Journal no.147 din 13 April 1998

[300] Law no.571/2003 corob. with cu G.D. 44/2004 regarding the Fiscal Code, with the enforcement methodologies. It has suffered numerous amendements till date.

[301] Law no. 21/1996 – Official Journal Part I no.88 din 30 April1996 , subsequently modified by Emergency Goverment Ordinance no.121/2003 for the modification and completion of Competition Law no. 21/1996 – Official Journal Part I, no. 875 - 10 dec. 2003, approved by Law no.184/2004 Official Journal, Part I, no.461 / 24 May2004

[302] Chavanne et burst, Droit de la propriété industrielle, Precis Dalloz, Paris, 2004

[303] Y. Dargieri, Le régime juridique des connaissances techniques non brevetées, Toulouse, 1968. Y.M. Mansseron, Aspects juridiques du know-how, în Cahiers de l'entreprise, nr.1/1972

Regarding the secret character, this resides also in the fact that it is not generally known or easily accessible to the persons from the environment usually dealing with such kind of information. The secret character of such a package of information does not require that each component, formula, technical definition to be totally unknown, however its commercial value comes from the fact that the respective information – in the connection of its elements – is secret[304].

In order to be substantial, know-how needs to include important information for the fabrication, selling of products or for the merchandising of the products, relationships with clientele, administrative and financial management issues.

Know-how is substantial if it is useful to the beneficiary, being able to improve its competitive position and its results and to guarantee its penetration on other markets[305].

In order to be substantial, know-how needs to be also original. The originality of know-how is not being appreciated in relation to its every element but in relation to the unitary concept which is the know-how.

It is possible that certain elements of know-how, regarded individually, are not original by themselves, hence being known by the beneficiary by other means other than the transmission of know-how[306]. Even so and even if none of the elements of know-how are original, we will be in the presence of a substantial and original know-how if the modality in which these elements are combined is original.

Know-how should also be identified in this context and, in the European Commission Decision, is being noted that know-how should be described in a sufficiently complete manner for allowing the verification of its secrecy and substantiality conditions[307].

Know-how is never patented, this implying also its disclosure. The value of know-how consists of the fact that it represents a *de facto* monopoly for its owner, guaranteed by the interdiction of third parties access to the respective knowledge.

Sometimes the causes[308] for which it cannot be patented reside both in its specific content and its non compliance with the prerequisites of an invention.

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[304] Yolanda Eminescu, Dreptul de inventator în România, Ed.Academiei Române, Bucharest, 1969

[305] Ioan Macovei, Dreptul Comerţului Internaţional University Alexandru Ioan-Cuza, Iaşi, 2009, Editura Universităţii, p.66-68

[306] Al. Deleşan, Ion Rucăreanu, Brânduşa Ştefănescu, Dreptul Comerţului Internaţional, Revista economică, 1976, p.53 şi urm.

[307] V. Deleuze, Contract international de licenţe de know-how, 1988

[308] Francois Maguin, Know-how- et propriété industrielle, Librairies Techniques, Paris, 1974, p.31 şi urm.

Know-how is different from the factory secret as it regards not only the effectively utilized techniques, object of the factory secret, but also the techniques at an experimental stage and also knowledge[309]. Legally, know-how can be secured both on a criminal path (for the breach of factory secret and of the professional secret through the enforcement of the sanctions regarding the unlawful appropriation of the quality of author, theft, forgery etc.) or on a civil path, contractually (through the inclusion in the know-how contract of adequate clauses, meant to insure the confidential character of the knowledge transmitted) or extra-contractually, through an action of unlawful competition[310].

The transmission of the know-how from titular to beneficiary can be done in multiple ways[311]: 1) transmission of the documentation (plans, drawings, manuals, formulas); 2) supply of material or of one part of the material comprising the know-how; 3) the training and specialization of technicians, sent by the beneficiary to the sender's establishment, the latter one being the most utilized practically.

In regards to the know-how contract effects[312], we should highlight the fact that there is no patent; therefore once the beneficiary has received the know-how, the latter one cannot be withdrawn, even if the beneficiary refuses to pay the fees. The transmitter has mainly the obligation to send the technical knowledge, to guarantee the result, to ensure the technical assistance, to guarantee the right of exclusive use and the right to use the factory marks. The payment of know-how can consist in money, products or other technical knowledge[313]. When the payment is done in money, it can be done via a global amount, a forfeit amount or fractions from the resulted production.

The contract can contain different clauses regarding mutual obligations or unilateral ones, such as liability for non execution of contractual obligations, tax regime – with the communication of eventual modifications, improvements in the contractual object etc.

The contractual object is represented by the transfer of technical knowledge, information and documentations at a high range of complexity and difficulty.

In case of a "secret know-how" transmission, if the secret character disappears without the fault of the beneficiary, the payment of the future fees seems to remain without object for the remaining part of the contract.

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[309] Roxana Munteanu, Contractele de intermediere în comerţul exterior al României, Bucharest, 1984, p.71 şi urm., Ed. Academiei Române

[310] George Coca- Procedura penală, Editura Universul juridic, Buc., 2012, p.247 şi urm.

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[312] Y.M.Mausseron, Aspects juridiques du know-how, în Cahiers de l'entreprise, nr.1/1972

[313] Tudor Popescu, Dreptul comerţului internaţional, Ed. didactică şi pedagogică, Buc., 1983

In order to avoid such situations, the transmitter does not state in the contract the "secret character of know-how", using expressions as "technical advance", meant to bring to the beneficiary important economies or "technical procedure", meant to insure the beneficiary a better profit[314].

The know-how beneficiary does not have an exclusive right over the information, procedures and auxiliary elements which are being comprised in a know contract. The novelty of know-how is subjective and related only to the knowledge of the beneficiary. Anyone can use identical procedures and techniques if he reached them in a fair and correct way. Know-how can be also characterized by dynamism, since one can insert in the contract a cross-licensing clause, based on which the transmitter can acquire the eventual improvements that are brought by the user to the factory procedures or to the technologies incorporated[315].

In regards to the legal nature of the contract[316], it has similarities with sales contracts or lease contracts in the light of the material elements that imply remission. The intellectual elements are being transmitted to the beneficiary through communication; hence the know-how has similarities with enterprise contracts, being often qualified as an enterprise contract.

The sender of know-how has a diligence obligation rather than a result obligation. In agreement with the complexity of the operations that need to be accomplished, the know-how contract can be divided into 3 categories: the ones through which a technology or a procedure are being transmitted in the stage determined by the moment of contract conclusion, through simple acts, contracts that comprise the same transfer operations, but through complex and successive acts established in multiple phases and contracts by which products and technical procedures to be transferred derive from own research or will be successively obtained in a determined time frame.

There is another classification, the one related to the interference with other technical and economical operations, the know-how contract being divided into three categories, as follows: contracts of pure know-how, when the transfer is not conditioned by another operation, contracts of combined know-how, when the transfer is auxiliary or a consequence of other operations and a last category, the contracts of complementary know-how, when the transfer conditions for the realization of a distinct convention are to be established separately.

As observed, know-how falls under the public domain and has no influence over the validity of the contract, since the beneficiary – possessor of know-how – has in call cases an advantage over his competitors.

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[314] Octavian Căpăţână, Brânduşa Ştefănescu, Tratat de drept al comerţului internaţional, Ed. Academiei Române, Bucharest, 1985

[315] Ioan Macovei, Instituţii în dreptul comerţului internaţional, Editura Junimea, Iaşi, 1980

[316] E.Ciongaru, Teoria generala a dreptului. Notiuni generale, Ed.Scrisul Romanesc, Craiova, 2012, p.53.

In between the contract parties, the know-how transfer can be achieved by the following modalities: transmission of documents, plans, drawings, manuals, models, formulas; the supply of material or a part of a material; the transmission of technicians in the beneficiary's factory, the receipt of technicians for specialization.

The main elements that form separately or in their ensemble the know-how content consist mainly of technical ability, expertise and technical knowledge. These elements have in general a material support, consisting of plans, sketches, and instructions.

During the contract execution, parties have the mutual obligation of mutually communicating eventual improvements to know-how. The disclosure of information related to the industrial, commercial or scientific expertise for a product fabrication is forbidden, same as for the enforcement of a procedure, without the authorization of the person which supplied the respective information.

The contract ends by the expiry of the term or via annulment. In this case and since know-how is not a privative right, the information transmitted can be freely used. Still, in order to prevent the irreversible effect of the transfer, often parties stipulate a clause that forbids the utilization of the contract after the expiry of the contract or after its end. Such a clause is restrictive and contravenes to the free competition, as protected and guaranteed by the international law. Also, the know-how contract can end by the entry of the license in the circuit of free competition.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

THE ON-THE-JOB APPRENTICESHIP CONTRACT

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Abstract

The instertion into the labor market is a complex process which, for plenty of young people begins before their highschool years end. As a result, they must earn their living, but they do not have a job which helps them in this respect. The apprentice contract comes off, in those conditions, as a juridic instrument which those young people, still at the outset of their career, period when they obtain a professional degree, as well as a salary. Although it has a highly important usefulness, the apprentice contract is not frequently encountered in the romanian employers requirements, and as a consequence, we have considered that a study on the internal and unnional reglementantions which refer to this individual working contract of a particular type would be very well percieved.

Key words: *labor market, contract, apprentice, trainning, employment*.

1. THE INTERNAL REGULATION OF THE ON-THE-JOB APPRENTICESHIP CONTRACT

In the Romanian law, the contract of apprenticeship is regulated by the Labor Code, Law 279/2005[317] on the on-the-job apprenticeship and the implementation rules of this legal provision approved by Government Decision no. 234/2006[318], and Government Ordinance no. 129/2000 on adult professional training[319].

The apprenticeship contract is an individual employment contract of a particular type, under which a person, called an apprentice, undertakes to prepare professionally and work for and under the authority of a legal or natural person named employer, who undertakes to ensure payment of wages and all the conditions necessary for the professional training[320].

The apprenticeship contract must expressly stipulate certain additional clauses to the general clauses of the classic individual labor contract content, namely:

[317] Republished in„Monitorul oficial al României", part I, no. 522 in 25 July 2011
[318] Published in „Monitorul oficial al României", partea I, no. 196 in 2 March 2006
[319] Republished in „Monitorul oficial al României", part I, no. 711 in 30 September 2002
[320] Al. Athansiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, 2005, p. 238

- The qualification, or skills that the apprentice must acquire;
- The name of his master apprenticeship and his qualification;
- The location of the professional training activity;
- The program distribution of practical and theoretical training, as appropriate;
- The time required to obtain qualifications or skills;
- Benefits in kind provided for the apprentice.

The apprentice is applied all provisions relating to the status of an employee to the extent that they are not contrary to the ones specific to the status of the apprentice. Under the provisions of art. Article 8. 2 of Law no. 279/2005 on the on-the-job apprenticeship, the employer may require the apprentice to include in the contract the obligation to remain in the firm for a certain period of time after being professionally trained. Otherwise, the apprentice undertakes to reimburse the expenditure incurred by the employer with his training.

The apprenticeship contract is concluded on a fixed term of between six months and three years and the apprentice benefits from the entire rights of other employees if they do not contradict his status.

Essentially, the apprenticeship contract is a contract of employment, of a particular type, concluded and executed under specific conditions. Thus, the parties that may enter into an apprenticeship contract must meet certain conditions, namely:

1. According to art. 5 of Law no. 279/2005 any person over the age of 16 but not more than 25 years can be classified as an apprentice, as long as they do not have a qualification for the occupation for which the on-the-job apprenticeship is organized. Individuals aged 15 to 16 years may also enter an apprenticeship contract if three cumulative conditions are fulfilled, namely:
- There is written consent of parents or legal guardians;
- Activities to be undertaken are appropriate to the physical development, skills and knowledge of the child;
- The apprenticeship contract shall not endanger the health, development and training of the child.

2. According to art. 6 of Law no. 279/2005, only legal entities and natural persons authorized by the Ministry of Labor, Family and Equal Opportunities may conclude a contract of apprenticeship as employers. Authorized individuals and family businesses can act as employers, notwithstanding the provisions of Government Emergency Ordinance no. 44/2008 that limit the capacity for other types of contracts.

The apprenticeship contract is concluded in a written form in Romanian and recorded by the Labor Inspectorate in whose jurisdiction the employer operates. In addition, the employer is required to register the contract of apprenticeship in the general register of employees compiled electronically.

A special feature of the contract of apprenticeship is the quality needed by the foreman under whose guidance the apprentice is formed. Thus, the foreman must be hired by the employer and approved for this purpose by the Ministry of Labor, Family and Equal Opportunities. He is responsible for coordinating the activities of the apprentice.

Considering these aspects, the legislature explained the legal nature of the contract of apprenticeship, that is, the contract was qualified as a particular type of work contract, with a complex object. The object is not represented only by the labor supply and by paying the salary, but also by the training of apprentice in a particular job, an element that is crucial for this type of contract[321].

In the literature[322] it was stated that this type of individual employment contract has the general features of this legal act, as well as specific features. Thus, the contract of apprenticeship is, on the one hand, a contract called bilateral synallagmatic, commutative, onerous, *intuitu personae*, with sequential execution, characterized by the relationship of subordination between apprentice and employer, and, on the other hand, is characterized by the following:

- It is part of the professional training, according to art. 193 letter d of the Labor Code;
- It is a fixed-term contract;
- A legal individual work relationship is based on it;
- The cause of the contract is unique, incorporating both the training of apprentices and their work and salary.

In conclusion, as stated in the doctrine[323], 'the main factor of qualifying the contract of apprenticeship as an employment contract of a particular type is the fact that – along with the objective of training - providing employment and salary benefits are characteristics of this type of contract'.

Currently, in the country, according to data published by Labor inspection, there registered apprenticeship contracts at work, which means that employers are less interested in this way of training.

2. UNNIONAL LEGISLATION FOR ON-THE-JOB APPRENTICESHIP CONTRACTS

At Community level there are currently no legal regulations of the contract of apprenticeship. Community institutions are interested in this type of employment contract. Thus, the Council adopted the Resolution of the 18th of

[321] Al. Ţiclea, *Tratat de dreptul muncii*, Rosetti Publishing House, Bucharest, 2006, p. 249
[322] See T.I.Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 427 and ff.
[323] T.I.Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 429

December 1979 on alternating formation of youth[324], and, on the 20th of December 1996, Conclusions on the ongoing apprenticeship strategy[325]. These documents established a set of principles for this type of work relationship, namely[326]:

1. The actions performed must respect the balance between personal, cultural and civic interests and the concerns about the economy and jobs;

2. Apprenticeship should be based on the possibility to choose from a wide range, allowing apprentices to progress in their education, according to their interests and their social, cultural and economic needs;

3. Initial education and training are fundamental to apprenticeship;

4. Apprenticeship should be aimed at developing individual capacities, at strengthening the ability of young people to obtain a job, at promoting an optimal use of resources and of human talent, eliminating social exclusion;

5. Apprenticeship enables apprentices to seek to develop responsibility for their own education and training;

6. Individuals, institutions, businesses, local governments, social partners, and society generally must create the conditions necessary to establish a positive attitude towards apprenticeship.

It should be noted, however, that the apprentices still benefit from the protection of Community law by Directive 94/33/EC on the protection of young people at work[327], whose aims fall within the following coordinates:

- Member States shall take the necessary measures to prohibit child labor. They will ensure that minimum employment age is not lower than the age at which compulsory schooling under national law is completed and, in any case, not lower than 15 years;

- Member States shall ensure that the work of adolescents is strictly regulated and protected in accordance with the terms of the Directive;

- Member States shall ensure that employers guarantee that young people's working conditions are appropriate to their age[328].

It should be noted that the International Labor Organization has developed two recommendations which contain references to on-the-job apprenticeship, namely, Recommendation 57/1939 and Recommendation 60/1939. As mentioned in the literature[329], these international documents define apprenticeship as any system where the employer is contractually obliged to hire

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[324] Published in Jurnalul oficial al Comunităţilor Europene, no. C1 in 3 January 1980

[325] Published in Jurnalul oficial al Comunităţilor Europene no. C7 in 10January 1997

[326] A se vedea O. Ţinca, *Contractul de ucenicie în dreptul comparat*, în „Revista română de dreptul muncii" nr. 2/2003, p. 51 - 59

[327] Published in Jurnalul Oficial al Comunităţilor Europene Series L no. 216 in 20 August 1994.

[328] See A. Popescu, *Dreptul internaţional al muncii,* C.H. Beck Publishing House, Bucharest, 2006, p. 536 and ff.

[329] See T.I.Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 429.

a young man whom he teaches or whom he makes methodically learn a trade within a fixed period. Thus, the person concerned is obliged to perform work in the service of the employer.

The analysis of international documents, compared with the national ones referring to apprenticeship on the job, it is noted that, in general, the national legislature considered international rules, but, as stated in the doctrine, there are some gaps that could be filled by subsequent amendments to the legislation. Thus, in the literature, proposals *de lege ferenda* were made[330] in this regard, proposals considered appropriate, and exposed briefly below:

- Young people aged at least 15 years could conclude a contract of apprenticeship on the job, even if they have completed only their primary education. Under the current law, in order to conclude a contract of apprenticeship, the young person must be a graduate of 10 year-compulsory education;

- The maximum age of 25 years for an apprentice should be overcome, in the case of the disabled or when the apprentice had completed an apprenticeship contract which was terminated for non-attributable reasons , before the deadline;

- Establishing the territorial labor inspectorate right to suspend the contract of apprenticeship on the job in case of a risk of an occupational disease or of physical or mental injury of the apprentice. During the suspension, however, the employer must pay the apprentice a compensatory allowance. If the risks that led to the suspension of the contract of apprenticeship are not eliminated, the contract should be terminated and the employer is obliged to compensate the apprentice.

- The possibility to extend the contract in the case of failure of the apprentice in the final professional evaluation;

- Regulating specific conditions of termination of the apprenticeship contract, in order to enhance the protection of the apprentice, by establishing territorial labor inspectorate notice requirement for the dismissal of the apprentice.

[330] T.I.Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 439-440

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

LEGAL FEATURES OF OBLIGATIONS

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Abstract

The authors of the new Civil Code defined obligation as being "the content of the obligational relationship". The obligation has multiple meanings. Technically, the obligation is different from the legal act or relation that assumes it. The legislator chose to define the obligation as a legal act or relation, whose content must always state it. In fact, the obligation is a wider notion without which the obligational relation cannot be defined because its existence is due to obligation.

Key words*: obligation, personal, patrimonial, coercive, joint guarantee*

1. THE DEFINITION OF OBLIGATION IN THE ROMAN LAW

"*Iustiniani institutiones*" defined obligation as being "*juris vinculum quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura*"[331]. Thus were emphasized the defining notes of obligation: a) the obligation of the debtor to pay (*solvende*); b) the personal feature of obligation, because in a precise translation *vinculum juris* means the debtor is bounded to *alicuius*; c) its economic content (*solvende rei*) and d) a differentiation between civil obligations and moral duties by the coercive feature of the relationship (*adstringimur*)[332].

2. THE DEFINITION OF OBLIGATION ACCORDING TO THE NEW CIVIL CODE

Revealing only the passive side of obligation, the duty of the debtor, the definition above mentioned has been corrected. The idea of *vinculum iuris* from the above definition has a wider connotation, meaning among others: a legal

[331] *Obligation is a legal fetter to pay another person for something under the need of constraint, according to the law of our city*. This definition comes from Gaius (110-180 BC) being taken in 533 AD by the *Institutiones sive elementa juris* of Justinian.
[332] Jean-Pierre Gridel, *Introduction au droit et au droit français*, Dalloz, Paris, 1994, p.114-115

situation[333] or a legal relationship, namely a social relationship stated by the law; the latter meaning nowadays is generally admitted.

In the actual law, the obligation is defined as being a connection in the virtue of which the debtor must offer a service for the creditor, who is entitled by the law to receive that service (Art 1164 Civil Code).

The above definition means the entire legal relationship of the obligation. This meaning is natural because the obligation being a natural legal relationship assumes two persons and two sides simultaneously: the passive side, when we see the obligation from the debtor's standpoint, as a debt, and the active side, when we see obligation from the creditor's perspective, as a right of claim.

The obligation is delimited by its features: personal (1°), coercive (2°) and patrimonial (3°).

1^0. The obligation is a personal debt.

The obligation is a legal relationship between two persons, in which the debtor has a personal debt to the creditor, thus imprinting its relativity, in opposition with the real right which is only *erga omnes* opposable (A); these particularities generate consequences specific to obligations (B).

This opposability is not an absolute distinction criterion between them; some real rights requesting legal relationships which generate relative effects. This is the situation of legal relationships between the owner of the ownership right and the owner of the dismembered right on the same good, which is called a real right to someone else's good.

A. The personal feature of obligation and its relative effect

3. The obligation is a legal relationship between two (or more) persons, creditor and debtor, known at the moment the relationship was concluded. The debt is personal, because only the debtor must perform it and only the creditor is entitled to claim its performance[334].

On the other hand, being a relationship between two known persons, it is revealed also the relative effect of the debt, generating effects only between the legal parties. In contrast, exercising the real right does not involve a legal relationship between two persons because this right offers his owner direct and immediate prerogatives over the asset[335].

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[333] Notion proposed by Demogue for the "*vinculum juris*", quoted by George Plastara, *Curs de drept civil român*, 4th Volume, Cartea Românească Publishing-House, Bucharest, 1925, pp.32-38.

[334] In the actual law, the personal feature of the obligation no longer has the same meaning as in the Roman law, by this feature meaning the fact that the debtor was liable with self for performing the debt.

[335] This rule is not absolute; the dismemberments of the right to ownership assume a legal relation between the owner of the good and the owner of the dismemberment. This relation

The theory of the personality of the real right (or the theory of the universal passive obligation)[336] according to which the real right states a legal relationship between the owner of the right and all the other persons, the latter ones being compelled to respect the real right (general negative obligation), thus concluding that this right has a similar structure with the debenture, has a limited echo in doctrine[337] and jurisprudence. Indeed, any subjective right, including the personal right, assumes a social relationship consisting in the obligation of all persons to respect the subjective right, and every owner of the violated subjective right is entitled to constrain the offender to recognize his lawful right. This obligation is not translated by a legal relationship, but has the general meaning of a legal debt to not cause prejudice to another person, being an external manifestation of the *erga omnes* opposability of the subjective right[338].

Being compelled to recognize the real right does not change the debtor's passive patrimony, because he has no debt for the owner of the mentioned right. As a conclusion, all subjective rights are *erga omnes* opposable[339], not just the real right, but only the personal right generates relative effects[340], except real rights on

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does not generate personal rights, but real obligations, even when the owner of the real right is not compelled by a positive obligation to the owner.

[336] The theory issued by M. Planiol and defended today by some authors, who argue with the fact that a relation between men and goods is not possible, but only between men; as a consequence, the real right would claim a legal relation. See I. Micescu, *Curs de drept civil*, All Beck Publishing-House, Restitutio Collection, Bucharest, 2000, pp.96-102.

[337] The followers of this theory are: T.R Popescu and P. Anca, in T.R Popescu, P. Anca, *op.cit.*, p.13

[338] See footnote no. 2

[339] In the same respect, see C. Bîrsan, *Drept civil. Drepturile reale principale*, All Beck Publishing-House, Bucharest, 2001, pp.21-22; M. Avram, *Actul unilateral în dreptul privat*, Hamangiu Publishing-House, Bucharest, 2006, pp. 117-122; P. Vasilescu, Relativitatea actului juridic civil, *Repere pentru o nouă teorie generală a actului de drept privat*, Rosetti Publishing-House, Bucharest, 2003, pp.267-277; I. Deleanu, *Părțile și Terții, Relativitatea și Opozabilitatea efectelor juridice*, Rosetti Publishing-House, Bucharest, 2003, pp.73-74; I. Deleanu, *Opozabilitatea – considerații generale*, in The Law Review, No. 7/2001, p.87 and next; I. Micescu, *Curs de drept civil*, All Beck Publishing-House, Bucharest, 2000, pp.100-102.

[340] Much of the doctrine states that only the real right is *erga omnes* opposable, unlike the personal right which is just relative, and this antithesis would be the criterion to differentiate these two types of rights. In this respect: M.B. Cantacuzino, *Elementele dreptului civil*, All Publishing-House, Bucharest, 1998, pp.28-29; T.R. Popescu, P. Anca, *op.cit.*, p.14; C. Bîrsan, *Drept civil, Teoria generală a obligațiilor*, All Publishing-House, Bucharest, 1993, p.3; E. Chelaru, *Curs de drept civil. Drepturile reale principale*, All Beck Publishing-House, Bucharest, 2000, p.11. Also, some authors support the same thesis of the opposability between the real right and debenture on the criterion of the absolute opposability of the first and of the relative effects of the second. D. Florescu, *Drept civil.*

someone else's assets, namely the dismemberments of the ownership right, which also generate relative effects[341].

2. The meaning of the personal feature of debt[342], the evolution of the personal feature of obligation

The personal feature of the debt is synonym with the subjective feature of the obligation and opposed to its objective feature. The first feature means the fact that the obligation is addicted to its source (the debtor) and this is why it cannot be passed because its extinction it is generated by the performance of the debtor. In opposition, the objective feature reveals the fact that the debt is a value in the patrimony of the parties of the obligational relationship (positive for the creditor and negative for the debtor) and it can be passed as any asset.

In time, the personal feature of obligation has been modified tending to its objectivity.

Unlike the old Roman law, where the obligation meant a material connection of the debtor and in an older stage this connection also had a familial feature, being performed either directly against the debtor, or against another member of his family, in the actual law the obligation is synonym with the *personal right*, because only the debtor, personally, can be compelled to perform his debt. In an exceptional case, in the obligational relationships born by the act or fact of one of the spouses regarding their common goods, the familial feature of the

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Teoria generală a obligațiilor, 1st Volume, Titu Maiorescu University Press, Bucharest, 2000, pp.18-19; Fl. Ciutacu, Cr. Jura, *Drept civil. Teoria generală a obligațiilor*, Themis Cart Publishing-House, Bucharest, p.9. In our standpoint, the differentiation between this thesis and the one above mentioned, according to which personal and real rights are *erga omnes* opposable, results from the meaning of the notion of opposability, to which was attached the absolute and relative adjective, making it clear that there are two means of opposability: of personal rights – which are opposable only for the parties, and an *erga omnes* opposability – which is applicable only for real rights. Such signification of the opposability seems ambiguous because it makes room for confusion between the relativity of the personal rights and the opposability of such an act. *De facto*, if there are numerous meanings of opposability, we consider the most relevant the one according to which the opposability means the respect owed by everyone (*erga omnes*) to the social fact with a legal resonance, respect conditioned by the existence of its publicity.

[341] See footnote no. 17

[342] The meaning of the personal feature of the obligation must not be mistaken by the meaning of the personal feature specific to the beneficial interest. This interest, being lifelong, is named personal because it is extinguished when the owner dies; nor it must be mistaken with the rights we call personal, in the meaning of Art 1560 Para 2 Civil Code, because are strongly connected to the personal latitude of the owner, and from this reason cannot be attacked by a derivative action.

obligation is maintained, the other spouse being compelled to perform the obligation (Art 351-352 Civil Code).

The classic Roman law made a first step to alleviate the personal feature of the obligation and its objectivity, attaching the legal regime of an asset. His obligations as a *cuius*, though personal, were passed with a universal feature to his successors. The compromise made by the Roman jurists was determined by economic needs, more precisely by the need for a credit[343] and was based on the fiction of continuing the credit by the successors of the deceased person.

Our Civil Code retrieved this rule stating the *universal* transmission of his obligations as *cuius* (Art 1114); same for legal persons, their obligations being passed in case of reorganization by division or merger (Art 235, 238 Civil Code and Art 240 of the Law No 31/1990). Furthermore, the new Civil Code inserted a novelty stating the assignment of the contract, instrument by which the transferor passes both his rights and obligations (Art 1315-1320) and retrieved the old rule of assigning the debt as an instrument for the particular passing of the personal right (the active side of the obligational relationship), as any patrimonial asset, without the debtor's consent, thus making abstraction of the connection between this right with the owner (Art 1566-1592). The debt (the passive side of the obligational relationship) is still marked by the connection with the debtor, preventing its transmission by a particular act, *the subjective concept of obligation prevailing nowadays*. The technique of the debt assumption by which a third party person who undertakes to perform the debt is not a veritable act of transmission, because the creditor must also give his consent (Art 1599 Let a) and Art 1609 Civil Code). Also, undertaking de debt by a third party person in front of the creditor (Art 1599 Let b) Civil Code) is *a novation by changing the debtor*, not a particular transmission of the obligation. The initial obligational relationship is extinguished, making room for the new one. Or, the usual transmission of an asset is made without extinguishing the initial relationship.

B. The consequence of the personal feature of debt: low efficiency and fragility of the personal right

10. Low efficiency of the personal right

As it was already shown above, the object of a real right is an asset, and of the personal right is the performance of the debtor consisting in the service or asset expected by the creditor. To satisfy the right, the creditor must address to the debtor, the right interposing between his and the promised service or asset. Naturally, the creditor cannot obtain the promised service unless the debtor shall perform it (for instance performing a service by a doctor); similar, when the object

[343] François Terré, Philippe Simler, Yves Laquette, *Droit civil, Les obligations*, 8e édition, 2002, Paris, Dalloz, p. 9

of the performance is handing over an asset by the debtor, the creditor shall become the owner of that asset (by the will of the debtor and not on his own powers) because in a state of law no one can make justice on its own.

We thus conclude that, unlike the real right, which offers direct and unmediated power over an asset, the debenture does not offer efficient prerogatives for the creditor because the debtor's performance, being personal, cannot be performed without his voluntary participation.

As one can notice, the personal feature of debt has consequences over the efficiency of the personal right. It can also be noticed that the Civil Code, in order to emphasize the efficiency of the obligation's performance, it is relevant the *obligation to do or not to do,* because it is performed by the debtor in person. Unlike these, the object of the *obligation to give* is the transfer of a real right and under the aspect of its performance, it derogates from the personal feature of performance, Art 1273 and 1674 of the Civil Code stating the principle of the mutual consent of transferring the ownership right or of other real right in the virtue of which the transfer is *de facto*. This transfer is not related to the personal performance of the debtor.

As an exception, the performance of the obligation to give can depend on the activity of the debtor when the transfer of the ownership right is suspended until the performance of an obligation of the debtor. For instance, in the case of selling certain assets, the transfer of the ownership right for these asets is made in fact, but only after the assets were numbered, measured or weighted[344].

11. Compensating this inefficiency with a guarantee: general pledge of the unsecured creditor

In order to compensate the inefficiency of the personal right, the legislator offers to the creditor a guarantee for the performance of the obligation: the debtor guarantees the performance of the debt with his entire patrimony. Based on this guarantee, named the general pledge of the unsecured creditor, the creditor is entitled to pursue any asset from the patrimony of the debtor, regardless if it

[344] Also, if the obligation to give has as object the transfer of movable assets, the refuse of the seller to perform the obligation of to do, namely to hand over the asset, shall generate the inefficiency of the rightful performance of the obligation of to give when the seller alienated the asset to another person. In the shown case, between the seller and the buyer the transfer of property for the asset occurs *de jure*, the seller becoming the debtor of the obligation of to do, namely to hand over the asset. If the seller did not hand over the asset and alienated to a third party person, the buyer, even if he is the new owner of the asset shall not claim this performance from the third party person, because being in possession shall be preferred (Art 1275 and Art 973 Para 1 Civil Code). As a conclusion, in the shown case, the efficiency of the performance of the obligation of to give depends on the debtor's personal performance.

existed at the moment the obligational relationship was concluded or after that because, according to Art 2324 of the Civil Code, *the debtor is bounded with his current and future assets*.

12. The fragility of the personal right: the lack of the right to pursue and the of preference

The common (general) pledge of the unsecured creditor offers a fragile guarantee of the performance, the odds of the creditor to see his debt being performed depending on the solvability of the debtor's patrimony. The general pledge of the unsecured creditor, though it suggests the idea of a real guarantee (the pledge is a real guarantee) offers prerogatives far from being real, because it does not offer either the *right to pursue* or the *right to preference*.

The creditor does not have the right to pursue. If the debtor alienates one of his assets, the creditor loses that asset from his general pledge, because he cannot pursue the alienated assets to the subsequent owner. His claim shall be performed only for those assets that exist in the patrimony of the debtor at the moment a distrait is levy upon it.

The creditor does not have the *right to preference*. If the debtor acquires new debts he shall increment the number of creditors with a general pledge upon his patrimony and by that, the existent creditors shall bear the plurality of the new creditors if the debtor's patrimony shall be insufficient to cover all debts, each of them performing his claim proportional with its value (Art 2326 Civil Code).

As a conclusion, though they seem incompatible, the *personal* and *patrimonial* features of the obligation are assumed. At its origin, the right to claim is performed directly against the debtor who was sold as slave to retrieve his unperformed debt or was kept as prisoner to force him to perform. Subsequent, the performance of the debt directly against the debtor was replaced by the indirect performance, by distrait and sell assets from his patrimony[345]. In law, to personally pursue the debtor or to pursue his assets are synonyms, because the patrimony is seen as an emanation of the person. Art. 2324 of the Civil Code translates this relationship.

In order to prevent situations in which the debtor simulates an emptying of his patrimony or situations in which this emptying is real being caused out of negligence or by intention to make it impossible for the creditor to claim his debt, knowing that he cannot use the right to pursue or to prefer, the law offered for the creditor, as a compensation, special means: the action to set aside (paulian – Art 1562 Civil Code) and the derivative action (Art 1560 Civil Code).

[345] In the Roman law this passage has been made by the law Poetelia Papiria; see also P.C. Vlachide, *Repetiția principiilor de drept civil*, 2nd Volume, Europa Nova Publishing-House, Bucharest, 1994, p.11

2. The debt is not optional but constraining for the debtor

13. The debt (*debitum*) and the coercion (*obligatio*) both form the debenture[346] (debenture = debt + action). Stating that the obligation is compulsory it is not pleonastic because, by exception, there are obligations which, even though are legal, do not enjoy this feature: natural obligations do not have sanctions[347]. Constraint is an essential element of the civil obligation. It is applicable for the failure to perform the debt and not for the violation of the personal right, as the pattern of the real right. In order to reveal this feature, the Romans have decomposed the obligation is two elements: the debt, namely the performance owed by the debtor; and coercion (*obligatio*), the right of the creditor to constrain the debtor to perform his debt, this right being part of the latter one's patrimony[348]. The first element reveals the passive side of the obligational relationship: the debt owed personally by the debtor (*debitum*)[349]. If he voluntarily performs it, the debt shall be extinguished, the debtor being freed and the legal relationship shall cease because it is left without object; if not, it shall be performed by coercion (sanction). In brief, debenture = debt + sanction (of constraint), named personal action. The lack of constraint changes the nature of the debt[350]

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[346] For the civil obligation the sanction is also essential, not only the debt. For no good reason the creditor claims what is rightfully his even if he has no legal mean to constrain. This is why the Romans named the sanction *obligatio, thus lexically suggesting that the specific element for the obligation is the sanction*, unlike the *debitum*. The lack of the sanction changes the nature of the obligation. It is still an obligation, but a natural one, instead of a civil one. Finally, as we shall show, in marginal situations, there are civil obligations without a personal debt, but not without sanction. See also M. Costin, *Marile instituții ale dreptului civil român*, 3rd Volume, Dacia Publishing-House, Cluj-Napoca, 1993, p.9. The author ground the obligation on the *debitum*.

[347] L. Pop, *op.cit.*, p.15 referring to the legal offensive means for the creditor and his possibility to refuse the refund the voluntary performance of the debtor.

[348] H. et L. Mazeaud, J. Mazeaud, Fr. Chabas, *Leçons de droit civil, t.II, Obligations, théorie générale*, 9e édition, par Fr. Chabas, Montchrestien, 1998, p.7

[349] Etymological, *debitum* originates from the Latin word *habitum* (*de habere*) meaning "to have less"; in practice, the obligational relationship generates a loss for the debtor, suffering a diminution of his patrimony equivalent to the debt.

[350] In our law, these two elements have been ignored. The lack of interest for the distinction above mentioned can be explained by the fact that, since the end of the 19th century, the right to action has been considered autonomous, different from the substantive right, and as a consequence, the action would no longer represent an element specific to debentures. In our opinion, emphasizing these two elements specific to obligation has a triple utility: first, it reveals the difference between the specific sanction for violating relative effects by the parties of the legal relationship and the resulting sanction from the *erga omnes* opposability of every subjective rights, secondly, for the identification of the nature of a legal relationship, and thirdly, to explain the technique of changing the object of the obligation in case of enforcement.

14. Real action, personal action.

Unlike the real right, protected by the real action[351], which the Romans called *actio in rem*, the personal right is protected by the personal action (*action in personam*). The distinction between these two actions emphasizes the differentiation in nature and structure between the real and personal right. *Actio in rem* is performed for the good-object of the real right and against the third party who has troubled the real right of the owner. *Actio in personam* is exercised because the debt was not voluntarily performed by the debtor and so the object of the performance is the debtor, more precisely his patrimony because, according to

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a) The sanction for violating the relative effect must not be confused with the sanction for violation of the general negative obligation of not causing prejudice to someone. The sanction specific to the obligational relationship is inherent to it because the owner of the personal right claims the sanction of the debtor prevailing his debt and not the sanction for violating his subjective right, as will do the owner of the real right. From this reason, the real right does not assume any sanction. It is stated only for the violation of the right, as a manifestation of the *erga omnes* opposability of the real right, but this sanction is specific to any subjective right, so also to the personal right, meaning that this sanction is not related to the nature of the real right.

b) The existence or lack of constraint reveals the nature of the obligation, the lack of the personal debt does not changes it (guaranteeing the debt of another person). The civil obligation, namely the obligation which has in its structure the sanction is distinguished from the natural obligation (or imperfect), which does not involves a sanction, though it is a legal obligation; for instance, the debenture for which the right to claim was prescribed.

In exchange, in a border situation, the obligation is civil even if its structure does not state a personal debt, but it guarantees the performance of another person's debt. Real guarantees established by third parties generate *real obligations* which do not state the *debt* element. The third parties to the debenture relationship, who guarantee by a pledge or mortgage, even though they do not have a debt for the pledgee or mortgage creditor, because they guarantee the debt of the debtor and not their own, shall be compelled to pay the debt if the latter one does not do it. The same regime is applicable also for the real obligation to which is compelled the subsequent owner of a mortgaged or pledged good. If the debtor who guaranteed the claim with a mortgage over the asset passed to the third party does not pay his debt, the latter one, though he has no debt to the mortgage owner, shall be compelled to pay.

Finally, the guarantors who have guaranteed in person (fidejussors) the payment of the main debt contracted by another person, are not bounded to a *personal debt* to the creditor, but are personally bounded (with their entire patrimony) to pay, if the main debtor does not pay, their obligation being *personal and not real*, as for the other two cases.

[351] Which can be shaped as the *action for the recovery of possession* for the situation in which more persons claim they are the rightful owner of the same asset, as the *negatory action*, when the owner denies the existence of another real right for an asset, or the *confessory pleading of real estate*, when a person contradicts the owner that he has real rights for an asset.

Art 2324, it guarantees the performance of the obligation with his entire patrimony, guarantee named the general pledge of the unsecured creditor.

15. Enforcement (forced execution). Receiving the expected performance by enforcement of the debtor or its replacement by an equivalent

When the debtor voluntarily performs his debt, the obligation is extinguished by payment and the constraining element remains unused. If the debtor fails to voluntarily perform his debt, the creditor shall use the sanction, in order to receive the expected satisfaction by enforcing the debtor.

The enforcement of the claim can be achieved according to the object of the obligation: (α) exchanging the object of the performance with its financial equivalent or (β) enforcement is subordinated to the civil procedure rules, but the Civil Code states the rules for exchanging the object of the obligation if the debt failed to be performed by constraining the debtor so that the creditor shall receive his expected performance or, if necessary, a financial equivalent of it.

(α) The principle is the enforcement in nature. In this case, the *object of the enforcement* is the same with the *object of the debtor's performance*. If the object of the performance is represented by an amount of money, its performance in nature is easy because the object of the performance is a specific asset which can be obtained by the garnishment of the debtor's bank accounts or incomes, or by selling his assets to obtain the necessary amount of money to pay the debt. If the object of the performance is the *obligation to do or not do*, the constraint of the debtor to perform the service or to abstain from a behavior is usually imposed by penalties (Art 905 Civil Procedure Code). Finally, if the enforcement to perform the *obligation of to do* is possible without a physical constraint, prohibited by the modern law, the enforcement can be made *manu militari*, for instance, in case of the debtor refusing to leave a property, the judge shall order the eviction by removing his assets from that property without physically expelling him.

The performance in nature can also be made by substituting the debtor. The creditor may be authorized by the judge to perform an obligation of to do, on the debtor's expense, for instance, for the obligation to build a wall, to close a window etc. Similarly, if the to do obligation is violated, for instance, by building in a place where the debtor undertook not to build, it shall be demolished by the creditor, on the debtor's expense, based on the authorization issued by the judge. Also, the debtor substitution can be ordered by a court decision when he violated his promise to conclude a contract. The creditor may submit a personal action claiming a court decision stating that the purchase agreement was concluded or which must replace an authentic purchase agreement.

(β) In all the above mentioned situations, when the performance in nature is no longer possible, the second phase of the personal action can be focused on changing the object in money as compensatory damages. In this case, the object of

the performance is specific to the obligational relationship, the debtor's patrimony, the enforcement being made by selling any asset in order to obtain the compensatory damages (Art 2324 Civil Code).

16. *Cognito* and *executio*, phases of the personal action

Though performing a personal action is subjected to the rules of the civil procedural law, it is useful to reveal some aspects concerning the procedure of performing this action. The right to a claim is generates directly, by itself, the prerogative of the creditor to claim its performance. In case of refuse, this right is not enough to pass to enforcement, with some exceptions expressly stated by the law[352]. The creditor must first obtain the enforceable title (Art 632 Civil Procedure Code). Only after verifying the source of the claim the court can decide to enforce the debtor to perform the debt claimed by the creditor (*cognitio*). The court's decision ordering the enforcement is the enforceable title (Art 632 Civil Code) and on its base the creditor shall be able to initiate the enforcement (Art 663 of the Civil Code) – the second phase of performing the claim (*executio*). Both *cognition* and *executio* are forms of the personal action[353]. The new Civil Procedure Code no longer states the formality of obtaining the enforcement formula, being implicit by the resolution of the judge ordering the enforcement (Art 665 Civil Procedure Code).

3°. The debt has a patrimonial feature

17. The patrimonial feature reveals the pecuniary nature of the obligation, the performance owed by the debtor being evaluable in money. This feature opposes the area of obligation to the area of the personal prerogatives (right to life, to heath, to honor etc.) and to the area of family relations (parental rights, the obligation to loyalty between spouses etc.) their object not being quantifiable.

Also, though the real right has a patrimonial feature, as well as the obligation, their functions being different. Thus, the obligations are the legal expression of economic trades. Unlike them, real rights, though express, as well as obligations, social relations, they do not translate in law the economic relations. The person owing an asset and exercising his right of property does not cause a movement of value from a patrimony to another by this exercise. Only by the application of the rules of obligation, the owner shall exploit his asset performing a trade of values, for instance, in a renting contract.

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[352] Exceptionally, Art 632 of the Civil Procedure Code states that the law may provide situations in which the right to claim stipulated by a written can be an enforceable title such as, for instance, authentic documents (Art 639 Civil Code) or debentures (Art 640 Civil Code).

[353] Savelly Zilberstein Viorel Mihai Ciobanu, *Drept procesual civil, Executarea silită*, Lumina Lex Publishing-house, Bucharest, 1996, p.14

The demarcation between obligation and other rights shown is not absolute. The relations stated by family law or the violation of the obligations arisen from these relations, as well as the violation of the personal rights or of the real rights generate obligations. The legal right (the obligation) of maintenance between family members has a pecuniary feature; and the violation of the parental obligations is sanctioned by the termination of parental rights, the person in cause being compelled to financial support the child; likewise, the violation of a personal right generates the obligation to offer damages for the victim, as well as the violation of the real right.

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NEW ASPECTS REGARDING THE NONUNIFORM PRACTICE AND JUDICIAL PRECEDENT

Judge Doina ARTENE
Court of Appeal Suceava

Abstract

It is at our hand to see that we live in a world of uncertainty, a world that makes us more and more acutely to search and find landmarks and that finally would bring us security and would justly feed our legitimate hope.

In this context of great and multiple challenges and searches, jurisprudence has its role and functions, in fact different, in the evolution of human society, as it is today in different law systems.

The term of equitable lawsuit involves also the fact that the irrevocable dispensations given to law issues in previous litigations, but identical from solved law issues, have an compulsory character in later litigations, otherwise the principle of la relations security - usually invoked in ECHR decisions - with the consequence of generating jurisprudential uncertainties and restoring the litigants' trust in the judicial system.

The Romanian judicial space, often warned and penalized by ECHR for jurisprudence discrepancies, irrespective if we call them conflicting solutions or nonuniform practice - scored an obvious progress by adopting the New Civil Procedure Code that wishes to be an answer to the challenges and exigencies imposed by the European Union institutions, but also to the legitimate expectations of the litigants.

Moto: „If I have seen further it is by standing on the shoulders of Giants"
Sir Isaac Newton

Formation of the large law families is not by far a spontaneous appearance, located in an precise historical moment, determined or, at least determinable, it is the finality achieved by an evolutional process, centered around some fundamental sources, called extremely suggestive in the doctrine as "reception processes"[354], who's mission was to enter different geographical areas and to mould different judicial systems according to certain rules and principles.

Traditional delimiting distinguishes between: the Roman-Germanic law family and the Anglo-Saxon law family. They are joined by the socialist law systems family and the religious or traditional law systems family.

[354] Mihai Bădescu, *Familii şi tipuri de drept (Law families and types),* Lumina Lex Publishing House, Bucharest, 2002, pp. 9-10

The world's judicial geography is marked even today by the two large law families (Roman-Germanic and Anglo-Saxon), their delimitation being made - usually - on the grounds of a historical criteria.

In time, this criterion proved its insufficiency, therefore other delimitation criteria were also claimed, one of these - of interest for this analysis - being the law sources hierarchy.

The term of jurisprudence included over time meanings with different tones. Without developing, we must say that in Rome, jurisprudence meant the activity of the legal advisor (unlikely, the practical one) and in time, the term would define both the legal decisions and the theoretical knowledge[355]. Otherwise put, jurisprudence means the solutions pronounced by courts with the imperative of observing the law science syntax.

The meaning it maintained until now in the continental law systems is the technical one, jurisprudence being regarded as the sum of the solutions given by the authorities making jurisprudence, especially the courts of law.

Specific to the Anglo-Saxon law system, the judge is placed in the position of law creator. Written law is here the exception, the supreme judicial force being concentrated in what is called judicial practice.

The solution pronounced in the case by the judge has the virtue to prevail for cases on the roll of inferior courts and in similar cases.

For the American law, emerged also from the same Anglo-Saxon source, the particularities result on one hand from the way the judicial system is structured and operates (the states compose the USA federation, although they are - in principle - subject to the same rules, they have particular elements), and on the other hand, from the relation set between common law and written law. Although it does not apart from the judicial precedence rule as prime law source, the American law pays more attention to the written law.

The Roman-Germanic law systems promote the primacy of legislative process and its creation, here the highest judicial significance law source being the law. This system got over time thru several significant stages: the period of adoption of Constitutions, the period of codifications and finally, the period of adopting the International Treaties.

The systems that would embrace the socialist doctrine, emerged from the Roman-Germanic system, therefore, the judicial norm elaborated by the legislator, general and compulsory, continued to constitute the basic element of law, its authority being often stretched to extreme, being notorious that history noted situations where the norm itself would be a platform for unjust actions, in the name of the law would be committed any acts, even injustice. Today, the former socialist

[355] Sache Negulescu, *Introducere în dreptul civil (Introduction to civil law),* Lumina Lex Publishing House, Bucharest, 2001, p.25

countries, as a result of the decisive socio-political transformations brought by the revolutions that marked the recent history, aim to claim their originary specific, testing a return to the matrix and implicit a reintegration in the Roman-Germanic law family.

We must consider also the law systems grouped in: philosophical-religious systems (Moslem law and Hindu law) and the traditional systems (Chinese and Japanese law). [356]

First of them are characterized by a pronounced religious influence, and for the second category, characteristic is the idea of harmony, of peace obtained by peaceful way, addressing the Justice being the extreme and unwanted solution.

The final of this short incursion brings the conclusion that jurisprudence cannot be ignored

The end of this brief forays conclude that case law cannot be ignored , because it exerts a compensatory function in any legal system (for the continental - its role being to give elasticity to the law became too rigid by the written and inflexible laws, and for the Anglo-Saxon, to limit the judge's freedom).

Theorists of law, in recent writings, highlights a more blur of the contrast between the two law families[357], the Roman-Germanic legal systems apply to judicial practice as additional source of law, while the Anglo-Saxon law, apply to law as additional source of law.

In the same context of evoking of the dynamics of today's world realities one of the controversial issues is also the one of the legal system of jurisprudence as a source of law, in the new legal order of the European Union.

With reference to the jurisprudence of the Court of Justice of the European Union (CJEU), it combines the features of the Roman-Germanic legal system with the Anglo-Saxon one, being framed in hierarchy of community sources, among the unwritten sources of the union law.

The law creating legal effects of the CJEU jurisprudence and imparting an own specific to communitarian jurisprudence, began with the judgment in Da Costa case. Since then, the authority of the Court decisions was enhanced, since they became compulsory national courts and initiated what is in fact a system of judicial precedent. Although, as noted, the practice of the Court approached the doctrine of judicial precedent - and according to it, the decisions are the main source of law, the Roman-Germanic law specific - on which the Court relied - still coexist

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[356] Romul Petru Vonica, *Introducere generală în drept (General introduction to law),* Lumina Lex Publishing House, Bucharest, pp.222 and next.

[357] Sofia Popescu, *Statul de drept în dezbaterile contemporane (Rule of law in contemporary debates),* Romanian Academy Publishing House, Bucharest, 1998, pp.157-160

because in the reasoning of a decision, the Court can anytime reconsider the created jurisprudence[358] („revirement de jurisprudence").

What is the situation - in terms of the issues analyzed - in Romanian law?

According to Art. 20 of the Constitution, the provisions on citizens' rights and freedoms must be interpreted in accordance with the covenants and other treaties Romania is a party to. As Romania is a party to the European Convention on Human Rights, ECHR rulings are binding on the Romanian courts.

The High Court of Cassation and Justice in its jurisprudence valued the ECHR jurisprudence and has shown that it is for the national judge to appreciate - on the one hand - according to Art. 20 of the Constitution on whether the priority of the treaties regarding fundamental human rights to which Romania is a party, and on the other hand, within the meaning of Art. 148 (2) of the Constitution concerning the compatibility and consistency of national rules with Community regulations and jurisprudence.

Invoking the same ECHR jurisprudence, jurisprudence uncertainty is likely to reduce the confidence of litigants in Justice and is contrary to the principle of legal certainty as an essential element of the rule of law.

Ensuring of the uniformity character of judicial practice is required also by the constitutional principle of equality of citizens before the law and hence of the judiciary authorities.

ECHR judgment in the case Beian v. Romania[359] sounded the alarm on the contrary jurisprudence developed by the High Court of Cassation and Justice in the same period and in similar cases, and was explicitly sanctioned in the disposition of that judgment. Considerations of ECHR jurisprudence show that the differences are, by their nature, the inert consequence of any legal system based on a number of courts of first instance having jurisdiction within their territorial area, but the role of a Supreme Court is precisely to adjust these jurisprudence contradictions. It was also pointed out that this practice is in itself contrary to the principle of legal security, which is implicit in all articles of the Convention and constitutes one of the fundamental elements of the rule of law.

Responding to these exigencies, the New Civil Procedure Code provides a series of links and tools to remove the jurisprudence uncertainty.

Thus, Title III of the New Civil Procedure Code "Provisions ensuring uniform judicial practice" includes a series of provisions that expand the scope of persons with duties in the notification of HCCJ to pronounce judgments on legal issues resolved differently by the courts of law, and in Chap. II of the Title is regulated the procedure "Referral of HCCJ in pronouncing a ruling prior to unraveling the issues of law" (Art. 519-521 Civil Procedure Code), in which

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[358] *Buletin de informare legislativă (Legislative of legislative information) 2/2012*, pp.2-7

[359] ECHR Decision of 6 December 2007 in the case Beian v. Romania, published in the Official Gazette, Part I no. 616 of 21.08.2008

respect increased the competencies of the panel of judges of the HCCJ, the appeal courts or first instance courts, vested to finally solve the case, which finds that a question of law on which the resolution of the case relies on, has not been unraveled by the HCCJ, may request the HCCJ to pronounce a decision by which to give a principle solution to the law issue for which it was referred.

The new abovementioned procedural provisions provide that absolution given to the law problem as is mandatory for the courts as of the publication of the decision in the Official Gazette of Romania, Part I with the specification laid down in Art. 521 (3) sentence I of the Civil Procedure Code.

Different from these procedures, and the party concerned in a dispute has a handy procedural means adequate for obtaining an identical ruling/solution, which is "the exception of res judicata authority" (article 430-435 the Civil Procedure Code).

In the drafting of the old Civil Procedure Code is reflected "the power of judged matter" – article 166 of the Civil Procedure Code, the phrase that the new Civil Procedure Code no longer takes over, what we want to believe that the new regulation has not denied the concept of res judicata.

In the context of doctrinal[360] arrangements for defining the concepts of "res judicata authority" was revealed that the effect of "res judicata" of a judicial decision has two meanings: stricto sensu - the authority of a final decision (bis de eadem) which makes it impossible to determine a new dispute between the same parties for the same object with the same question (exclusivity) and lato sensu-"the power of final decision (res judicata) which implies that the decision has a conclusive presumption that expresses the truth, and that is not contradicted by a another judgment (mandatory).

In other words, the requirements for the invocation of a judicial resolution of an irrevocable legal issues it is not necessary that the triple identity of parties, object and cause, but only proof of identity is required between the issue and the matter was settled irrevocably inferred, the Court judgment is being held to express the same solution, because otherwise it would reach the res judicata breach situation component of the power of final decision.

In the same context of the Romanian legal realities, it is interesting to note that lifting the previous jurisprudence of this Court determined that the latter (judicial precedent) to have the power of a normative act.

There are controversies generated by current amendments to law No. 193/2000 relating to unfair terms in contracts concluded between consumers and

[360] *Revista de note şi studii juridice/august 2011 (Legal notes and studies magazine/August 2011)* - Imposibilitatea de a contrazice hotărârile irevocabile constituie argumente şi instrumente pentru asigurarea practicii unitare a instanţelor" ("Impossibility to argue against irrevocable decisions are arguments and instruments to ensure the uniform practice of the courts") – P.Piperea

traders-to be reissued to take effect with the code of civil procedure (15 February 2013) but have been postponed to July this year. They shall prescribe that where a right has been established in court as being abusive to be removed from all contracts in which it is found.

Recent decisions handed down by the Court of appeal[361], jurisprudence surprising solutions with regard to the issue of erga omnes effect of judgments from the finding of unfairness of a clause in a contract of adhesion.

In the context of this review of judicial precedent that in some special circumstances has the power of normative act, also enlist the provisions of Article. 23 of Law no. 554/2004 on administrative law ("Final and irrevocable court decisions annulling all or part of a normative character administrative act are generally binding and effective only for the future. They shall be published upon reasoning, at the request of courts, in the Official Gazette of Romania, Part I, or, where applicable, in the official gazettes of the counties or of the City of Bucharest, being exempted from paying publication fees for").

And for this, the interest for publishing a final judgment is public and is based on the need for other persons affected by the provisions of the canceled administrative act to be aware that the administrative act was issued under conditions of illegality, was canceled and can request damages under common law[362].

The examples could continue also with the litigations in the field of reimbursement of first registration / pollution taxes, where the jurisprudence is absolutely uniform.

FINAL CONSIDERATIONS

The presented analysis did not finish all aspects which form such a complex set of problems.

The intention was that of outlining some of the features of the great law systems and of presenting a few definite problems, which the Romanian legal system faces, from the perspective of the approached theme. It is obvious that the importance of the legal practice should not be considered absolute (Vladimir Hanga: „if there were only jurisprudence practice, the law should reduce to a simple casuistry […] which eliminates the element of legal security"[363]), but by keeping balance, its role should not be ignored.

The European Commission presented a new comparative instrument to promote some efficient legal systems in the European Union. „The European

[361] Dacian Cosmin Dragoş, *Legea contenciosului administrativ – Comentarii şi explicaţii*, Ed.2, Bucharest, Edit C.H.Back, Bucharest, 2009, pp.332-334
[362] Vladimir Hanga, *Dreptul şi tehnica juridică,* Edit. Lumina Lex, Bucharest, 2000, p.27
[363] Vladimir Hanga, *Law and legal technique,* Publishing House Lumina Lex, Bucureşti, 2000, p.27

instruments regarding the legal systems" offer objective, reliable and comparable information, about the legal systems in the member states of the European Union.

„The attractiveness of a country to get investments and the economic activity is, without any doubt, stimulated by the existence of an independent and efficient legal system. This is the reason why it's important that the court decisions should be predictable, pronounced in due time and they should have an executor character, as well as why the national legal reforms became an important structural component of the economic strategy of the European Union. The new European list regarding the legal systems shall act as an early warning system, supporting the European Union and its member states in their efforts concerning a high degree of efficiency of the legal system for the service of our citizens and of our enterprises." – Vice-president Viviane Reding, EU officer of justice.

„O high quality, independent and efficient justice is essential for a business environment, which is favorable for growth. The new List shall support the member states in the consolidation of the national legal systems, increasing their efforts of stimulation of investments and creation of work places. " – Olli Rehn, vice-president of the European Commission and the officer for economic business and EURO currency.[364]

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[364] March 27, 2013 – publishing, by the European Commission, of the Communication regarding the List related to legal systems in the EU,

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THE INTERNATIONAL CONFERENCE
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RECRUITMENT AND SELECTION OF JUDGES IN COMPARATIVE LAW

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Abstract

Due to the fact that the body of judges must always be formed of the best jurists, because of the social importance of judges, the democratic states offer a great importance to the process of recruiting and selecting the magistrates, as well as to the authorities invested with powers in this area, by establishing the principles and methodology of these two processes essential in the function of the judicial system/ judiciary. The present study aims to briefly analyze three means of recruitment and selection of magistrates reflected in different judicial system of the world.

Key words*: magistrate, recruitment, selection, comparative law.*

The General Assembly of the United Nations, considering the need to offer special attention to judges in the justice system and to the importance of their selection, training and professional behavior, approved by Resolutions No 40/32 of 29 November 1985 and 40/146 of 13 December 1985 the Basic Principles on the Independence of Judiciary, adopted by the 7th United Nations Congress. The Member States shall ensure and promote the independence of justice, by inserting these principles in their national legislation and practice.

According to these principles, the "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory" (Pt. 10). "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience" (Pt. 13)[365].

[365] The Resolutions No 40/32 of the 29 November 1985 and 40/146 of 13 December 1985 on the Basic Principles on the Independence of Judiciary, adopted by the 7th United Nations Congress, are available http://www.hjpc.ba/dc/pdf/Basic%20Principles%20on%20the%20Independence%20of%20the%20Judiciary.pdf

In order to guarantee a proper administration and in accordance with these basic principles, the comparative law knows different systems regarding the recruitment and selection of magistrates, judges and prosecutors. The recruitment and selection, as well as the methods applied depend on the political conceptions existing in a certain society, on the political freedoms, behaviors, as well as on tradition.

In comparative law there are three main systems of recruitment and selection of judges, namely:

- Appointment by the executive power
- The election of judges
- Recruitment of judges by the magistrates' body

The appointment of judges by the executive power is a system that functions in a large number of states, though such system creates many shortcomings by its involvement in the recruitment and selection of the executive power of the state.

This system is used exclusively in countries such as Argentina, where all judges are appointed by the chief of the executive with the approval of the Senate or in Australia, where the judges of the Supreme Court and other tribunals created by the Parliament are appointed in the Council by the Governor-General of Australia, for life[366].

Also in Sweden, permanent judges are appointed by the Government. As a rule, a permanent judge cannot be removed from his position only in the cases stated by the investment act issued by the Government. In order to become judges, the candidates must have a Master Degree in Law (L.L.M). Most persons appointed as judges have a career in this area, activating as judicial assistants after graduation, for two years, in a district or regional court. After that, usually, they submit their candidature for the position as reporting officers attached to a court of appeal or to an administrative court of appeal. After one year of practice in such courts, the trainee judge is employed for at least two years in a regional or administrative county court. After that he will attend an internship for at least one year in a court of appeal or in an administrative court of appeal, during which the judge shall be part of the panel of judges. After this probation period the judge is appointed as associate judge[367].

In the United States of America this system of appointing judges by the executive power is only partial, judges from federal courts and from the Supreme Court of Justice being appointed by the head of the state with the approval of the

[366] Leș Ioan, *Instituții judiciare contemporane*, C.H. Beck Publishing-House, Bucharest, 2007, p.177.
[367] https://e-justice.europa.eu/content_legal_professions-29-se-en.do?member=1

Senate from the graduates of law schools[368]. In the Member States, judges are not, often, graduates of law schools, demand requested for all federal judges, and their selection and appointment procedures are different for each state. Thus, in Virginia, judges from the Supreme Court are elected by both chambers of the Parliament, while in Florida and Nebraska the judges are appointed by the Governor.

In Germany[369], the system of appointing judges by the executive power coexists with the system of electing them, mentioning the fact that beside professional judges, who are licensed in law, there are the assessors of law working in commercial and labor tribunals, title held by graduates of law who have passed the second of the two examinations qualifying for a career in a legal profession.

In France, most of the magistrates are recruited by competitive examination. In order to take the "first competitive examination", which is open to students, the candidates must have a diploma confirming that they have had at least four years of further education, up to the standard of a master's degree. Candidates who passed the competitive examination are appointed as judges' assistants, and they then receive the same training given by France's national school for the judiciary (ENM). There are also possibilities for entering the judiciary by direct recruitment. At the end of their training at the ENM, the judges' assistants are appointed, by decree, to a jurisdiction to which they are posted[370].

In Great Britain, judges are appointed by the Crown and do not attend the classes of an institution such as the French national school for the judiciary (ENM) or as the Romanian National Institute for Magistracy. They are recruited among lawyers (barristers) with at least 7 years of experience[371]. The statute of judges is different depending on the court where they perform their activity. Thus, judges from the House of Lords and from the Courts of Appeal are appointed with the approval of the Prime-Minister, who also requests approval from the Lord Chancellor. In order to be appointed, these judges must have experience as lawyers for at least 15 years and must have been judges at the Supreme Court. Judges from the High Court can be appointed only based on the approval of the Lord Chancellor, having at least 10 years as lawyers. Judges from the district courts are appointed by the queen with the approval of the Lord Chancellor, being recruited among lawyers with at least 10 years of activity.

In Italy, judges exercise jurisdiction and are divided into career judges (*togati*), who are recruited by competition and are public officials, and honorary judges (justices of the peace, honorary trial judges and supplementary honorary

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[368] Burciaga J., *An independent judiciary on the protection of liberty*, in *I Jornadas Internacionales de derecheo comparado sobre los sistemas juridicos contemporaneos*, I.D.C. Valencia – Venezuela, 1992-1993, p. 120

[369] https://e-justice.europa.eu/content_legal_professions-29-de-en.do?member=1

[370] https://e-justice.europa.eu/content_legal_professions-29-fr-en.do?member=1

[371] Leș Ioan, *op. cit.*, pp. 566-572

judges), who exercise such powers on a personal and temporary basis without being members of the ordinary judiciary. They are appointed by the General Council of the Judiciary on the basis of an assessment of their qualifications[372].

As a conclusion, we can state that regardless of the elected recruitment and selection procedure, each state has a single purpose and namely finding those judges to ensure competency, independence and impartiality, which every person expects from courts and judges who are entrusted with the protection of his rights. The judge has been and will remain the central pillar of any democratic system of justice, being the embodiment of all virtues necessary for the act of justice.

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[372] http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ita_en.htm

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LA PREVALENCE DE L'INTERET SUPERIEUR DE L'ENFANT EN JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME

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Child's right of growing together with his parents is being recognized since his birth, so any restriction of contacts between parents and children is, in principle, considered an interference with the right to respect for family life. Most of violations of this right were submitted to the European Court of Human Rights (ECHR) in its different cases. The most common case-law is about separating children from his parents. We have to do mention here about the prohibition issue of parental rights as criminal penalty, although in Romania, it is more a moral sanction aimed at punishing the condemned and less child welfare.

Therefore, the child's interest must be regarded as paramount and only a very unworthy behaviour can lead a person to be deprived of his parental rights in child's best interest.

Not to violate Article 8 of the European Convention on Human Rights, the separation of child from his parents must be thoroughly justified for a legitimate purpose, justified by the protection of child's health, whose development was threatened by his family.

Key-words: *l'intérêt supérieur de l'enfant**,** European Court of Human Rights, the right to respect for family life, parental rights, protection of child's health.*

On a fait observer d'analyse de la pratique de la Commission Européenne des Droits de l'Homme et de la Cour Européenne des Droits de l'Homme que toutes les affaires concernant les mineurs sont subordonnés á l'intérêt supérieur de l'enfant, principe qui prévaut dans toutes les décisions. Le système européen de protection des droits de l'homme instauré par la Convention pour la protection des droits de l'homme et des libertés fondamentales (CEDH) et développé par la Cour Européenne des Droits de l'Homme dans sa riche jurisprudence est pleinement applicable aussi dans les cas avec des mineurs.

La Cour Européenne des Droits de l'Homme accorde une attention particulière au droit à la vie privée et familiale, en prononçant en particulier sur les relations entre parents et enfants. La Cour a déclaré que, pour un enfant le fait de vivre avec son parent ou avec ses parents est un élément essentiel de la vie

familiale, pendant que le placement dans un établissement d'assistance sociale constitue une atteinte à la vie familiale des personnes concernées. Par conséquent, la Cour Européenne des Droits de l'Homme estime que la prise de la mesure de placement doit être justifiée par un intérêt légitime, qui doit apparaître comme une garantie de respect et de protection des droits de l'enfant.

Ainsi, pour ne pas constituer une ingérence dans le droit à la vie privée et familiale, le placement doit être justifiée par l'intérêt supérieur de l'enfant. L'état ne doit pas remplacer les parents dans l'exercice de leurs droits et obligations légales et doit également assurer la réinsertion de l'enfant dans sa famille naturelle. Il est donc nécessaire que les parents entretenir des liens personnels avec leur enfant pour qui on a ordonné le placement.

La passivité de ceux qui sont contraints de prendre des mesures d'appropriés de l'enfant, en sachant ou qui devraient connaître la situation de risque que présente son milieu familial est, dans la jurisprudence de la Cour Européenne des Droits de l'Homme, un manquement d'obligation positive de l'État de fournir assistance et protection[373]. Ainsi, dans la Cause Z et A contre la Grande-Bretagne, la Cour a constaté la violation de l'art. 3 de la Convention, qui prévoit que "Personne ne sera soumis à la torture ni. aux peines ou aux traitements inhumains ou dégradants", par le fait que les autorités britanniques n'ont pas pris pendant 4 ans les mesures nécessaires pour protéger les 4 enfants contre les actes de mauvais traitements á qu'ils ont été soumis à la maison familiale.

Par conséquent, en même sens, on a retenu deux cas de mauvais traitement appliqués au mineur, dans lesquels la Cour a refusé d'appliquer les dispositions de l'art. 3 de la Convention sur l'interdiction de la torture. Ainsi[374], dans le cas Grace Campbell contre la Grande-Bretagne (1976)[375], Mme Grace Campbell avait un enfant de 9 ans qui fréquentait une école publique où les châtiments corporels n'étaient pas interdits. Les responsables scolaires ont refusé de donner des assurances que cette peine ne sera jamais appliquée à son fils. Une autre plainte, adressée de Mme Cosans contre la Grande-Bretagne (1976), avait un objectif similaire: le fils de Mme Cosans, âgé de 15 ans a été exclu temporairement, en Septembre 1976, de l'école qu'il fréquentait, parce qu'il avait refusé de se soumettre à un châtiment corporel après avoir admis qu'il avait escaladé le mur de l'école pour se retourner à l'école sur le chemin le plus court.

Dans ces espèces, la Cour a refusé d'appliquer les dispositions de l'art. 3 de la Convention sur l'interdiction de la torture, mais elle a retenu la violation des

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[373] Emese, Florian, *Protection du droit de l'enfant*, 2eme édition, Ed. CH Beck, Bucarest, 2007, p. 20.
[374] Duculescu, Victor, *Protection juridique du droit de l'homme – moyens intérieurs et internationales*-, Ed. Lumina Lex, Bucarest, 1998, p.119-120.
[375] Conseil de l'Europe, Bilan de la Convention Européenne des Droits de l`Homme, 1954-1984, Strasbourg, 1985, p. 85.

dispositions de la deuxième partie de l'art. 2 du premier Protocole additionnel de la Convention qui prévoit que l'État, dans l'exercice des fonctions qu'il assumera dans l'éducation et l'enseignement, doit respecter le droit des parents d'assurer cette éducation et cet enseignement, conformément à leurs convictions religieuses et philosophiques".

Ainsi, dans des circonstances particulières, pour des raisons différentes, la croissance et le développement de l'enfant avec ses parents peut-être en danger, c'est pourquoi on peut s'imposer la prise par les pouvoirs publics de la mesure de le confier aux institutions de soins spéciaux[376].

Concernant la mesure provisoire qui a été prise en ce qui regarde le placement des enfants, on a mis la question dans quelle mesure a-t-elle été justifiée, car dans ces cas, le recours à de telles mesures urgentes s'impose en fonction de l'actualité de danger imminent[377]. La Cour a conclu que la mise des mesures provisoires de garde des enfants et de retrait du droit de garde des parents n'a pas été justifiée par une urgence particulière, et comme tel, ces mesures devraient prises après l'audience des parents et des enfants.

Le droit au respect de la vie familiale entraîne en charge de l'État, en termes de séparation des parents d'enfants, l'obligation positive de prendre des mesures nécessaires pour restaurer le lien entre un parent et son enfant. Protéger le droit à la vie privée et vie familiale, la Cour Européenne des Droits de l'Homme a considéré comme une violation de la loi, toutes ces mesures prises par les États et inscrites dans la législation intérieur par qui une personne est empêché de maintenir efficacement des relations spécifiques de la vie familiale, avec d'autres membres de la famille. Par conséquent, la question de l'existence ou d'inexistence de la vie familiale est une question de fait, qui suppose l'existence, dans la pratique des liens personnels étroits entre eux.

Dans plusieurs de ses décisions, parmi la décision[378] donné dans la cause Marckx contre la Belgique, la Cour a interprété le texte[379] de la Convention d'un sens très large, aux États revenant l'obligation d'offrir à un enfant hors mariage et á

[376] Bârsan, Corneliu, *Convention Européen des Droits de l'Homme*, Vol. I, Ed. CH Beck, Bucarest, 2005, p. 158-161.
[377] Popescu, Corneliu-Liviu, *Jurisprudence de la Cour Européen des Droits de l'Homme (2004*), Ed. C.H. Beck, Bucarest, 2006, p. 84.
[378] Cour EDH, cause Marckx c. Belgique, décision de 13 juin 1979.
[379] Article 8 alin. 2 stipule que «*Ne pas admettre aucune ingérence d'une autorité publique dans l'exercice de ce droit, sauf la mesure où cette ingérence est réglée par la loi et si elle est une mesure qui, dans une société démocratique, est nécessaire pour la sécurité nationale, la sécurité publique, pour le bien-être économique du pays, la défense de l'ordre et la prévention des infractions, la protection de la santé ou de la morale, ou pour la protection des droits et des libertés d'autres* ».

sa mère une vie familiale normale, mais aussi l'obligation de prendre toutes les mesures nécessaires pour assurer la réunion d'un parent avec son enfant.

La Cour a prévu la mesure de l'intégration de l'enfant dans sa famille depuis de sa naissance, par l'établissement d'affiliation. Dans ce sens, on doit avoir en vue que le droit d'établir la filiation appartient aux enfants du mariage, mais aussi aux enfants nés hors mariage, sur le principe d'égalité entre les enfants. La Cour consacre le principe de l'égalité des droits des enfants, indépendamment de la nature de leur affiliation, ajoutant que l'art. 8 a valeur à la fois pour la vie privée de la famille "naturelle", mais aussi pour la famille «légitimes». En outre, le droit au respect de la vie de famille implique le fait que l'état peut avoir d'accomplir des obligations positives.

Donc, on doit actionner de telle manière pour permettre aux personnes intéressées de mener une vie familiale normale et de se protéger de toute discrimination fondée sur la naissance[380]. La Cour a considéré,aussi, que pour la protection de l'enfant et de la famille traditionnelle ne doit pas recourir aux mesures qui peuvent porter atteinte à la «famille naturelle», parce que l'enfant «naturel» n'a moins intérêt que l'enfant légitime en constatation d'un lien de famille. La Cour a considéré que la distinction entre les enfants "naturels" et les enfants "légitimes" est manqué d'une justification objective et rationnelle.

D'autre part, la Cour, ayant en vue l'extension juridique de la famille Marckx, a constaté que la vie de famille inclut inclusivement les relations entre les proches parents, précisant en même temps le fait que le respect de la vie familiale naît l'obligation de l'Etat d'agir de telle manière pour permettre le développement normal de ces relations. La Cour a soutenu ce point de vue par la motivation que le développement de la vie de famille d'une mère célibataire et de son enfant qu'elle l'a reconnu peut être empêcher si cet enfant n'entre pas dans la famille de la mère et si l'établissement de la filiation ne produit pas des effets que entre les deux.

En jurisprudence de la Cour, on a constaté que la plupart des interférences vise la séparation de l'enfant de ses parents, par la mesure spéciale du placement, comme par exemple : l'interdiction des droits parentaux[381], la confiance á l'autre parent de ses droits parentaux[382], le retrait[383] ou la déchéance des droits parentaux, le transfert de la garde de l'enfant aux autorités de protection spéciales, la suspension de l'autorité parentale et la séparation temporaire des enfants de leurs

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[380] Berger, Vincent, *Jurisprudence de la Cour Européenne des Droits de l'Homme*, deuxième édition revue et augmentée, L'Institut Roumain pour les Droits de l'Homme, Bucarest, 1998, p. 320.

[381] Cour EDH, cause Sabau et Parcalab contre la Roumanie, pétition no 45672/99, décision de 28 septembre 2004.

[382] Cour EDH, cause Ivano Raffaelli c. Italie, décision de inadmissibilité de 28 octobre 2004.

[383] Cour EDH, cause Kutzer c. Germanie, décision de 26 février 2002.

parents, la limitation du droit á la visite etc. Bien que la Cour a considéré, dans certains causes, que la mesure du placement de l'enfant c'est une ingérence dans la vie familiale[384], cependant, dans certains cas, celle-ci a sanctionné, en vertu de l'article 3 de la Convention[385], le fait que les autorités compétentes n'ont pas pris des mesures spéciales de protection, de séparation de l'enfant de l'environnement familial, si la situation l'exige.

Dans la cause Pini et Bertani et Manera et Atripaldi contre la Roumanie[386], les autorités roumaines ont refusé de mettre en exécution les jugements par qui a été admis l'adoption de deux mineurs, comme conséquence du fait que celles-ci ont refusé de partir en Italie. La Cour a décidé que la relation établie sous une adoption réelle et non fictive, entre l'adoptant et l'enfant adopté "serait considérée comme suffisant à venir sous la protection de l'art. 8".

La Cour de Strasbourg a noté que l'article 8 implique le droit du parent de recevoir des mesures appropriées de la part de l'Etat pour être á coté de son enfant et aussi l'obligation des autorités nationales d'ordonner de telles mesures. Toutefois, étant donné le refus des mineures de se déplacer en Italie, et surtout le principe de l'intérêt supérieur de l'enfant, principe concrétisé dans une déclaration précieuse de la Cour rendue dans une autre cause, conformément á qui «l'adoption signifie trouver une famille pour un enfant et pas un enfant pour une famille » [387], la Cour a conclu que l'article 8 n'a pas été violé.

Dans la cause Sabou et Parcalab contre la Roumanie[388] - L'interdiction des droits parentaux- en invoquant la protection de l'art. 8 de la Convention, l'un des plaignants, Sabou, a invoqué le fait que, par l'interdiction de ses droits parentaux on a porté une grande atteinte de son droit au respect de la vie familiale, parce que cette mesure on a été prise sans égard à l'intérêt supérieur de l'enfant. En conséquence, la Cour a constaté que l'interdiction des droits parentaux a été une ingérence dans le droit au respect de la vie familiale, bien que le Gouvernement avait décidé cette ingérence comme ayant un but légitime, à savoir la défense de la sécurité, de la moralité et de l'éducation des mineurs. Dans ces circonstances, la Cour a considéré que n'a pas été démontrée que le retrait absolu des droits parentaux du premier requérante serait une nécessitée primordiale aux intérêts de l'enfant, et que, par conséquent, poursuit un but légitime, à savoir protéger la santé, la moralité ou l'éducation des mineurs. Par conséquent, l'article 8 de la Convention

[384] La Cour a montré que pour un parent vivre ensemble avec son enfant c'est essentielle pour la vie familiale.
[385] L'article 3 de la Convention Européenne des Droits de l'Homme stipule que «Personne ne peut être soumis à la torture, ni aux peines ou traitements inhumains ou dégradants", information accessible sur le site de la Cour Européenne des Droits de l'Homme.
[386] Décision de la Cour EDH de 22 juin 2004.
[387] Décision donnée dans la cause Fretté c. France, no. 36515/97, alin. 42, CEDH 2002-I.
[388] Cour EDH, Cause Sabau et Parcalab c. Roumanie, décision de 28 septembre 2004.

a été violé en ce qui concerne le premier requérant.

Évidemment, dans le cas de l'interdiction des droits parentaux est dictée par l'intérêt de l'enfant, en raison des abus de toute nature, exercés par les parents sur lui, est absolument justifié de prendre une telle sanction. En ce qui concerne la prééminence de l'intérêt de l'enfant, une décision pertinente est celle donnée dans la cause Gnahoré contre la France[389] - La séparation de l'enfant de ses parents en transgressant le principe de l'intérêt supérieur de l'enfant - la Cour estimant que l'infraction pour laquelle a été condamné le requérant était totalement étrangère de l'autorité parentale, donc sans être mis la question d'une manque de soins ou de mauvais traitements de celui-ci appliqués à ses enfants.

En ce qui concerne la mesure radicale consistant en cessation totale de tout lien entre les parents et l'enfant, la Cour a jugé que cela a signifié que l'enfant s'est rompu de ses racines, n'étant justifiée que dans des circonstances très exceptionnelles, ou par un besoin primordial, qui se réfère á l'intérêt supérieur de l'enfant[390]. Pour déterminer si le placement était nécessaire, la Cour a montré que la notion de nécessité implique l'exigence que l'ingérence correspond à un besoin spéciale et elle doit être proportionnelle au but poursuivi. A cet égard, la Cour a mentionné aussi le fait que la simple possibilité de placer l'enfant dans un meilleur environnement pour son croissance n'est pas suffit pour prendre l'enfant de ses parents biologiques, mais il doit y avoir d'autres questions qui doivent justifier la nécessite d'ingérence dans la vie familiale[391].

Dans la décision Gnahoré contre la France, la Cour a jugé que dans les causes où est prise la mesure de séparer le parent de son enfant, l'intérêt de l'enfant présente deux aspects. D'une part, cet intérêt suppose inclusivement garantir pour enfant une évolution dans un environnement stable et sain, mais l'article 8 ne pourrait aucune manière autoriser à un parent de prendre des mesures préjudiciables à la santé et le développement de l'enfant.

D'autre part, l'intérêt de l'enfant suppose aussi maintenir le lien entre lui et sa famille, sauf dans le cas, comme on a mentionné ci-dessus, le comportement honteux. Par conséquent, l'intérêt de l'enfant exige que seulement dans des cas exceptionnels, de recourir à rompre le lien familial et le maintien des relations personnelles, et, quand il est possible, "reconstituer" la famille a "bon moment". Toutefois l'applicabilité du principe de l'intérêt de l'enfant dépend de la nature du lien parent-enfant, dans le sens que la protection offerte par la Cour est limitée au cas où les liens familiaux sont très faibles.

La cause Olsson contre Suède[392] - Prendre soin d'enfants par l'autorité publique et le placement dans les foyers d'accueil – invoquant l'art. 8 de la

[389] Cour EDH, Cause Gnahore c. France, décision no. 40031/98, par. 59 CEDH 200-IX.
[390] Cour EDH, cause Johansen c. Norvège, décision de 7 août 1996.
[391] Cour EDH, cause Kutzer c. Allemagne, décision de 26 février 2002.
[392] Cour EDH, Décision de 24 mars 1988.

Convention les épouses Olsson ont affirmé qu'on a été violé le droit au respect de la vie familiale, á la suite de la décision de prendre en soin des enfants, des façons d'exécution et des refus d'être suspendue.

La Cour a jugé que, bien que les mesures prises ont eu en vue un but légitime, à savoir protéger la santé ou la moralité, les droits et les libertés des enfants, mais ils étaient considérés comme une atteinte au droit au respect de la vie familiale. En ce qui concerne la modalité de mettre en pratique la décision de soins, la Cour a conclu que la mauvaise qualité des soins, accorde aux enfants dans les foyers d'accueil n'a pas été confirmée[393].

En outre, la séparation des deux frères, Hélène et Thomas, et leur placement loin de la maison des maris Olsson étaient une violation du droit au respect de la vie familiale par les restrictions imposées à leurs visites, qui ont empêché les réunions régulières des membres de la famille. Par conséquent, a été violé l'objectif final de réaliser la réunion de la famille, l'objectif qui devait avoir en vue par les autorités suédoises.

De lege ferenda, on a proposé que chaque décision doit prononcer par le respect du principe de l'égalité des parties dans le processus, en tenant compte non seulement des circonstances personnelles du défendeur, mais plus de position de la victime dans le processus quand elle est mineure. Par conséquent, la protection des mineurs victimes exigent une législation spéciale et spécifique depuis la phase de résolution d'une cause pénale, n'importe le stade où il est.

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[393] Berger, Vincent, *Jurisprudence de la Cour Européenne des Droits de l'Homme, deuxième édition, revue et augmentée*, L'Institut Roumain pour les Droits de l'Homme, Bucarest, 1998, p. 338.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

BREVE PRESENTATION DE L'APPARITION ET DE L'EVOLUTION DE LA LOI EN TANT QUE SOURCE FORMELLE DU DROIT ROUMAIN

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Résume

L'intérêt vis-à-vis de l'ancienneté de la loi comme source formelle du droit, de la manière dans laquelle elle a évolué tout au long de l'histoire s'explique par la place qu'elle occupe dans la hiérarchie des sources du droit. On ne peut pas ignorer les aspects historiques, car la place occupée par la loi dans le tableau des sources du droit est fonde surtout sur des causes historiques. La loi est, aujourd'hui aussi,- comme nous allons démontrer - l'une des principales sources du droit dans nore système juridique, vue, aussi, sa tradition.

Mots-clé: *loi, source du droit, fondement historique*.

En général, dans la doctrine[394] on montre qu'il existe deux modalités de fonder le droit et, implicitement, la loi: „la première consiste de trouver son raison dans l'histoire" et il s'agit d'une vision d'origine anglo-saxonne, et „ la deuxième consiste de lui trouver un fondement rationnel", vision rencontrée, en règle générale, chez les jusnaturalistes, s'agissant d'un fondement philosophique. Les deux modalités contribuent, de la même manière, pour relever le fondement d'un phénomène car, depuis toujours, l'histoire et la philosophie ont été en étroite liaison.

La loi persiste dans la théorie juridique et dans la conscience collective par ce qu'elle est fondée sur une tradition culturelle commune pour la majorité des Etats européens. La tradition culturelle trouve son origine dans la pensée grecque sur la loi (la notion philosophique du droit naturel), dans la tradition hébraïque (la loi divine, la loi - ordre) dont les références n'ont pas cessé d'encourager la pensée juridique, chez Saint Thomas et Hobbes ou Hegel. En fin, la conception sur la loi (La loi des XII tables et le Code de Justinien) a inspiré d'une manière directe les modèles juridiques de la famille «romano - germanique» parmi lesquels se

[394] Y. Ch. Zarka, *Le droit naturel moderne*, în „Naissances de la modernité", sous la direction d'Alain Renaut, Calmann - Lévy, 1999, p. 281.

trouve, aussi, le droit roumain. Les traditions philosophiques et historiques ont imposé l'image d'un législateur prestigieux et ont imprimé, d'une manière simultanée, une force à la loi qui confère de l'originalité à la tradition juridique de notre pays et des pays de la même famille.

Comme source du droit, la loi est apparue chez les romains sous la forme d'un accord entre le magistrat et le peuple, naît suite à l'accepte du peuple *(iubet)* de la proposition de règlementation faite par le magistrat (*rogat*), définie par Gaius, dans les «Institutions de Justinain » de la manière suivante: „*quod populus romanus iubet atque constituit*." Les premières lois romaines sont considérées les lois royales (*leges-regae*), votées pendant la période de la royauté par les assemblées curiates et rassemblées dans un recueil par le juriste Sextus Papirus, d'ou le nom de droit du Papirus (*Jus Papirianum*). Pourtant, la plus ancienne et importante loi romaine reste la Loi des XII Tables[395] qui, même s'il ne s'agit pas d'une oeuvre systématisée, mais d'un amalgame de dispositions civiles, pénales ou religieuses, représentant just une transposition en écrit des habitudes qui dominaient Rome, elle a représenté, pour une longue période de temps, la principale source du droit public et privé romain et la première codification, dans le sens d'une loi écrite.

Plus tard, la codification de Justinian commencée en 528 ap. J.-C, créée et connue sous la dénomination de *Corpus iuris civilis* ou le Code droit civil et qui comprenait les Digestes, le Code, les Institutions et les Noveles – est devenue la source d'inspiration et le modèle classique pour les théoriciens et les praticiens du droit pendant les siècles suivants[396].

Dans la période féodale, le droit s'est exprimé, surtout, sous la forme de la coutume et de la jurisprudence, mais, suite au développement des relations de production et de change, on a ressenti de plus en plus la nécessité de l'élaboration du droit écrit. Ont été élaborées des lois et des codes comme: le Code général Carolina de 1532 d'Allemagne, le Code maritime (1673) et le code commercial (1681) de France, le Code Caragea (1818) de notre pays, etc.

Avec le temps, la centralisation excessive du pouvoir entre les mains du monarque absolu a donné naissance à des nombreux abus, illégalités et à la transgression du droit. La réaction contre l'abus de pouvoir s'est concrétisée, dans les conditions de la victoire des révolutions bourgeoises, dans une attitude quasi - religieuse vis-à-vis à la loi (l'acte normatif): „Les textes avant tout" représentant la formule préférée de la bourgeoisie victorieuse. Cet aspect a déterminé la position de premier rang de la loi dans le système des sources du droit. La vaste action de codification réalisée pendant cette période a réduit le

[395] D. Iancu, C. Gălăţeanu, *Drept privat roman*, Maison d'édition de l'Université de Pitesti, Piteşti, p. 21.
[396] Vl. Hanga, *Drept roman*, Maison d'édition Argonaut, Cluj-Napoca, 2001, p. 51.

rôle de la coutume, et l'apparition en 1804 du Code civil français a été considérée comme une véritable „novation législative", moment qui représente, vraiment, les plus grand progrès dans la théorie et la pratique du droit[397].

En partant de ce moment, on assiste à une consolidation de la position de la loi dans l'ensemble des sources du droit qui reçoit de l'importance même dans le système juridique anglo-saxon. La tendance constante vers un droit écrit a connu une forte affirmation à l'époque moderne, avec l'apparition des premières constitutions, en tant que lois fondamentales et l'augmentation du nombre des codifications, suivant l'exemples napoléoniens de France et, surtout, dans le domaine du droit civil, commercial et pénal[398]. A un certain moment de leur évolution, la majorité des peuples du monde ont ressenti la nécessité de la codification de leurs coutumes, leur transformation dans des lois et le rassemblement des lois dans des codes. Ainsi, la légifération des coutumes et la codification ont représenté un progrès réel.

La loi, comme source du droit, a connu une évolution semblable dans notre pays aussi. Les premières règles de comportement peuvent être identifiées, comme chez les autres peuples, dans les moeurs, les coutumes, les traditions et la morale.

Pendant la période qui précède l'apparition de l'Etat, les relations sociales des géto-daces étaient régies par des normes de conduite sans caractère juridique, respectée volontairement par les membres de la communauté, mais une fois avec la naissance de l'Etat dace sont apparues, aussi, les normes juridiques. Certaines coutumes ont été sanctionnées par l'Etat et, aussi, des nouvelles règles juridiques, en concordance avec les réalités économiques et sociales, ont été édictées. Ainsi, à coté du droit non écrit, formé par les coutumes, a été élaboré, aussi, un système de lois qui n'ont pas représenté seulement une codification des coutumes car des nouvelles règles de droit ont été introduites, des règles qui contenaient „des ordres du roi"[399].

Après la conquête de la Dacie par les romains, le droit romain écrit est devenu applicable, à coté du droit local, en général non écrit, de la manière que, au début, les deux systèmes de règles juridiques – dace et romain – ont été appliqués en même temps. Ultérieurement, dans un processus de mélange et de réciproque influence, un nouveau système de droit est né – le système daco-romain.

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[397] N. Popa, *Teoria generală a dreptului*, Maison d'édition C.H. Beck, Bucureşti, 2008, p. 162.
[398] E. Paraschiv, *Izvoarele formale ale dreptului*, Maison d'édition C.H. Beck, Bucureşti, 2007, p. 39.
[399] E. Cernea, E. Molcuţ, *Istoria statului şi dreptului românesc*, Maison d'édition Universul Juridic, Bucureşti, 2006, pp. 15-18.

La règle écrite commence a être dénommée loi une fois avec l'apparition des codes écrits (*pravila*) dans le XVII-em siècle[400], codes considérés comme les plus importantes sources du droit écrit pendant la période féodale: „Le Livre Roumain d'Enseignement" et „La Correction de la Loi". Le Livre Roumain d'enseignement représente la première codification législative avec un caractère laïque de l'histoire du droit roumain, étant réalisée par le logothète Eustratie, à l'ordre du prince régnant Vasile Lupu et imprimée en 1646, et la Correction de la Loi a été imprimée en 1652 à Târgovişte, à l'ordre du prince régnant Matei Basarab, sous la dénomination de Le Grande Code (Pravila cea Mare).

Même si le peuple roumain, à cause des difficultés créés par les peuples expansionnistes ou migrateurs, a été obligé de vivre sur plusieurs territoires distincts, trouvés sous des administrations distinctes, autochtones ou étrangères, la vie juridique dans l'espace entier habité par les roumains a eu, toujours, multiples éléments communs, surtout dans le domaine du droit public et de la terminologie utilisée[401].

Un moment important dans l'histoire du droit roumain sous l'aspect de la systématisation et de la technique de réglementation juridique est marqué par les codifications réalisées jusqu'en 1821[402]. Ainsi, dans le Pays Roumain, il faut mentionner: le premier code de synthèse appelé *Pravilniceasca condică*, code sanctionné par le prince régnant et mis en application à l'ordre du Alexandru Ipsilanti en 1775, après Le Code (Legiuirea) Caragea, de 1818 et qui a été toujours un code général dans lequel on trouvait quatre codes spécialisés: civil, pénal, de procédure civile et de procédure pénale. Aussi, en Moldavie, ont été élaborés des loi ayant la même importance pour le droit roumain: Sobornicescul Hrisov, le 28 décembre 1785, sous la règne d'Alexandru Mavrocordat, suivi par le Code Calimach (Codica civilă a Moldovei – Le Code civil de Moldavie) élaboré dès 1813 à l'initiative du prince régnant Scarlat Calimach et appliqué jusqu'au 1-er décembre 1865.

La période 1821-1842 est caractérisée par la modernisation de la forme du droit par l'élaboration des nouveaux codes, plus complets que les précédents, ce qui marque le début d'un système législatif étendu. Le moment de référence de l'apparition du droit roumain moderne reste, portant, celui de l'adoption du Code civil de 1864, du Code pénal, du Code de procédure civile et du Code de procédure pénale. Ainsi a été créé, dans ses lignes générales, le

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[400] F. Negoiţă, *Introducere în istoria dreptului*, Maison d'édition TCM Print SRL, Bucureşti, 2005, p. 72.
[401] Al. Herlea, *Studii de istorie a dreptului*, vol. III, Maison d'édition Dacia, Cluj – Napoca, 1997, p. 16.
[402] Pentru o prezentare pe larg, a se vedea: D. Iancu, *Istoria dreptului românesc*, Maison d'édition de l'Université de Piteşti, Piteşti, 2010, pp. 39-48.

système de droit moderne qui a placé la Roumanie parmi les pays ayant la plus progressiste législation.

Pendant la période 1918-1936, un problème délicat a été l'unification législative, opération qui a duré long temps, pour certains domaines se prolongeant jusqu'à la période précédant le début de la deuxième guerre mondiale.

Dans la matière du droit constitutionnel, la Constitution adoptée le 1 juin 1866 est restée en vigueur jusqu'en 1923. En 1923 une nouvelle Constitution a été adoptée, étant imposée par la réalité de la création de l'Etat national roumain unitaire. Elle a consacré le régime parlementaire élu d'une manière démocratique et, aussi, les droit et les libertés des citoyens. Le 28 février 1938 a été adoptée une nouvelle Constitution, qui consacrait la dictature du roi et, en 1940, quand le roi a été forcé d'abdiquer, la Constitution a été suspendue, le législatif dissolu, les prérogatives du roi réduites et le président du Conseil de Ministres a été investi avec pleins pouvoirs. Après la deuxième guerre mondiale, on a adopté la solution de remettre en vigueur, avec quelques modifications, la Constitution de 1923, car les conditions n'étaient pas favorables à l'adoption d'une nouvelle constitution.

Ultérieurement, l'élaboration de la Constitution de 1948 se réalise dans le contexte de la proclamation de la République Populaire Roumaine, après l'abolition de la monarchie. Elle est suivie par la Constitution de 1952 qui consacrait l'augmentation du rôle de l'Etat dans tous les domaines de la vie socio-économiques, la législation adoptée sous l'empire de celle-ci favorisant l'expansion de la propriété de l'Etat et coopératiste, la suppression presque totale de la propriété privée, l'accentuation de la direction réalisée par un seul parti politique, la violation des droits et des libertés fondamentales des citoyens, en accentuant la répression pour des faits qui représentaient un péril seulement pour le système dictatorial instauré. En 1965 est adoptée une nouvelle Constitution ayant un contenu similaire avec la Constitution de 1952[403].

La révolution de 1989 a produit un changement fondamental au niveau du droit roumain, mais ce changement ne s'est pas produit tout d'un coup. La première étape a été représentée par l'adoption de la Constitution de 1991, ultérieurement d'autres actes normatifs de l'ancien régime étant remplacés dans la tentative de corrélation du notre système de droit avec celui existent dans les Etats européens développés, et, à présent, on assiste à une deuxième étape, elle de la réforme substantielle du droit privé roumain. Les transformations profondes subies par la société roumaine pendant les dernières années, l'intégration dans l'Union Européenne, l'engagement de réaliser l'harmonisation législative, l'existence au

[403] E. Paraschiv, *op. cit*., pp. 49-50.

niveau européen de la volonté de réalisation d'un Code civil européen et, aussi, l'impossibilité du Code civil de 1864 de réglementer les nouvelles valeurs sociales, culturelles, technico-scientifiques et économiques apparues suite à l'évolution normale de la société sont seulement quelques éléments qui ont imposé la nécessité de l'adoption d'un nouveau Code civil. Ainsi, en 2009, le Parlement de la Roumanie a adopté, par la Loi no. 287/2009, le nouveau Code civil, entré en vigueur le 1-er octobre 2011. On a intentionné que ce nouveau code soit un instrument moderne de réglementation des aspects fondamentales de l'existence individuelle et sociale, comprenant la totalité des dispositions concernant les personnes, les relations de famille, les relations commerciales et les relations de droit international privé, étant ainsi promue une conception moniste dans les rapports de droit privé, comme on peut le déduite de la consultation de l'exposé des motifs, de la manière de systématisation de la matière et des solutions lancées. Récemment est entré en vigueur le nouveau Code de procédure civile, et dans les années qui suivent on préfigure l'entrée en vigueur du nouveau Code pénal et du Code de procédure pénale.

Dans la droit actuel, quand on utilise la formule „la loi comme source du droit", il faut envisager le sens large du terme loi (celui d'acte ayant une force obligatoire) et non pas son sens restreint (l'acte normatif adopté, utilisant une certaine procédure, par le Parlement). La notion d'acte normatif comprend, premièrement, la loi élaborée par le Parlement (avant tout, la Constitution), mais son contenu ne s'y réduit pas. Il existe un système des actes normatifs. Dans le sens large et commun du terme, la loi signifie toute règle de droit obligatoire, en comprenant toutes les sources du droit (dans ce sens la coutume est, aussi, une loi, si elle est obligatoire)[404]. Donc, l'acte normatif, comme source du droit, comprend des normes général - obligatoires dont l'application peur se réaliser, s'il est nécessaire, par la force de coercition de l'Etat. Le système des actes normatifs est formé, à présent, par des: lois, décrets, arrêts et ordonnances du gouvernement, règlements et ordres des ministères, décisions et arrêts des organes administratives locales et, au cadre de ce système, la place centrale est occupé par les lois.

Toute cette incursion dans l'histoire de la loi roumaine nous permet de tirer la conclusion que, vue la tradition de notre système juridique, la loi reste encore l'une des principales sources du droit mais pas l'unique. Elles est complétée et interaction, comme, d'ailleurs, il est prévu expressément à l'art. 1 du Code civil en vigueur, avec les principes générales du droit, avec les usances et même avec la jurisprudence.

[404] N. Popa, *Consideraţii generale privind conceptul de izvor al dreptului*, dans „Culegere de studii juridice", Maison d'édition de Sitech, Craiova, 2009, p. 367.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

CONCLUDING A MARRIAGE CONTRACT WITH A FOREIGN ELEMENT

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Abstract

In the current context of an ever increasing number of marriages with a foreign element and taking into account the recent unification of private law in our legislation, the study of the conflict of lawson marriage proves to be quite convenient. As a rule, marriage is governed by the national law of the spouses, forming part of a person's civil status. Exceptionally and based on special stipulations, certain aspects can be regulated by laws from other nations.

Key terms: *engagement, marriage, foreign element, substantive conditions, formal conditions.*

1. INTRODUCTORY ASPECTS

Marriage reflects the political, social and religious particularities of each state. As such, there is a great diversity of legislations which coupled with the current increasing movement of people makes this element of personal status favourable ground for the advent and multiplication of conflicts between laws.

In a majority of European states, the legal act of marriage is exclusive to the law (Belgium, Switzerland, France, the Netherlands, Germany). However there are also legislations where it is exclusively religious (Greece and Muslim nations) or ones in which both civil and religious marriage have legal value thus permitting the spouses to opt for either or both, e.g. Brazil, Canada, Denmark Finland, Italy, Iceland, Peru, the United States, Sweden[405]. In our legal system, marriage belongs to the category of mutual agreements. This means that the parties can decide only whether the legal stipulations which form the legal status of marriage apply to them or not, without the legal possibility of modifying them.

In our legislation, the stipulations concerning conflicts between laws on family matters were in articles 11-38 of Law 105/1992, which at present can be found in articles 2585-2611 of the New Civil Code, with the articles from 2585 to 2602 constituting rules on conflict concerning marriage.

[405]O. Ungureanu, C. Jugastru, A. Circa, *Manual de drept internaţional privat*, Ed. Hamangiu, Bucureşti, 2008, p. 214.

2. WHAT LAW APPLIES IN CASES OF ENGAGEMENT WITH A FOREIGN ELEMENT?

The engagement is nothing more than the mutual promise of marriage, made as a rule in festive circumstances. It cannot be classified as a pre-contract agreement, because there is no conceivable obligation to conclude a marriage. Therefore, the freedom to marry or not to marry prevents any such legal obligation[406].

There is nothing new about regulating engagements in our legal system given that in our older legal texts, such as the Calimach, Caragea and Donici Codes, it was considered a pre-contract agreement with the subsequent contractual obligation to marry. Following the example of the French Civil Code, the Civil Code of 1864 and the subsequent Family Code no longer regulated engagements. Nowadays, the current Civil Code dedicates Chapter I of Title II "Marriage", Tome II to engagements, which it regulates as a juridical situation preceding marriage.

Article 266 of the Civil Code defines an engagement as "the mutual promise to marry". This promise is not bound by any formality since it is considered a legal fact which could at most have extrinsic effects on the marriage, especially in the case of a unilateral and improper termination and therefore can be proved by any means. Concluding a marriage contract is not conditioned by an engagement.

Similar stipulations can be found in article 90 of the Swiss Civil Code as well as in article 79 of the Italian Civil Code. French engagements also represent a mutual promise of future marriage, which is well explained both in doctrine[407] and jurisprudence, given that civil law remains silent on the subject of engagements.

In the field of Romanian international private law, the substantive conditions required for making a formal commitment of marriagepresenting a foreign element are determined by the national law of each of the future spouses, according to article 2585 paragraph 1 of the Civil Code. These must be met by the date when the promise is made. Apart from a doctor's statement and the authorization of the administrative authority, the dispositions concerning substantive conditions for concluding a marriage contract apply to the making of a promise of marriage aswell[408].

There are various precedents and solutions when it comes to the effects of the marriage promise and its effects. According to article 2585 paragraph 2 of the

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[406]M. Avram, L. M. Andrei, *Instituţia familiei în noul Cod Civil*, Bucureşti, 2010, p. 24.
[407]P. Murat, *Droit de la famille*, Ed. Dalloz, Paris, 2007, pp. 53-58; P. Courbe, *Droit de la famille*, Ed. Dalloz, Paris, 2001, pp. 35-38.
[408]I.Macovei, *Drept internaţional privat*, Ed. C.H. Beck, Bucureşti, 2011, pp. 227-228; I. Macovei, N. R. Dominte în *Noul Cod Civil. Comentariu pe articole*, Ed. C.H. Beck, Bucureşti, 2012, p. 2584.

Civil Code, the effects of a marriage promise as well as the consequences of breaking are subject to several laws, which will be applied in the order established by the lawmaker. First comes the law of the place where the future spouses usually live at the time of their engagement, then the national law common to both future spouses, when they do not have a usual residence in the same state, then Romanian law, in the absence of a common national law.

3. WHAT LAW APPLIES IN CASES OF SUBSTANTIVE CONDITIONS WITH A FOREIGN ELEMENT?

In order to conclude a valid marriage contract, several substantive and formal conditions must be met and there must not be any impeding factors. Substantive conditions fall into two categories positive and negative, which can impede a marriage. Positive substantive conditions must be met in order that the marriage be concluded. Negative substantive conditions or impediments are factual or legal circumstances which prevent the conclusion of the marriage contract. If they exist, then the marriage is not valid. These conditions are stipulated not only to ensure that formal conditions are met and that there are no impediments to the marriage, but also to guarantee the means of proving the existence of the marital bond[409].

This classification is based on the importance attributed to each legal requirement for the conclusion of a marriage contract. However, this varies from one legislation to another and it is therefore possible that a legal requirement be considered either a substantive condition in one state or a formal condition in another[410].

In principle, the distinction between substantive and formal conditions depends on the *legemfori*, which in this case is Romanian law. In comparative law, there are several systems which determine the law applicable for substantive conditions. Firstly, there is the system using the national law of the future spouses. Secondly, there is the system using the law of the country where the future spouses are domiciled. Thirdly, there is the one applying the law of the country where the marriage vows were taken. Fourthly, there is the one applying the national law for citizens which married abroad and finally, the system using Romanian law, in the case of any foreign nationals that got married on Romanian territory.

In Romanian international private law, the substantive conditions required to conclude a marriage contract are determined by the national law of either one of the future spouses at the moment of the ceremony, in accordance with article 2586

[409]For more details see: L. Olah, A. Drăghici, *Dreptul familiei*, Ed. Universităţii din Piteşti, Piteşti, 2010.
[410]See: I.P. Filipescu, *Drept internaţional privat*, voI. II, Ed. Proarcadia, 1993, p. 169.

paragraph 1 of the Civil Code. The impediments specified in the national law also apply.

In doctrine, these stipulations, which can also be found in Law 105/1992 under a different form, were interpreted differently. Therefore, certain authors[411] endorse applying the national laws of both spouses while others[412] do not. As far as we and other authors[413] are concerned, we consider that in the absence of further mentions, the intention of the legislator in the text is that each spouse be subject to the law of his own country and not that of his/her spouse also.

To support this opinion with the stipulations of article 33 from Law 119/1996 on vital records in which it is mentioned that the registrar may validly officiate a marriage between foreign citizens, if the future spouses provide him with documents issued by diplomatic offices or consulates of the countries to which they belong, and thereby prove that the substantive conditions are met, as required by the national law. Only by adding these documents and any other necessary papers to the marriage license can the marital contract be concluded.

With regards to Romanian private law, the substantive conditions are subject to the law as follows:

- when a marriage is concluded abroad between Romanian citizens, Romanian law applies;
- when foreign nationals from the same country get married on Romanian territory, their national law applies;
- when a Romanian national marries a foreign national abroad – their respective national law applies;
- when a Romanian citizen marries a foreign national in Romania – the respective national law of the spouses applies;
- when a Romanian national marries a stateless person abroad – the latter is subject to the law of the country where his/her domicile is, or otherwise the country where his/her second declared residence is, while the Romanian national is subject to his/her national law;
- when a Romanian national marries a stateless person in Romania and if the latter is domiciled in Romania, then the national law applies for both persons;
- when two foreign nationals from different countries – their respective laws apply;

[411]Dragoş-Alexandru Sitaru, *Drept internaţional privat*, Ed. Lumina Lex, Bucureşti, 2002, p. 334, T. Prescure, C. Nicolae Savu, *Drept internaţional privat*, Ed. Lumina Lex, Bucureşti, 2005, p. 140.
[412]Dan Lupaşcu, *Drept internaţional privat*, Ed. Universul Juridic, Bucureşti, 2008, p. 193; Augustin Fuerea, *Drept internaţional privat,* Ed. Universul Juridic, Bucureşti, 2008, p. 212.
[413]I. Macovei, N. R. Dominte în *Noul Cod Civil. Comentariu pe articole*, Ed. C.H. Beck, Bucureşti, 2012, p. 2585.

- when two stateless persons marry in Romania – the law applied is that of the country, where their usual residence is; if they are domiciled in Romania, then the national law applies[414].

With regards to impediments, article 2586 paragraph 2 of the Civil Code establishes a measure meant to protect Romanian citizens. Therefore, in case one of the foreign laws declares an impediment which is incompatible with the Romanian legislation, then that impediment no longer applies if one of the future spouses is a Romanian national and the marriage contract is concluded on Romanian territory.

The proof that the substantive conditions are met for a valid union must be provided by the foreign national taking marriage vows in Romania in the form of a document issued for this purpose by the competent authorities in his country. Any Romanian national getting married abroad must offer the same proof of meeting the substantive conditions.

4. WHAT LAW APPLIES IN CASES OF MARRIAGE WITH A FOREIGN ELEMENT?

With regards to the way a marriage contract is concluded, article 2587 from the Civil Code stipulates that the form is governed by the law of the territory where the wedding is held, which means that a marriage in Romania, at the office of the local justice of the peace, is done in accordance with Romanian law.

A Romanian citizen abroad may only get married before a state authority. However, certain foreign laws grant religious ceremonies legal standing, so therefore the marriage ceremony of a Romanian national officiated before a local religious authority abroad will be considered valid in Romania. In the case that the marriage is officiated by a diplomat or a functionary working at a Romanian consulate, in the state where he/she is accredited, the procedure will follow Romanian law, as stated by article 2587 paragraph 2 of the Civil Code.

In case the marriage is officiated in Romania between a Romanian citizen and a foreign national, the couple can choose between the local justice of the peace and either the diplomatic agent or the consular functionary of the spouse of foreign nationality.

In case the marriage takes place in Romania between two foreign nationals from different countries, they may choose between the state authority and the diplomatic agent of the consular functionary of either of their respective states. In conclusion, the form of marriage depends either on the law of the "locoregitactum" or "auctoriregitactum".

[414]R. Duminică, L. Olah, *Drept internaţional privat. Note de curs*, Ed. Sitech, Craiova, 2011, pp. 184-185.

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LES GARANTIES DE PAIEMENT DU TRANSPORTEUR ROUTIER

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Resumé

Le transporteur, en raison de sa qualité de commerçant et de prestataire de services trouvé dans un état d'offre permanente, ne peut pas procéder à une vérification au préalable de ses clients en ce qui concerne leur solvabilité. Ainsi, il peut survenir le risque du transporteur sur l'insolvabilité du client et dans ce cas, le transporteur ne recueillera les frais du transport, fait qui lui causera un préjudice.

Pour protéger les droits du transporteur et pour assurer le recouvrement des dommages causés par l'exécution d'un contrat de transport où le contractant ne peut pas payer les frais, le législateur a créé deux types des garanties de paiement en faveur du transporteur : le droit de rétention et le privilège du transporteur sur les marchandises transportées. Cette solution présente l'avantage d'assurer rapidement l'activité de transport, sans qu'il soit nécessaire de poursuivre le débiteur.

Les mots-clés*: les garanties de paiement, le droit des rétention, le privilège.*

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Dans le cas des transporteurs routiers on peut trouver des références sur la réglementation juridique du privilège du transporteur sur les biens transportés dans le Nouveau Code civil et dans la Convention CMR relative au contrat de transport international des marchandises sur les routes.

Il convient de noter qu'à l'heure actuelle, contrairement à la législation antérieure, le droit de rétention bénéficie des dispositions expresses étant régi à caractère général dans le Nouveau Code civil. Le droit de rétention est défini par les dispositions de l'article 2495 du NCC comme le droit qui confère au créancier transporteur, débiteur de l'obligation de céder le bien à l'autre, la possibilité de retenir dans sa possession et de refuser la restitution du bien jusqu'à ce que son débiteur, créancier du bien, paiera sa dette.

Le droit de rétention est une mesure conservatrice efficace à l' origine légale, le titulaire de ce droit peut assurer le recouvrement des sommes qui lui sont dues; il représente aussi un moyen de contraindre le débiteur. Contrairement à la garantie réelle, le titulaire du droit de rétention ne peut pas vendre le bien et ne bénéficie pas du droit de préférence et de poursuite par rapport aux autres créanciers du même débiteur. Il peut seulement refuser la restitution du bien en l'absence du paiement qui lui est dû, ce qui peut se qualifier à titre de garantie imparfait. Elle est considérée comme une garantie réelle car elle est opposable à tous et aux tiers également, aux autres créanciers du débiteur et au propriétaire sous-gagnant du bien. Ainsi, le droit de rétention a un caractère absolu, étant opposable à tous –sans remplir aucune formalité de publicité (voir les dispositions de l'art. 2498, 1er alinéa, NCC), un caractère indivisible, ayant comme objet le bien entier détenu de transporteur et il ne doit pas être confondu avec l'exception d'inexécution du contrat, qui a un caractère relatif et ne peut être enlevée en exécutant partielle l'obligation corrélative de l'autre partie contractante.

Le droit de rétention peut être exercé tant que le transporteur-créancier possède le bien du débiteur mais les effets de ce droit cessent lorsque le bien est volontairement retiré de sa rétention.

Les conditions pour l'exercice du droit de rétention du transporteur sont :

(a) l'existence d'une créance contre le débiteur, créance qui doit être certain, liquide et exigible;

(b) il faut que la possession exercé du titulaire du droit de rétention ne soit pas vicié par la fraude, l'objet du droit de rétention doit être un bien mobile corporel (la marchandise), et le droit de rétention doit être invoqué envers la personne qui a le droit de disposer de la marchandise détenue par le transporteur.

(c) l'existence d'une connexion entre la marchandise retenue et la créance, ça veut dire que la dette doit être liée à la marchandise, dont libération est refusé. La connexion peut être matérielle ou objective justifiant le droit de rétention fondé sur l'existence d'une créance générée par des dépenses effectuées pour la conservation, l'amélioration ou la transformation du bien, et la connexion juridique ou subjective, justifiant le droit de rétention fondé sur l'existence d'une créance générée par l'exécution d'une obligation par le créancier au débiteur en vertu du contrat.

Les effets du droit de rétention découlent de son caractère absolu et indivisible. De son caractère absolu résulte qu'il est opposable à tous et qu'il peut être valorisé à l'encontre du débiteur, ayant-cause et des successeurs à titre particulier du celui-ci. De son caractère indivisible résulte que le droit de rétention a comme objet la marchandise toute entière trouvée dans la détention du transporteur jusqu'au paiement intégral de la dette.

Le titulaire du droit de rétention devra effectuer tous les actes nécessaires à la conservation du bien, aussi que les documents utiles pour que le bien peut être utilisé conformément à sa destination normale étant obligé d'agir avec la diligence qu'un bon propriétaire dépose dans l'administration de ses biens.

Étant fondé sur l'équité, le droit de rétention doit cesser dans le cas où le créancier refuse de payer, le montant demandé étant enregistré, ou quand on lui a offert une garantie suffisante qui couvrirait le préjudice provoqué par l'inexécution de l'obligation de son débiteur, même s'il n'acceptera pas.

Actuellement, le Nouveau Code civil prévoit différent cette question du droit de rétention. L'article 1980, 1er alinéa, prévoit expressément obligations pour le destinataire. Ainsi, pour prendre possession des biens transportés, le destinataire doit payer au transporteur ou il doit enregistrer à une banque les différences de montant sur lesquelles ils ne sont pas d'accord, étant le droit du transporteur de ne pas livrer les biens jusqu'à ce qu'il ne reçoit le montant réclamé d'être dû.

En outre, si le transporteur ne prend pas les mesures que la loi lui permet (le droit de rétention), selon l'article 1983 NCC il est pénalisé pour manque de diligence et, le cas échéant, il devient responsable devant l'expéditeur et les transporteurs précédents pour les montants qui leur étaient dus et aussi perdre son droit de recours contre l'expéditeur et les transporteurs précédents.

Sur la deuxième garantie de paiement du transporteur, des références sur sa réglementation légale se trouvent dans le Nouveau Code civil, dans la Convention CMR relative au contrat de transport international des marchandises sur les routes et d'autres actes normatifs, le cadre légal étant relativement réduit.

Selon le Code civil, tout privilège peut être défini comme un droit de préférence accordé par la loi à un créancier particulier devant les autres créanciers du même débiteur, droit duquel le titulaire bénéficie en vertu de sa créance. En conséquence, le privilège est le droit du créancier à être payé avec priorité devant les autres créanciers à cause du fait juridique duquel il est né. Pour garantir les créances résultant du contrat de transport, le transporteur est titulaire des droits d'un créancier gagiste, et peut les exercer tant qu'il a un bien transporté ou dans les 24 heures suivant la livraison si le destinataire détient encore ce bien.

Le gage est le contrat accessoire en vertu duquel le débiteur remet au créditeur ou au tiers un bien mobil pour garantir l'exécution d'une obligation. Tant le privilège que le gage représentent des garanties réelles dont peut bénéficier le créditeur sauf que le gage confère à son titulaire un droit de poursuite et de

préférence, pendant que le privilège confère à son titulaire seulement le droit de préférence, ça veut dire la possibilité d'être payé prioritaire du prix du bien trouvé en sa détention devant autres créditeurs, mais il ne lui confère aucun droit de demander le bien de toute personne dans la possession duquel serait.

Le Code civil réglemente deux catégories de privilèges : générales- sur tous les biens mobiles et immobiles du débiteur et spéciaux- sur tous les biens mobiles du débiteur. Les privilèges spéciaux mobiliers se subdivisent en privilèges fondés sur l'idée de préserver les choses par le créancier, privilèges fondés sur l'idée d'augmenter le patrimoine ou sur l'idée de l'enrichissement du débiteur et privilèges fondés sur l'idée de gage. Le privilège du transporteur est considéré comme découle d'un gage tacite que l'expéditeur reconnaît une fois que le contrat de transport et la livraison de marchandise à transporter.

Le privilège du transporteur est fondé sur l'existence d'une créance garantie où sont comprises les sommes demandés pour le transport :

(a) le coût de déplacement des marchandises, coût inclut le bénéfice du transporteur, le pourcentage du capital investi dans les moyens de transport ou équipement technique, les frais de personnel et les coûts de maintenance de service;

(b) les dépenses engagées par le transporteur pour effectuer des opérations accessoires du transport (chargement, déchargement, pesage, magasinage, etc.);

(c) les dépenses engagées par le transporteur résultant de l'exécution des opérations douanières ou des amendes payées par le transporteur à cause de déclaration inexacte ou non-déclaration de marchandises soumises à transporter.

La créance garantie peut être récupérée par le transporteur des marchandises transportées uniquement dans la mesure où elle découle du transport effectué et non rémunéré. Non admis comme une dette existante à partir d'un précédent transport être récupérée en exerçant le privilège du transporteur sur les marchandises qui ont fait l'objet d'un autre transport.

Les effets du privilège du transporteur sur les marchandises transportées se réfèrent au droit de rétention et au droit de préférence. Le transporteur a le droit de retenir les marchandises aussi longtemps que le débiteur ne paie pas les sommes dues dans le cadre de l'expédition.

Le créancier a un droit de préférence pour les biens ce qui lui donne la possibilité d'être payé prioritaire du prix des biens trouvés dans sa détention. Si le débiteur ne paie pas la dette, le transporteur n'est pas en droit de disposer de la marchandise, mais il peut exiger devant le tribunal que les marchandises soient vendues aux enchères au public et être payé en priorité du prix obtenu.

Le transporteur n'a pas le droit d'utiliser les marchandises tant qu'elles sont dans sa détention. Le transporteur est responsable du dommage ou de la perte de la marchandise, si le défaut est survenu de sa faute. Le cas où la marchandise sorte de la détention du transporteur par soustraction, il a le droit de demander la

cargaison n'importe qui est en possession parce qu'il est considéré encore titulaire du privilège sur la marchandise. Le privilège du transporteur cesse avec la remise volontaire de la marchandise à la personne habilitée à en disposer.

Au fil du temps, le droit de rétention a démontré son efficacité pratique parce que, le débiteur, étant exclus de l'utilisation du bien, se dépêche de payer sa dette à reprendre la détention du bien.

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THE INTERNATIONAL CONFERENCE
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SITUATIONS JURIDIQUES QUI EMPECHENT LA PRODUCTION DE L'ACCESSION IMMOBILIERE ARTIFICIELLE

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Résumé

L'accession est connue comme une modalité originaire d'acquérir le droit de propriété. Mais l'accession immobilière artificielle est la plus intéressante grâce à sa fréquence dans l'incidence en pratique, mais surtout grâce à ses conséquences économiques.

La doctrine et la jurisprudence ont mis en évidence beaucoup d'aspects déficitaires de la réglementation concernant l'accession immobilière artificielle. La controverse la plus connue est celle concernant la détermination du moment où le droit de propriété apparaît comme effet de l'accession : le moment de l'incorporation des matériaux dans le sol ou le moment de l'exercice du droit d'accession.

La détermination exacte de ce moment nous aide à distinguer correctement les situations dans lesquelles l'accession est intervenue, par rapport aux situations dans lesquelles celle-ci n'est pas intervenue. Pour faire une telle distinction, il est nécessaire d'analyser attentivement d'autres éléments aussi : l'existence d'une convention entre le propriétaire et l'auteur du travail ou l'intervention de la prescription d'acquisition.

La doctrine et la jurisprudence ont identifié également d'autres éléments en fonction desquels elles ont apprécié si dans une certaine situation l'accession est intervenue ou non. Les solutions de la jurisprudence et les études de doctrine ont offert au législateur des indices visant certaines lacunes de la réglementation concernant l'accession. En même temps, la doctrine s'avère à être, de nouveau, un facteur important dans le processus de réglementation par les nombreuses solutions de loi afférentes qu'elle a proposées. La majorité des solutions sont assimilées par le législateur dans le nouveau Code Civil.

Mots-cléfs: *l'accession immobilière artificielle, convention, le droit de superficie, l'usucapion*.

L'accession immobilière artificielle est l'accession qui ne se produit pas naturellement, spontanément, mais comme une conséquence de l'intervention humaine. L'accession immobilière artificielle n'a pas été définie par la loi. L'article 492 du Code Civil antérieur prévoyait que : « Toute construction, plantation ou chose faite dans la terre ou sur la terre sont présumées à être faites par le propriétaire de la terre à son propre argent et tout cela lui appartient jusqu'à ce qu'on prouve le contraire.» De la même manière, le nouveau Code Civil prévoit

dans l'article 579, alinéa 1 que : « Tout travail est présumé à être fait par le propriétaire de l'immeuble à son propre argent et lui appartient jusqu'à ce qu'on prouve le contraire. » La doctrine[415] a identifié dans cette réglementation deux présomptions relatives : une, conformément à laquelle toute construction, plantation ou travail appartient au titulaire du droit de propriété du terrain sur lequel celui-ci se trouve et une autre, conformément à laquelle les frais pour l'effectuation des ces travaux ont été supportés par le propriétaire du terrain.

Toute personne intéressée pourrait, prouvant le contraire, renverser toutes ces présomptions. Ainsi, la première présomption peut être renversée par la preuve d'une convention valable par laquelle le propriétaire du terrain a transmis à une autre personne le droit de construire ou de planter sur son terrain. Une telle convention peut avoir comme objet la constitution d'un droit de superficie, l'embauche d'un entrepreneur, la constitution d'un mandat etc. En ce sens, le législateur, a prévu dans l'art.579, alinéa 2 du Code Civil actuel le fait que : « La preuve contraire peut se faire quand on a constitué un droit de superficie, quand le propriétaire de l'immeuble n'a pas enregistré son droit de propriété sur le nouveau travail ou dans d'autres cas prévus par la loi. »

La deuxième présomption peut être renversée par la preuve d'un droit de propriété sur le matériaux incorporés dans le fond ou si on prouve qu'une autre personne a réalisé le travail avec des matériaux achetés à son propre argent.

Dans le problème qui nous intéresse, seulement les situations par lesquelles on renverse la première présomption sont relevantes, parce que seulement celles-ci ont l'aptitude d'écarter de l'application les prévisions légales qui réglementent l'accession.

Dans le cas de la deuxième présomption, elle part d'une accession qui s'est déjà produite et vise la personne qui a réalisé les travaux. Ce fait est mis en évidence par les prévisions de l'art. 580, alinéa 1 du Code Civil actuel conformément auquel : « dans le cas où on réalise le travail avec les matériaux d'une autre personne, le propriétaire de l'immeuble devient le propriétaire du travail et il ne peut pas être obligé à la suppression de celle-ci, ni à la restitution des matériaux utilisés. Mais, conformément au 2 alinéa du même article, le propriétaire des matériaux a le droit de solliciter et de recevoir la valeur des matériaux, mais aussi le recouvrement de tout préjudice provoqué.

SIGNER UNE CONVENTION VALABLE

Comme on a déjà mentionné, quand la construction s'édifie sur une convention entre le propriétaire du fond et l'auteur du travail, les réglementations concernant l'accession immobilière ne s'appliquent pas.

[415] E.Chelaru, *Drept civil. Drepturile reale principale*, Ed.C.H.Beck, 2009, page 350.

L'accord entre les parts, exprès ou tacite, par lequel l'auteur reçoit la permission d'effectuer le travail sur le terrain qui ne lui appartient pas, a comme effet la soumission de la situation aux prévisions du contrat. La convention entre les parts doit être prouvée, et l'instance doit rechercher : « les conditions dans lesquelles on a fait les constructions, les plantations ou les travaux »[416] L'instance doit aussi analyser la situation existante sous l'aspect de la passivité ou de l'acception du propriétaire. Elles sont « des éléments en fonction desquels on peut apprécier s'il y a une convention entre le propriétaire du terrain et l'auteur du travail et quel est le contenu de cette convention. »[417]. La doctrine[418] a identifié deux interprétations possibles d'une telle convention (tacite) : soit comme une expression d'un accord du propriétaire du terrain concernant la constitution d'un droit de superficie en faveur de l'auteur du travail, soit comme une expression de l'accord concernant la réalisation du travail par un tiers, mais en faveur de propriétaire du terrain.

S'il y a un accord entre les parts, le propriétaire du terrain, même s'il deviendra le propriétaire du travail, il obtiendra la propriété grâce à l'art. 567 du Code Civil (l'art 492 de l'ancien Code Civil) et non pas par l'accession. En plus, la convention entre les parts constitue la base de la bonne foi de l'auteur, qui ne peut pas être obligé à élever la construction[419]. Tout cela lui offre un droit réel (le droit de superficie), ou un droit de créance (la valeur de circulation de l'immeuble). Dans ces circonstances on estime que les dommages intérêts doivent être plus grands que ceux accordés au constructeur (même s'il est de bonne foi), dans le cas de l'accession, car « les conventions doivent être exécutées de bonne foi, elles ne mènent pas seulement aux conséquences expresses, mais à toutes les conséquences données d'après sa nature par l'équitation, la coutume ou la loi »[420] En plus, on considère que dans une telle situation, le propriétaire du fond s'enrichirait au préjudice du constructeur[421], avec la différence d'entre la valeur de circulation de l'immeuble et la valeur des matériaux cumulée avec la valeur du travail, payées au titre de dommages intérêts.

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[416]Tribunalul Suprem, décision no.13/1959, CD 1959, page 59, cit. de V.Stoica, Accesiunea imobiliară artificială, Dreptul nr.1/2006, page 65.
[417] V.Stoica, Accesiunea (I), page 65.
[418] V.Stoica, Accesiunea (I), page 65.
[419] Trib.Suprem, section civile, décision no. 720/1989, Dreptul nr.1-2/1990, page 125.
[420] Trib.Suprem., section civile, décision no 2004 du 11 octobre 1980, C.D.1980, page 52-55, cit. de A.Pena, Accesiunea imobiliară artificială şi uzucapiunea. Practică judiciară, Ed.C.H.Beck, 2009, page 45. Trib.Suprem, section civile, décision no. 1787/1979, Cristina Turianu, C.Turianu, Dreptul de proprietate şi alte drepturi reale. Practică judiciară adnotată, Ed.All Beck, Bucureşti, 1998, page 84-85.
[421] Trib. Suprem,. section civile, décision no.386 du 23 février 1980, C.D.1980, page 50-52.

Les dispositions concernant l'accession, ayant un caractère supplétif, ne s'appliquent pas si les parts sont d'accord. Mais cet effet n'est pas produit par toute convention. Si on signe un avant-contrat de vente achat qui a comme objet un terrain, cela ne veut pas dire qu'il s'agit d'une telle convention. « Par une telle convention, on ne transmet pas le droit de propriété sur le bien, car les parts, qui s'engagent à signer un contrat, ont seulement la responsabilité de « faire » »[422]. Par une telle convention, les parts conviennent donc à transmettre le droit d'édification sur l'immeuble en cause. En présent, un tel accord ne produit pas un tel effet. Donc, même s'il s'agit d'une convention, l'avant-contrat ne sera pas apte[423] d\écarter l'application des dispositions qui règlementent l'accession. L'avant-contrat de vente achat peut[424] être une preuve de la bonne foi de l'auteur du travail.

Même la simple permission de réaliser une construction sur le terrain d'une autre personne n'a pas le pouvoir d'écarter de l'application les prévisions légales concernant l'accession. L'accord du propriétaire du terrain de construire sur son terrain ne peut pas être toujours interprété comme une convention tacite qui a comme objet un droit de superficie. L'instance ne peut pas prononcer une décision qui constate un tel droit de superficie si elle ne détient pas d'indices suffisants concernant l'intention réelle des parts. [425]

LE DROIT DE SUPERFICIE

Dans la situation où l accession immobilière artificielle intervient, même si le constructeur est de bonne foi, il ne peut pas avoir un droit réel à son avantage, mais seulement un droit de créance. « Il y a aussi la possibilité offerte par l'art. 492 du Code Civiil (art.567 du Code Civil en vigueur), vers la fin, d'écarter la présomption du droit du terrain sur les constructions faites sur son terrain si on prouve qu'elles on été faites par une autre personne à la base d'une convention qui pourrait justifier le droit de propriété du constructeur sur la construction en cause,

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[422] C.A.Iaşi, section civile, décision no. 623 du 27 avril 1999, M.Gaiţă, M.M.Pivniceru, Jurisprudenţa Curţii de Apel Iaşi în materie civilă pe anul 1999, Ed.Lumina Lex, Bucureşti, 2000, page 25-26, cit. de A.Pena, lucr.cit., page 29. În acelaşi sens, E. Safta-Romano, Dreptul de proprietate privată şi publică în România, Ed.Graphix, Iaşi, 1993, page 35.

[423] On a exprimé également l'opinion contraire, conformément à laquelle l'avant-contrat de vente achat peut être aussi interprété comme un accord de la part du prometteur transmetteur de réaliser le travail, dans le cas où on a donné le terrain au prometteur acquéreur. V.Stoica, Accesiunea (I), page 65.

[424] M.D.Bocşan, O încercare de reconsiderare a aplicării art.494, din Codul civil, Dreptul nr. 11/1998, page 51.

[425] C.A.Ploieşti, décision no. 292 du 9 février 2006, în C.P.J.2006, cit.de I.Ninu, Uzucapiunea şi accesiunea imobiliară. Practică judiciară, Ed.Hamangiu, Bucureşti, 2009 ., page 299.

mais aussi le droit d'utiliser le terrain. Ces droits concrétisent le droit réel de superficie. »[426]

Le droit de superficie n'avait pas une réglementation expresse dans le Code Civil de 1864, ce qui a donné naissance aux controverses. Ceux qui ont soutenu l'existence incontestable de ce droit, ont eu comme support les dispositions de l'art. 492 du Code Civil[427] qui sollicite pour la preuve contraire du droit de propriété du propriétaire du terrain et sur la construction, la preuve que le propriétaire de la construction était une autre personne que le propriétaire du terrain. Tout cela à mener vers la nécessite d'exister et de prouver un droit d'utilisation sur le terrain sur lequel la construction se trouve.

Initialement, la jurisprudence a rejeté l'existence du droit de superficie. La doctrine a constaté que les solutions des instances avaient à la base le fait que par la traduction en roumain de l'art.553 du Code Civil français, qui avait comme correspondant l'art. 492 du Code civil de 1864, on a écarté la disposition finale. Cette disposition empêchait l'accession immobilière artificielle dans la situation où un tiers aurait acquis la propriété sur le sous-sol d'un édifice ou sur une autre partie de l'édifice.[428] Probablement, les instances ont interprété cette façon de réglementation comme mise en évidence de l'intention du législateur roumain de ne pas reconnaître le droit de superficie. La jurisprudence s'est changée après, dans le sens qu'elle reconnaît le fait que «le droit de superficie est consacré indirectement par l'art. 492 qui prévoit que les plantations et les constructions sont présumées d'appartenir au propriétaire du sol, donc si on fait preuve contraire, elles peuvent aussi appartenir à une autre personne. »[429]

L'existence du droit de superficie, étant déjà reconnu par la doctrine et par la jurisprudence, a reçu finalement la reconnaissance législative. Le nouveau Code Civile a offert au droit de superficie une réglementation expresse qui se retrouve dans les articles 693 – 702. Conformément à l'art. 68 de la Loi no.7 1/2011, pour la mise en œuvre de la Loi no. 287/2009 concernant le Code Civil, les nouvelles dispositions qui visent l'accession ne s'appliqueront pas aux situations dans lesquelles il y a eu un droit de superficie antérieurement à l'entrée en vigueur des nouvelles réglementations. Les situations en cause seront réglementées par l'ancienne loi, respectivement par l'art. 492 du Code Civil de 1864.

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[426] C.S.J.section civile, décision no. 892 du 1 avril 1994, B.J.C.D., 1994, page 29, cit. de A.Pena, lucr.cit., page 37.
[427] E.Chelaru, *op.cit*., page 324.
[428] S. Cercel, *Aspecte noi in reglementarea dezmembramintelor dreptului de prroprietate privata in noul Cod civil*, Noile coduri ale Romaniei, Studii si cercetari juridice, Conferinta Nationala a Noilor Coduri ale Romaniei, Timisoara. 27-28 mai 2011, Ed. Universul Juridic, Bucuresti, 2011.
[429] C.de Ap. Bucuresti, s.VI, décision no.426 du 14 juillet 1942 si Cas.III ., décision no.66 du 14 janvier 1943, in C.jud. no.4, du 10 février 1944, page 85.

Ainsi, conformément à l'art. 693, alinéa 1 de la nouvelle réglementation, « La superficie est le droit d'avoir ou d'édifier une construction sur le terrain d'autrui, au-dessus ou dans le sous-sol de ce terrain, sur lequel la personne qui a droit de superficie prouve le droit d'utilisation.»[430]

Le droit de superficie peut être acquis par convention[431], usucapion ou loi (l'art. 693, alinéa 2 prévoit que « le droit de superficie s'acquit à la base d'un acte juridique, par usucapion ou par une autre modalité prévue par la loi »).

L'obtention d'une autorisation de construction par l'auteur du travail ne prouve pas un droit de superficie, par consentement tacite de l'Etat Roumain c'est le propriétaire du terrain qui a droit de superficie.[432]

La majorité de la doctrine considère que le seul cas dans lequel le droit de superficie respecte la loi est celui des constructions réalisées par les époux sur un terrain propriété exclusive d'un d'entre eux (bien propre de celui-ci)[433]. Les constructions étant considérées des bien communes des époux, le mari, le non propriétaire du terrain devient titulaire d'un droit de superficie. Cette façon d'acquérir la superficie a été imposée par la jurisprudence et par la doctrine par l'art. 30 C.fam. [434]. Si après 1 octobre 2011, on applique le régime de la communauté légale, prévu par l'art. 399 NCC (correspondant à l'art. 30 C.fam), la solution se maintient[435]. Dans notre opinion, du moment que la nouvelle réglementation sollicite la forme authentique ad validitatem pour la constitution mais aussi pour la transmission des démembrements du droit de propriété, on considère que cette hypothèse ne sera pas valable pour les situations survenues après la modification des prévision légales en ce sens.

Un cas moins connu que celui du mari constructeur sur le terrain de l'autre époux est celui des étrangers qui ont acquis le droit de propriété sur quelques constructions en Roumaine, antérieurement à la reconnaissance par la loi roumaine de leur droit d'obtenir en propriété des terrains en Roumaine et antérieurement à la modification de la Constitution ou à l'adhésion de la Roumanie à l'Union Européenne.

Récemment, les instances ont décidé qu'il a aussi d'autres cas dans lesquels le droit de superficie peut être reconnu légalement. Ainsi, les instances ont

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[430] Trib. Suceava, section civile, décision no. 1147 du 22 décembre 1972, R.R.D. no.5/1973, p.141, cit.de A.Pena, lucr.cit., page 48.
[431] C.A.Craiova, Décision no. 3080 du 16 novembre 2005, C.A.Craiova, B.J.C.P.J.2005, cit. de I.Ninu, lucr.cit., page 281.
[432] C.A.Braşov, section civile, décision no. 4441/2000, Studia Universitatis Babeş-Bolyai nr. 1/2001, p.120.
[433] [433] C.A.Craiova, Décizia no. 3080 du 16 novembre 2005, B.J.C.P.J. 2005, I.Ninu, lucr.cit., page 281.
[434] TS, décidion de gudation no.19/1960, în CD 1960, page 26.
[435]S.Cercel, lucr.cit., page 176.

décidé que par l'effet de la loi no. 15/1990 une société qui a acquis le droit de propriété sur les constructions qu'elle avait en administration, elle a acquis en même temps un droit d'utilisation sur le terrain en cause. Sur ce terrain on n'a pas constitué un droit de propriété, car l'état n'était pas le propriétaire du terrain. Ce fait est relevant pour notre étude car parfois, quand une société a obtenu le droit de propriété sur une construction par la loi no. 15/1990, une autre personne a obtenu le droit de propriété sur le terrain comme effet de la reconstitution ou de la constitution du droit de propriété à la base des actes normatifs à effets réparables, après 1989. Pour ces situations, certaines instances ont décidé que les immeubles constructions appartiennent au propriétaire du terrain, conformément à l'accession. La vision des instances dans cette situation comporte aussi des changements. Ainsi, certaines instances ont admis déjà « par l'interprétation rationnelle de la thèse finale de l'art. 492 du Code Civil[436] que si on obtient un droit de propriété sur la construction, dans le patrimoine du détenteur, il apparaît ope legis un droit de superficie. Ce droit représente le droit de propriété sur la construction et le droit d'utiliser le terrain pendant la construction.»[437]

Le Code Civil du 2011 prévoit deux situations particulières de constitution du droit de superficie par acte juridique. Premièrement, conformément à l'art. 693, alinéa 3 NCC la superficie peut s'inscrire par un acte juridique par lequel le propriétaire du fond entier a transmis exclusivement la construction ou il a transmis séparément le terrain et la construction à des personnes différentes. Dans cette situation, l'inscription se réalise même si les parts n'ont pas prévus le droit de superficie dans l'acte signé. D'une autre côté, l'art. 693 alinéa 4 NCC prévoit l'opposition entre l'accession immobilière artificielle et le droit de superficie (opposition déjà mentionnée dans l'art. 579, alinéa 2 NCC : la preuve contraire de la présomption que tout travail est « fait par le propriétaire de l'immeuble à son argent et lui appartient » peut se réaliser « quand un droit de superficie s'est constitué »). Par l'acte du propriétaire du terrain de renoncer au droit d'invoquer l'accession en faveur du constructeur, il constitue indirectement le droit de superficie de celui-ci sur le terrain afférent à la construction. Mais, par la transmission du droit d'invoquer l'accession par un tiers, il obtient le même résultat.[438]

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[436] Î.C.C.J., Secţia civilă şi de proprietate intelectuală, décision no. 4165 du 27 avril 2006, in Legalis, cit. de I.Ninu, lucr.cit., page 330.
[437] Décision no. 214 A/22.03.2010 Curtea de Apel Bucuresti, http://jurisprudentacedo.com/Constatarea-existentei-dreptului-de-superficie-ca-efect-al-dobandirii-dreptului-de-proprietate-asupra-constructiei-aflate-pe-un-teren-proprietatea-altei-persoane.html , vu le 03.04.2013, 18 heures.30.
[438] S.Cercel, lucr.cit., page 175.

L'ENTREPRISE

Conformément à l'art. 1851 du Code Civil, « par le contrat d'entreprise, l'entrepreneur s'oblige, à son risque, à exécuter un certain travail matériel ou intellectuel, ou à faire un service pour le bénéficiaire, pour un certain prix. »

Quand entre le propriétaire du terrain et l'auteur des travaux il y a un contrat d'entreprise, le rapport d'entre les parts est gouverné par les prévisions du contrat, et non pas par celles légales concernant l'accession.

Quand l'entrepreneur réalise le travail avec les matériaux du propriétaire du terrain, le droit de propriété sur le travail apparaît en faveur du propriétaire du terrain dès le début des travaux, par l'incorporation des matériaux. Quand les matériaux appartiennent à l'entrepreneur, il devient aussi le propriétaire du travail pendant l'édification du travail et jusqu' à la finalisation, quand le droit de propriété se transfère au bénéficiaire.[439]

Quand entre les parts il y a une convention semblable à l'entreprise, mais qui ne réunit pas les éléments qui permettent la qualification de l'accord comme un contrat d'entreprise, la convention ne se soumettra pas aux règles de celle-ci, mais aux normes générales comme tout contrat non nommé.[440]

L'USUCAPION

L'usucapion ou la prescription acquise a été définie comme « une façon d'obtenir le droit de propriété ou d'autre droits réels démembrements du droit de propriété- par la possession prolongée d'un bien immeuble à la base et aux conditions prévues par la loi ».[441]

D'une autre perspective, l'usucapion est une institution d'ordre social qui a comme finalité la fixation d'une limite maximale de temps pour laquelle on peut admette « le divorce »[442] entre la possession et le droit de propriété exercés par des personnes différents sur le même bien. Tout cela mène à la modification de la situation de droit en fonction de la situation existante.

Pratiquement, l'usucapion peut être vue comme une sanction de la passivité du propriétaire qui a permis à une autre personne de se comporter comme un propriétaire réel d'un bien pour une certaine période de temps.[443] Donc, l'usucapion dès qu'elle est intervenue écarte les prévisions légales concernant l'accession, respectivement l'art. 494 du Code Civil antérieur, l'art. 567 du Code

[439] V.Stoica, Accesiunea (I), page 66.
[440] V.Stoica, Accesiunea (I), page 66.
[441] E.Chelaru, lucr.cit., page 362.
[442] Ph.Malaurie, L.Aynes, Droit civil, Les Biens, Defrenois, Paris, 2003, page 161.
[443] C.Stătescu, C.Bârsan, Drept civil. Teoria generală a drepturilor reale, Ed.All, Bucureşti, 1998, page 276.

Civil actuel.[444] Si on perd le droit de propriété sur le terrain, on perd également le droit de propriété sur les constructions réalisées sur le terrain, comme effet de l'usucapion. Le droit de propriété sur la construction s'obtient par l'usucapion par l'art. 567 du nouveau Code Civil, respectivement par l'art. 492 du Code Civil actuel. [445]

LA REALISATION DE LA CONSTRUCTION

Conformément à l'art. 577 du Code Civil, le droit de propriété sur le travail apparaît en faveur du propriétaire de l'immeuble dès le début de l'édification de celle-ci, au fur et à mesure de sa réalisation. Cette hypothèse concerne la situation du travail réalisé par le propriétaire du terrain avec les matériaux d'une autre personne. Per a contrario, quand le travail est realisé par un tiers, avec les matériaux propres ou d'une autre personne, le droit de propriété sur le travail n'apparaît pas dès le début de la construction, mais seulement au moment de l'exercice du droit d'accession.

Donc, jusqu'à l'exercice du droit d'accession le propriétaire du terrain n'est pas le propriétaire du travail. Ainsi, l'auteur du travail a la possibilité de réaliser le travail jusqu'au moment de l'exercice du droit d'accession. Cela mène au manque de l'objet du droit d'accession et celui-ci disparaît.[446]

CONCLUSIONS

La doctrine et la jurisprudence ont identifié, au fil du temps, des éléments en fonction desquels ont apprécié si dans une certaine situation l'accession est intervenue ou non. Les solutions de la jurisprudence et les études de doctrine ont offert au législateur des indices concernant certaines lacunes de la réglementation qui vise l'accession. En même temps, la doctrine est un facteur important dans le processus de réglementation, par les nombreuses solutions de loi qu'elle a proposées. La majorité des solutions étant appropriées par le législateur dans le nouveau Code civil.

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[444] C.A.Oradea, section civile mixte, décision no.1387 du 8 octobre 2008, în Jurindex, cit. de I.Ninu, lucr.cit., page 288.

[445] C.A.Bucureşti, Secţia a IX – a civilă şi pentru cauze privind proprietatea intelectuală, décision no.541/R du 11 décembre 2008, în Jurindex, cit. de I.Ninu, lucr.cit., page 43 . Î.C.C.-J., Secţia civilă şi de proprietate intelectuală, décision no.1104 du 5 février 2009, în Legalis, cit. de .I.Ninu, page 77.

[446] V.Stoica, Accesiunea imobiliară artificială, (I), Dreptul nr.1/2006, page 52. « Il faut dire que la construction n'apparient pas immédiatement au propriétaire et s'il est ainsi, …si avant le conflit la construction appartient au possesseur, la conséquence est que le créditeur du possesseur peut viser cette possession et la mettre en vente. » G.Plastara, Curs de drept civil român, vol.II, Bucureşti, f.a., page 163-164, cit. de V.Stoica, Accesiunea (I), page 45.

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Résumé

Que signifie le concept de libéralisation du droit de la famille? Techniquement, on peut dire que ce phénomène représente le mouvement qui tend à couler les manifestations de volontés individuelles en matière familliale dans l'unique moule du droit comun des contrats. Symboliquement, on peut admetre qu'il vise à mesurer l'espace accordé par le droit de la famille aux pactes, aux conventions et plus largement aux accords de volontés des intéressés. Voir les deux approche, le movement de libéralisation du droit de la famille s'inscrit dans l'antagonisme entre l'ordre public et la volonté individuelle. La difficulté d'atteindre l'equilibre réside peut-être dans cet antagonisme entre l'ordre public et les volontés individuelles.

Mots-cléfs: *libéralisation, droit de la famille, les conventions, l'ordre public, la volonté individuelle.*

1. UN LIBÉRALISATION CROISSANTE DU DROIT DE LA FAMILLE

Considéré par certains comme le sanctuaire de l'ordre public[447] et de l'impératif où l'expression des volontés individuelles demeurait exceptionnelle, le droit de la famille semble s'ouvrir subitement aux volontés des individus qu'il est censé régir. Au point que l'on peut se demander si l'exception que constituait hier, la réception des volontés individuelles dans le droit de la famille n'en est pas devenu le principe, aujourd'hui.

Cette évolution est riche d'enseignements fondamentaux: elle révèle, en creux, l'idée, que l'on se fait du droit de la famille. Et peut-être même de la famille tout court. Aussi, le droit de la famille doit-il être général et impersonnel et reprendre ainsi les caractères de la loi, posé indépendamment des volontés individuelles ou à la base, qu'il soit adapté à chaque personne? Plus fondamentalement, la construction d'une famille se décrète-t-elle ou doit-elle être exclusivement établie et organisée selon la volonté de chacun.

[447] Alain Bénabent, *L'ordre public en droit de la famille*, in L'ordre public à la fin du XXe siècle, Dalloy, 1996, p.27.

Chacune de ces conceptions a, pour elle, des avantages mais aussi des inconvénients. La conception légale du droit de la famille a certainement l'avantage de la prévisibilité et par conséquent de la sécurité juridique, mais pour inconvénient la négation des cas particuliers, le sentiment pour les intéressés de subir le droit. A l'inverse, une approche exclusivement fondée sur la volonté individuelle des intéressés permet la prise en compte des cas particuliers mais présente l'inconvénient d'être totalement imprévisible. La difficulté d'atteindre l'equilibre réside peut-être dans cet antagonisme entre l'ordre public et les volontés individuelles.

Chacune de ces conceptions renvoie, encore plus profondément à une interrogation de nature presque philosophique: quel droit pour quel individu? Souhaite-t-on un droit de la famille qui vient de haut, que les sujets de droit subiront ou souhaite-t-on un droit qui s'établisse à la base, voulu par les intéressés? Qui du groupe ou de l'individu doit être l'objectif de la règle?

Emettre une réponse, dépourvue de toute réserve reviendrait certainement à omettre que l'individu appartient à un groupe qui le trancede et que les libertés individuelles doivent marquer le pas dans une société organisée où l'intérêt général dépasse la somme des intérêts particuliers. C'est pour préserver une cohésion sociale que l'ordre public érige des barrières à l'autonomie de la volonté. C'est pour cette raison qu'il fix aux volontés privées des limites à ne pas franchir.

L'observation de l'évolution du droit positif semble refléter ces considération: si bien que malgré une contractualisation croissante du droit de la famille, ce mouvement ne peut-être absolu. La contractualisation du droit de la famille demeure donc en mouvement encadré.

1.1. Le déclin de la conception institutionnelle du droit de la famille

La conception institutionnelle du droit de la famille se caractérise par de puissantes lignes directrices au service desquelles se metent des instruments.

Pendant plus d'un demi siécle, le droit de la famille s'est caractérisé par un modèle unique, tourné vers la régulation de l'ordre social. L'ensamble des dispositions de ce modèle étaient destinées à en sauvegarder les institutions.

Ce n'est une surprise pour personne d'affirmer que le droit de la famille constitue, de long date, le siege de l'ordre public de direction. Au point que certains auteurs ont pu se demander si ce ne serait pas le droit de la famille tout entier qui serait d'ordre public.[448] Il est vrai que concernant les institutions familiales, Planiol et Ripert considéraient que "la famille import trop à l'Etat pour que celui-ci se

[448] Alain Bénabent, *L'ordre public en droit de la famille*, op. cit., p.27.

desinteresse de ce qui la concerne"[449]. Ce qui corespond tout à fait à l'esprit qui a gouverné la rédaction du Code civil de 1804, et biensur à la rédaction du Code civil de 1864 en Roumanie. Dans le Discours préliminaire de Portalis on trouve les sources: notre objet est de lier les moeurs aux lois et de propager l'esprit de famille, qui est si favorable, quoi qu'on en dise, à l'esprit de cité; les sentiments s'affaiblissent en se généralisant: il faut une prise naturelle pour former des liens de convention. Les vertus privées peuvent seules garantir les vertus publiques; et c'est par la petit patrie, qui est la famille, que l'on s'attache à la grande, ce sont les bons pères, les bons maris, les bons fils qui font les bons citozens. Or, il appartient essentiellement aux institutions civiles de sanctionner et de protéger toutes les affections honnétes de la nature".

C'est cette importance fondamentale de la famille "pépinière de l'Etat", qui explique la conception unique et traditionnallement très rigide des institutions juridiques la gouvernant. Le législateur se fait une conception de la famille et l'impose aux individus la composant. Le caractère obligatoire de la norme à respecter a une finalité tout à fait particulière: assurer la primauté d'un "modèle famillial autoritairement déterminé"[450], afin d'assurer le bon fonctionnement des institution indispensables à la collectivité.[451] En posant autoritairement un modèle, le législateur s'assure par là, l'intégrité morale des personnes qui y sont soumises.

L'ordre public traduit ce que l'Etat estime essential à un moment donné et pendant plus d'un demi siècle, l'importance pour l'Etat sera assurer le développement des individus en encadrant très étroitement la famille. En ce sens, il sera le médiateur entre l'individu et la société globale, par l'intermédiaire de la famille. Dans cette optique, "l'Etat organize le bonheur familial des individus au besoin contre eux-mêmes, parce qu'une partie importante du jugement leur échappe".[452] Le modèle repose ainsi posé, parce qu'il est estimé le meilleur, doit être sauvegardé.

Décrété par l'Etat, le modèle désigné doit être protégé. Aussi, observe-t-on que des régles homogènes s'attachent, dans cette perspective, à sauvegarder les institutions le composant. Dans cette perspective, le modèle établi est cohérent. Ainsi, par l'obligation de ne pas faire qu'elle imposé aux époux, l'obligation de fidélité visait à préserver une institution familiale dominante, et choisie comme modele par le législateur: la famille légitime. La finalité de cet impératif était de ne pas introduire d'enfant adultérin dans la famille légitime.

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[449] M. Planiol, G. Ripert, *Traité pratique de droit civil français*, tome II, *La famille*, par A. Rouast, Paris, LGDJ, 1952, p.7.
[450] J. Hauser, Rapport français, in *L'ordre public: aspects nouveaux*, travaux de l'association Henri Capitant, journées libanaise, tome XLIX, Paris, LGDJ, pp.475-482.
[451] Ph. Malaurie, *L'ordre public et les contrats*, Thèse, Reims, 1953, p. 37.
[452] *Ibidem.*

Cette conception, ce modèle unique de la famille empreint d'impérativité, d'abstraction et de rigidité, se matérialise essentiellement à travers les instruments de l'ordre public que sont l'indisponibilité (pas de terme et condition dans le droit de la famille) et la stabilité (le principe de mutabilité limité).

1.2. L'essor contemporain de la volonté individuelle dans le droit de la famille

Le constat est le même partout: le développement des volontés individuelles a pris une telle ampleur que l'on peut se demander si le droit de la famille est toujours d'ordre public.[453] Sans pouvoir prétendre à l'exhaustivité des manifestations contractuelle en la matière, on s'en tiendra à relever les plus patentes dans le sièges de ce qui fut pendant près d'un demi siècle le "pré carré" de lordre public.

Ainsi, si la volonté a toujours été essentielle à la formation du mariage, dont le caractère partiellement contractuel ne peut guère être discuté[454], elle avait traditionnellement peu d'emprise sur ses effets. Le statut des gens mariés était déterminé par la loi. C'est moins vrai aujourd'hui. Ainsi, on peut observer que le devoir de fidélité (art. 309, al. 1 NCC) n'est plus tout à fait ce qu'il était. D'abord en raison de la réforme du mariage que le législateur a élaboré en supprimant le délit pénal relatif à l'adultère[455]. On affirmait traditionnellement que le devoir de fidélité était d'ordre public, et que les époux ne pouvaient s'en délier par un "pacte de liberté". Cette évolution conduit une partie de la doctrine à ne plus voir, dans l'obligation de fidélité, qu'un élément relevant des relations d'ordre privé, susceptible d'aménagement contractuels.[456]

De même, l'obligation de communauté des biens, imposé par le régime matrimonial legal, obligatoire et immutable, réglementé dans le Code de la famille de 1954, conduisait autrefois la jurisprudence à refuser toute valeur aux pactes de séparations entre époux. Dans le mêmes terms, ils ont été interdites toutes les conventions contraires à la communauté des biens (l'art. 30, al. 2 C. Fam.). Dans l'art. 329 le Nouveau Code civil introduit la possibilité de choisir le régime

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[453] Alain Bénabent, *L'ordre public en droit de la famille*, op. cit., p.31.

[454] Au delà du débat consistant à s'interroger sur la nature juridique de mariage (contrat ou institution), voir la lettre de l'art. 271 NCC qui emploi l'expression "entrer dans un mariage", contrairement au lettre de l'art. 144 du Code civil fr. qui emploi le verbe "contracter"; voir T.R.Popescu, *Dreptul familiei*, vol. I, Ed. Didactică şi Pedagogică, Bucureşti, 1975, p. 112; Ioan Albu, *Dreptul familiei*, Ed. Didactică şi Pedagogică, Bucureşti, 1965, p. 81.

[455] L'art. 304 du Code penal, concernand l'adultère, a été abrogé par la Loi no. 278/2006, M.O. 601/2006.

[456] A. Mignon-Colombet, *Que reste-t-il du devoir de fidélité entre époux*?, Petites affiches 2005, no. 21, p. 6.

matrimonial et aussi de changer ce régime pendant le mariage (art. 369-372 NCC). Dans l'art. 329 NCC est réglementé la convention matrimoniale, par laquelle les époux peuvent organiser leur vie patrimoniale. Avec ce contrat, ils peuvent décider que leur biens seront communs ou qu'ils leur resteront personnels. Ils peuvent choisir une gestion séparée ou commune des biens. En tout cas, si le couple ne choisit pas le mariage ou qu'il ne lui est pas ouvert, le droit civil ne lui ouvre pas le recours au pacte civil de solidarité ou autre forme de concubinage (art. 277, al. 3 NCC).

Le divorce, justement, n'est pas non plus resté étranger au mouvement de contractualisation qui traverse le droit de la famille. Ainsi, depuis l'entrer en vigoeur de Nouveau Code civil, les époux peuvent maniferster leur volonté de recourir à une procédure de divorce plutôt qu' à une autre (judiciaire ou administrative), puisque cette loi a créé, à coté de divorce pour faute (art. 379 NCC), le divorce pour rupture de la vie commune (art. 373, let. c NCC), le divorce sur demande acceptée (art. 373, let. d NCC) , et surtout, le divorce sur requête conjointe (art. 373 let. a NCC). Le divorce est devenu très largement contractuel. En temoigne surtout la place et la faveur accordées au divorce par consentement mutuel dans lequel les époux gardent la maîtrise de la cause et des conséquences de leur désunion. Surtout, les époux peuvent obtenir le divorce sur voie administrative ou devant le notaire public, avec leur consentement et s'ils ont pas des enfants mineurs (art. 375-378 NCC).

A vrai dire, la question est récente mais l'interrogation se renouvelle à mesure que les accords de volonté se multiplient et que recule l'ordre public de direction. L'interrogation porte sur le fait de savoir si la liberté contractuelle en matière familiale ne pourrait pas être limitée.

2. UNE LIBÉRALISATION ENCADRÉE DU DROIT DE LA FAMILLE

Contrairement à ce que l'examen succinct des dernières réformes pourrait laisser penser, l'ordre public en matière familiale n'a pas totalement disparu. Il apparaît ainsi que la famille, aussi bien dans son organisation que dans son fonctionnement, est beaucoup trop importante pour être abandonnée aux seules volontés individuelles. Interdisant toute convention qui y contraviendrait, l'ordre public subsiste. Il est simplement déplacé. Par ailleurs, les volontés individuelles, lorsque leur expression est permise, font l'objet d'une surveillance exercée par le pouvoir judiciaire.

2.1. L'encadrement des volontés individuelles par un ordre public renouvelé

En vérité, l'ordre public traditionnel, de direction, bien qu'en nette régression, subsiste (aussi bien en matière extrapatrimoniale qu'en matière

patrimoniale), et on assiste, en parallèle, à l'épanouissement d'un ordre public de protection.

Les condition de formation du mariage restent très marquées par un ordre public directif concentré autour d'un noyau dur composé de quelques conditions fondamentales. Ces conditions sont essentiellement des conditions de fond dont la sanction par la nullité absolue en cas d'inobservation montre bien l'importance.[457] Ainsi, le consentement des futurs époux, l'absence d'un précédent mariage non dissous, constituent assurément des conditions imposées par un ordre public de direction. Pour s'en tenir aux dispositions essentielles traduisant le maintien d'un ordre public de direction, on rappellera l'art. 277 al. 1 NCC qui rappelle le caractère d'ordre public de la différence de sexe entre les futurs époux.

Si l'évolution de l'institution du marriage (et par voie de conséquence, celle du divorce) s'est faite incontestablement dans le sens d'une plus grande contractualisation et notamment, sur le plan patrimonial, cela ne signifie pas que ladite institution soit tombée pour autant, dans le domaine exclusiv de la volonté individuelle. L'article 351 NCC rend impératif ce que l'on peut qualifier de solidarité matérielle qui aux yeux de certains auteurs ne saurait être évincé "au risque d'anéantir la fonction sociale de la famille qui est le lien patrimonial intergénérationnel et intragénérationnel".[458] L'art. 332 NCC soumet la liberté des conventions matrimoniales au respect des dispositions du régime matrimoniale choisie. De même, en dehors des stipulations autorisées expressément au titre des libéralités, les époux ne peuvent faire aucune convention dont l'objet serait de changer l'ordre légal des successions.[459] Ainsi sont prohibées les conventions par lesquelles les futurs époux établiraient au profit de leurs héritiers collatéraux un ordre de succession différent de l'ordre légal.

L'impératif de protection de l'enfant a constitué le point de départ de la plupart des réformes contemporaines du droit de la famille. La lettre du nouvel article 263 NCC est à cet égard édifiante: l'autirité parentale exercée sur l'enfant par les père et mère a pour but de protéger l'enfant dans sa sécurité, sa santé et sa moralité. Le législateur ne protège pas seulement l'intérê de l'enfant, il protège directement d'autres intérêts. Parmi ceux-ci, le Nouveau Code civil soumet la validité de certaines conventions à l'intérêt de la famille. En matière de changement de régime matrimonial, il se voit offrir explicitement le premier rôle. Par ailleurs, bien que la lettre de la loi n'en dispose pas expressément, son esprit semble également traverser les dispositions relatives au régime primaire impératif. Ainsi, chacun des accords conclus par les époux semble devoir tendre, plus ou moins directement, à assurer l'intérêt familial. Il en est ainsi, par exemple, des pactes pris

[457] Art. 293 NCC.
[458] D. Fenouillet, *Couple hors mariage et contrat*, in *La contractualisation de la famille*, sous la dir. de D. Fenouillet et P. De Vareilles-Sommieres, Ed. Economica, Paris, p. 119.
[459] Art. 332, al. 2 NCC.

en application de l'article 321 NCC, de la détermination du logement familial, mais aussi, plus généralement de toutes les décisions prises par les époux. Finalement, la contractualisation du droit de la famille et des personnes peu présenter un certain risque pour les tiers, justifiant ainsi une certaine protection. S'agissant des tiers à ces conventions, et notamment des créanciers, l'action paulienne leur est toujours ouverte mais le législateur peut s'avérer encore plus favorable à leur endroit puisqu'il leur ouvre parfois expressément la voie de la tierce opposition. Au-delà de ces intérêts protégés par la loi, dans un registre plus implicite mais probablement tout aussi contraignant, le législateur protège également des valeurs susceptibles de limiter la prise en compte des volontés individuelles: l'égalité, la liberté, etc.

L'essor des volonté individuelles en matière familiale a été de pair avec celui du rôle du juge dans l'encadrement et l'arbitrage de celles-ci. François Terré précise en effet que "ses tâches croissantes en tous domaines depuis un demi-siècle, bien au-delà de celle qui consiste à dire le droit, ont été tout particulièrement accrues dans l'ordre familial"[460]. Cet accroissement du rôle du juge, qui fait lţobjet de discussions, se manifeste tant en présemce qu'en l'absence de tout conflit.

2.2. L'encadrement de la libéralisation par l'intervention du pouvoir judiciaire

La promotion des volontés individuelles au sein du droit de la famille, couplé à la spécificité du contentieux familial et à l'émergence d'une justice contractuelle peut donner le sentiment qu'en apparence, le rôle du juge s'amoindrit. En réalité, il n'est est rien. On assiste plus exactement à un recentrage de l'ofiice du juge qui continue à encadrer les volontés individuelles. L'essor des modes alternatifs de règlement des conflits que sont la conciliation et la médiation peut donner le sentiment de marginaliser le rôle du juge en présence d'un litige. En réalité, il n'en est rien, on assiste simplement à un recentrage du rôle du juge.

L'explosion du contentieux familial se résumant en un antagonisme de "droits à", couplé au recul du poids du groupe et à la spécificité du domaine familial, explique le développement des modes alternatifs de règlement des conflits. Les nombreuses réflexions contemporaines que suscite le développement des modes alternatifs de reglement des conflits et singulièrement la médiation, s'intégrant souvent dans le plus large débat sur la déjudiciarisation, sont la manifestation de la recherche et de la réalisation d'un échilibre satisfaisant entre "le rôle premier du juge, qui est de trancher un litige, et le rôle plus contemporain qui lui est dévolu d'arbitre des conflits familiaux".[461]

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[460] François Terré, *Rapport de synthèse*, in *La contractualisation de la famille*, sous la dir. de D. Fenouillet et P. De Vareilles-Sommieres, Ed. Economica, Paris, p. 317.
[461] M. Nicoletti, *La médiation familiale et le juge*, Petites affiches, 30 juin 2009, p. 7.

En réalité, pour reprendre le mot d'un auteur "il ne s'agit pas, quand on parle de déjudiciarisation, de porter atteinte à l'essentiel de l'office du juge en matière familiale, mais de prendre en compte, dans lea rapports entre celui-ci et les personnes en litige, la place croissante du contractualisme, ainsi que de la spécificité des conflits de famille".[462]

En effet, l'ensamble des texts relatifs à la conciliation mais également à la médiation démontre que le juge demeure le pivot central de la procédure de conciliation et de médiation. Pour reprendre l'image retenue dans le rapport Guinchard[463], la recherché d'un équilibre aboutit à l'existence "d'un juge décideur, au coeur d'une équipe". Dans le cas des textes relatifs à la médiation en matière d'autorité parentale et divorce, le juge propose, voire impose le recours à la médiation.[464] C'est lui qui désigne une tierce personne aux fins de médiation et c'est encore lui qui homologue ou non le fruit de la médiation. Par ailleurs, le renvoi à la médiation ne dessaisit pas le juge. C'est bien lui qui aura, en définitive, à statuer, sans être lié, juridiquement parlant, par les accords qui pourraient ressortir de cette opération.

Ensuite, la qualification de mode alternatif de règlement des conflits est quelque peu trompeuse, dans la mesure où, en Roumanie, il, s'agit au contraire d'un mode complémentaire à l'intervention du juge. La médiation n'est pas un procédé autonome; elle intervient une fois que l'instance est introduite et s'inscrit dans le processus judiciaire. On aperçoit ainsi que le juge, en présence d'un conflit et malgré la promotion contemporaine des règlements des différends en matière familiale, continue d'exercer un fort encadrement des volontés individuelles. Il en va de même en l'absence de tout conflit.

En l'absence de tout conflit, là où la loi ouvre de nouveaux horizons à l'expression des volontés individuelles, elle ne renonce pas, à conserver, par l'intermédiaire du juge, un droit de regard et de décision. Pourquoi? Parce qu'il apparait que trop d'intérêts graves sont en jeu pour que des matières sensibles soient totalement abandonnées à l'autonomie de la volonté. "Les conventions, les pactes et les accords en cause ne sauraient être valides s'ils n'étaient passés en parfaite connaissance de cause et s'ils ne préservaient pas les intérêts que la loi entend protéger".[465] Sous cet angle, le juge devient garant de l'ordre public, mais

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[462] *Idem*, p. 4.

[463] Le rapport de la Commission présidé par M. Serge Guinchard relatif à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles en France, 29 juin 2009, p. 153 et s.

[464] Art. 43, al. 2, Loi no. 370/2009 modifiant et complétant la *Loi no. 192/2006 sur la médiation et la profession de médiateur*, M.O. 831/3 decembrie 2009.

[465] J. Normand, *Droit judiciaire de la famille et contrat*, in *La contractualisation de la famille*, sous la dir. de D. Fenouillet et P. De Vareilles-Sommieres, Ed. Economica, Paris, p. 211.

dans le souci de pousser plus loin le movement de contractualisation du droit de la famille, ce contrôle de l'ordre public pourrait passer, au moins en partie, sous le contrôle du notaire.

CONCLUSION

La conclusion réside dans l'observation que la famille fait de moins en moins référence à un modèle collectif, déterminé autoritairement, auquel l'individu devrait adhérer et dans lequel il n'aurait qu'un pouvoir très limité d'initiative. En ce sens, l'essor de la prise en compte des volontés individuelles en droit de la famille est remarquable. Cependant, le déplacement du contrôle social ne signifie pas sa disparition. En effet, l'ordre public familial devient un centre de convergence d'intérêts individuels qui n'en demeurent pas moins impératif. Il devient une addition de libertés d'ordre public autour d'un noyau réduit à l'essentiel que constituent, l'égalité, la liberté, l'intérêts de la famille, etc...

Par ce biais, le législateur réussit à lever les interdictions et à ouvrir un modèle naguère fermé, sans renoncer pour autant à encadrer la liberté contractuelle du couple. Il s'en remet à l'autorité judiciaire chargé de mettre en oeuvre en ordin public de protection en veillant au respect de l'intérêt à protéger. En ce sens, le législateur trouve l'équilibre entre la liberté et l'impérativité.

PECULIARITIES OF PROPERTY WHEN ENTERING INTO CONTRACT ON ALIENATION THEREOF PROVIDING PERPETUAL MAINTENANCE

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Abstract

For the economy of states, real estate had a special importance since ancient times. Therefore, all states have decided to create rules for record and circulation thereof, aimed at providing advertising[466]*. Consequently, legal documents on alienation of real estate have acquired a special regulation in civil law at all times, and the state tended to monitor circulation thereof. Its special regulation is explained by the great social and economic value of real estate. Therefore, the alienation of immovable property is to be regulated in a manner more severe than the alienation of movable property.*

Having analyzed normative acts regulating the right of property in ownership, we established that most normative acts regulate the right of property in public ownership and there is no act to regulate specifically private ownership thereon. It is particularly significant to mention here the Decision of the Supreme Court of Justice of the Republic of Moldova: "Concerning the application of some provisions of the Civil Code and other normative acts related to private ownership on immovables, including extensions, no .2 dated 27.03.2006", which had the right to emphasize that the provisions of the CCRM have an impact on privately owned property, as legal practice was questionable in this regard[467].

New Civil Code of Romania took a step forward in this regard regulating it expressly. Thus, Romanian Civil Code - BOOK III - TITLE II - Private Property in CHAPTER I - General provisions SECTION 1, Art. 555, provides definition of this right as follows: (1) Private property is the owner's right to possess, use, and dispose of property in an exclusive, absolute, and perpetual manner, within the limits set by law.(2) Under the law, private ownership is subject to modifications and dismemberments, as appropriate[468].

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[466] Gionea V., Cadastral record and real estate advertising system. - Bucharest, 1996, p.1.
[467] Bulletin of the Supreme Court of Justice of the Republic of Moldova, 2006, No.12, p. 14.
[468] Romanian Civil Code. e-juridic.manager.ro.

Subpar.1 and subpar 4 art. 553 of CCR are also of interest in the context of the subject matter and specify: (1) All assets of private use or interest belonging to individuals, legal persons of private law or public law, including assets comprising private property of the state and administrative-territorial units are object of private property.

(4) Assets being object of private property, regardless of owners, are and remain in civil circuit, unless the law provides otherwise. They can be alienated, can be subject to compulsory seizure, and can be acquired by any manner provided by law[469].

CCRM does not contain such a definition nor the chapter, where the contract on alienation of property providing perpetual maintenance is regulated, does not contain express provisions related to any specific characters or peculiarities of property that can be thus alienated. To find any specific characters or peculiarities, we start with their definition. Subpar.1 of art.285 CCRM sets forth a definition, under which the property is considered all things subject to individual or collective appropriation and property rights. A specific feature is shown here as well, thus according to the provisions of the article 286 CCRM, they should be in civil circuit. The property can circulate freely, except where its circulation is restricted or prohibited by law[470]. Another character that is to be taken into account is that the property must have economic content, which can be measured in money. This character is very important as in the event of alienation of property providing perpetual maintenance, its content must be very impressive and continuing lifelong, it can be alienated only under such features by this condition. Certainly, the code also provides numerous classifications of property, which undoubtedly must be taken into account when entering into contract on alienation of property providing perpetual maintenance, especially when disputes arise.

Materials separated provisionally from plot of land to be reused remain immovables, as long as they are kept in the same form, as well as integral parts of an immovable that are provisionally detached from it if they are aimed at relocation. Materials brought to be used instead of old ones become immovables.

By law, and other assets can be referred to the category of immovables. Therefore based on provisions thereof, we have to emphasize that in the context of the issue we will refer only to assets in private property of the maintenance beneficiary, because only they are the main subject in studied contract[471].

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[469] Read more: http://legeaz.net/noul-cod-civil/art-553-proprietatea-privata-drepturile-reale-in-general.

[470] Law of the Republic of Moldova No.1107/06.06.2002 Civil Code. Book II - Real rights (art.284-511) *//Official Gazette 82-86/661, 22.06.2002.*

[471]Law of the Republic of Moldova No.1107/06.06.2002 Civil Code. Book II - Real rights (art.284-511) *//Official Gazette 82-86/661, 22.06.2002.*

Special regulation of legal acts relating to alienation of immovable property aims to guaranteeing the exercise and protection of property rights. As it was rightly stated in the literature, the subjective right recognized for a person, which exercise is not assured through remedies, remains to be just a declared right[472]. Without physical ability to protect their property, persons would not be motivated to accumulate capital and economic activity will be limited[473].

Therefore, one of the guarantees of property right protection is state registration of ownership of real estate. According to art.290 CCRM, ownership and other real rights to immovables, encumbrances on these rights, origin, modification and termination thereof are subject to state registration.

Particular attention should be paid to real estate owned jointly. In these cases, the value of property share, the possibility of alienation must be determined, the preferential right of co-owners must be taken into account and their consent for future alienation must be requested and that is not observed when entering into contract on alienation of property providing perpetual maintenance[474].

Subpar. 1 of the article 839 CCRM provides that the maintenance beneficiary undertakes to transfer to the other party, acquirer, into ownership an movable…[475]. The legislation does not specify which movables can be subject of the contract on alienation of property providing perpetual maintenance, but, obviously, they can only be valuable assets primarily for acquirers such as expensive cars, planes, paintings, jewelry etc. Neither art. 228, subpar. (5) CCRM that sets forth assets not referred to the category of immovables, including money and securities, are considered movables, afford us a broader ground for characterizing movables in the context of the contract on alienation of property providing perpetual maintenance.

Neither in the Decision of the Government of the RM No.849 dated 27.06.2002 on Register of mortgage of movables,[476] we find a legal interpretation of movables. Therefore, we believe that movables as subjects of the contract on alienation of property providing perpetual maintenance can only be assets of great value. Situation is even more difficult when property is movable, as civil law in

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[472] V.P.Gribanov. Limits of the exercise and protection of civil rights. - Moscow, 1992, p.96.

[473] D.Yu.Stiglits. Public Sector Economics. - Moscow, 1997, p.31.

[474] Practice related to civil cases of the SCJ. Decision of CC and AC of the SCJ of the RM dated 15.03.2006 No.2ra-265/2006 - Under contract on alienation of property providing perpetual maintenance, which was concluded with both spouses, the appellant is not entitled to the share of died husband in joint ownership of spouses, as this condition was not stipulated in the contract.

[475] Law of the Republic of Moldova No.1107/06.06.2002 Civil Code. Book III - Obligations (art.512-1431) *//Official Gazette 82-86/661, 22.06.2002.*

[476] Official Gazette No. 95 , art. No. : 946 of 01.07.2002.

effect does not expressly provide measures of protection or guaranteeing of rights of the parties related to movables.

Provisions of the New Romanian Civil Code[477] regulating private property right in respect of movable property are important and welcome for study effected. Thus, subpar.1 and 2 of art. 598 NRCC state that private ownership of movable produced with materials of other person belongs to the person that made it or, where appropriate, to the owner of materials, depending on the ratio of value of labor and materials, determined at the time when the movable was made. Property owner owes compensations equal to value of labor or, as appropriate, value of materials. Ratio of value of labor and materials is determined in art. 599 NRCC, which provides that in all cases where value of materials equals to labor or there is a slight difference, ownership of property is common and exercised under section 2 chapter V hereof. Art.600 and 601 establish the legal regime of joint of two movables and impossibility of separation of movables. Art.600 NRCC states that if two movables with different owners are joined, each one is entitled to separation of property, if thus other owner would not suffer damage greater than a tenth of the value of its property. Art.601 NRCC states that if separation of joined movables cannot be obtained, accordingly, provisions of art. 598 and 599 of the same code apply[478].

Unfortunately, legislation of the RM does not provide such regulations on movables, but this need is presumed.

Another category of property is related to services provided by supporter. It is important to consider not only the value of services provided, but also the value of required assets related to the performance of services. *This follows directly from the content of subpar. (1) of article 839 CCRM, as well as legal content of the legislation of other states, according to which* the acquirer is obliged to provide to the beneficiary maintenance in kind – housing, food, care, and support as needed during life, as well as funeral[479]. Therefore, housing, food, medicines as well as other goods that are necessary for life must have economic content to be measured in money, to be brought into civil circuit, and to meet needs of dependent. We support the view presented in doctrine that it would be good for protecting interests of dependents, which are usually elderly or ill, the law or another normative act to establish such a minimum that is not less than minimum basket and, given that the value of goods is changing in market economy, its annual revaluation is to be provided.

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[477] Abbreviated hereafter – NRCC.

[478] Romanian Civil Code - BOOK III - TITLE II - Private property. http://www.clubjuridic.ro/.

[479]Law of the Republic of Moldova No.1107/06.06.2002 Civil Code. Book III - Obligations (art.512-1431) *//Official Gazette 82-86/661, 22.06.2002.*

CONCLUSIONS

1. In conclusion, we emphasize that privately owned property plays a special role within the institution of alienation thereof providing perpetual maintenance. It can persist in the content of the contract on both sides. Given that immovables are used especially at the alienation of assets, when entering into contracts on alienation thereof providing perpetual maintenance, it is important to highlight specific characteristics of law, which must be taken into account in their alienation. They must first have a content and economic value, belong to the maintenance beneficiary on the basis of private ownership, be in civil circuit, and be registered in the Register of real estate, when a contract is to be entered into.

2. Although movables refer to a legal regime, that is milder, less restrictive compared to immovables, which legal regime is more severe, with more conventionality, limitations, and restrictions, however, we consider the situation to be even more difficult when the subject of the contract on alienation thereof providing perpetual maintenance, the property is movable, which is harder to be argued and valued as civil law of the RM in effect does not provide expressly any more extensive regulations thereon, measures protecting and guaranteeing the rights of the parties relating to movables.

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SOME ASPECTS OF THE LEGAL LIABILITY IN THE PUBLIC AND PRIVATE LAW

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Resumé

Dans cet article l'auteur fait une présentation concrète de la notion de responsabilité juridique dans la législation et la culture juridique de la République de Moldova, tout en mettant en évidence les situations qu'on doit prendre en considération lorsqu'on traite des problèmes de la culture juridique en tant que moyen d'assurance des droit de l'homme.

Keywords*: legal liability, penalty/sanction, obligation, coercion/constraint, coercive relation, liability in public law, liability in private law, legal liability of repairing a loss, repressive legal liability*

A really great number of different modalities of interpreting the legal liability in the public and private law took shape in the doctrines. We could list the following, which are among the most spread ones: the legal liability is a *sanction*, a punishment that foresees a coercive measure imposed by the state to the delinquent; *the legal obligation* of the guilty person of carrying his/her *punishment* for having committed an offence; a legal relation within which the delinquent suffers a coercive measure applied by the state. [480].

The concept of the legal liability as a complex phenomenon including the *retrospective and prospective* aspects is more general than the conceptions mentioned above.

In law, there are other explanations for the legal liability as well, but, in one way or another, all of them get summarized to those four mentioned above.[481]

We shall start with the first interpretation – *the legal liability is a sanction.* The admissibility and reasonableness of understanding the legal liability *as a sanction* that implies a repressive measure, a punishment applied to the delinquent by the state, are connected, as a rule, to the fact that the sanctions constitute an obligatory element of the legal liability as an institution.

[480] Baltag D. Liability and Legal Liability Theory. Chisinau: Tipografia Centrala(*Central Publishing House*), 2007. p. 118.
[481] Baltag D. Referenced publications p. 97.

The majority of the authors connect the notion of legal liability to the state-imposed constraint, founded on the legal assessment of the behaviour of the perpetrator and which is expressed by the determination of negative consequences for the person/entity subject to illegality, consequences as *limitations* of a *subjective, personal* or *patrimonial* nature. Only the tandem between these three elements gives birth to the legal liability.

Different theoretical approaches exist in the autochthonous specialty literature related to the phenomenon of the legal liability, which keep the same essence in principle: the liability is a constraint and a sanction. For example, Professor Gh. Avornic, presenting several approaches regarding the concept of the legal liability mentions in a special manner that the "legal liability is a coercive measure applied by the state for having committed an illegal act, expressed by the application of some sanctions of material, organizational or patrimonial type"[482].

Professor E.Cojocaru presents as well the definition of the civil legal liability as a type of constraint: „ the civil legal liability …is used as a method of protecting the subjective civil rights, as well as a method of forced performance of the contractual obligations"[483].

The author A. Bloşenco underlines the fact that not all the sanctions represent measures of liability, because the legal liability is a type of sanction that is characterized by peculiar features[484].

As well, A. Băieşu defines the civil liability as a form of the state-imposed constraint consisting in the commitment of any person to compensate the loss caused to another person through his or her illegal act stipulated by law or contract[485].

Professor V. Guţuleac considers that the contraventional legal liability is the response of the state …by the application of the state-imposed constraint foreseen by the contraventional laws through the methods and in the terms provided for by law[486].

Gh. Boboş, a representative of the Romanian doctrine, defines as well the legal liability as a legal relation of constraint having the *legal sanction* as object[487].

The researcher I. Craiovan brings another manner of expressing the essence of the notion, making reference to the repressive and educational feature of

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[482] Avornic Gh. General Theory of Law. Chisinau: Cartier juridic, 2004. p.7.
[483] Cojocaru E. Civil Law. Civil Legal Liability. (theoretical, legislative and comparative study of law). Chisinau: Free International University of Moldova, 2002. p.25.
[484] Bloşenco A. Criminal Legal Liability. Chisinau: ARC, 2002. p. 167.
[485] Baeş S., Baieşu A. Civil Law. Real Rights. General Theory of Obligations. 2nd volume. Chisinau: Moldova State University, 2005. p. 403.
[486] Guţuleac V. Scientific Work on Contraventional Law. Chisinau: Tipografia Centrală(*Central Publishing House*)2009. p. 36.
[487] Boboş Gh. General Theory of the State and Law. Bucharest: All Beck, 1983. p. 264.

the law that aims at outlining "its capacity of involving a *constraining* collective response in relation to the transgressor of the legal norm and the anticipation of which is able to induce respect and compliance from the part of the members of the society who don't want to draw ***legal sanctions*** upon themselves." [488]

We shall presuppose that namely this explains the fact that the perception of the legal liability as a sanction is the most commonly used in the legal practice. That's why we shall admit that this is one of the most used theoretical definitions affirmed of the legal liability at the moment.

During the critical analysis of the interpretations of the legal liability, we can notice that the *second direction* of interpretation lays stress on the punishment, sanction, delinquent's liability of bearing the coercive measure applied by the state.

V. Cîmpeanu and V. Tarhon, during their study of the material and patrimonial liability, define the liability as the *obligation* of one who caused a loss through his or her fault to repair this loss[489].

I.Iovănaş sees the legal liability as "an expression of the conviction of an illegal behaviour by the state, consisting of the *obligation* of bearing a deprivation"[490].

Professor V. Guţuleac, the representative of the autochthonous doctrine, besides the definition of the legal liability as a state-imposed constraint (sanction, punishment), underlines as well the transgressor's obligation of carrying the sanction[491].

We would like to remark that, in all the situations, these definitions relate to the liability as to *an obligation* of bearing a legal sanction, whether we deal with bearing a deprivation or a punishment.

According to the point of view of Professor D. Baltag, the interpretation of the legal liability as a variety of legal obligations the peculiar feature of which consists in the delinquent's obligation of bearing the negative response of the state, expressed by the respective coercive measure, is sufficiently grounded and important under the theoretical and practical aspect, exactly as in the first interpretation variant. All the more so these two variants must not be put in opposition, because they are the manifestation of the same phenomenon – the legal liability – presented at different levels of the legal regulation. While the legal liability as a sanction is a field of the objective law, then the liability understood

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[488] Craiovan I. General Theory of Law, Bucharest: ALL, 1997. p. 49.

[489] Cîmpeanu V. Labour Law. Bucharest: Ed. Didactică şi enciclopedică(*Didactical and Encyclopedical Publishing House*), 1967. p. 314; Tarhon V. The Patrimonial Liability of the State Administration Authorities and the Indirect Control of the Legality of the Administrative Acts. Bucharest: Ed. Ştiinţifică(*Scientific Publishing House*), 1967. p. 13.

[490] Iovanaş I. Criminal Legal Liability. Doctor's Degree Thesis, Cluj, 1968. p. 4.

[491] Guţuleac V. Scientific Work on Contraventional Law. Chisinau: Tipografia Centrală(*Central Publishing House*), 2009. p. 124.

under the aspect of the legal obligations is already related to the field of the subjective law. This is the reason why, in the latter case, it is studied preponderantly in the system of the categories of the subjective law and is expressed by the notion of legal obligation[492].

Generalizing the opinions expressed on those two approaches of the legal liability, we could apply the following logic idea: if it is true that the objective law cannot be realized without the subjective law, because it then loses the sense of its existence, we shall admit that the importance of the legal liability as a punishment will be reduced as well to zero if it lacks the form of a legal obligation of bearing the respective coercive measure imposed by the state for the committed offence.

Thus, we can ascertain that the variants of perception of the legal liability exposed above do not exclude each other but, on the contrary, complement each other presenting a direction and an important stage in its knowledge.

These two variants show the levels of the real manifestation of the legal liability as a legal modality of regulating human behaviour in the legal field[493].

The researches on the legal liability under the aspect of the obligation of bearing negative consequences have leaded, in a logical manner, to the creation of a new trend in its study. The essence of this trend consists of the fact that the legal obligation of bearing negative consequences is related to state's right of applying sanctions to the person who is culpable for having committed an offence. *The presence of a connection between delinquent's obligatoriness of bearing negative consequences for the offence he or she has committed and state's right to apply a concrete punishment to the guilty person gives us the opportunity to see in the legal liability a special coercive legal relation.*

And here we pass to the *third form* of interpretation of the legal liability, which states that the legal liability represents the legal relation appeared from the illegal action between the state, represented by special authorities, and the transgressor, who is imposed the obligation of bearing the respective deprivations and the unfavorable consequences for having committed the illegal action, for the violation of the requirements contained in the legal norms.

The legal liability is a special legal relation, mentions Professor Gh. Avornic, consisting of the obligation of bearing the sanction stipulated by law as a result of an imputable jural fact. This obligation is however included in a complex content, complemented by the corresponding, connected and correlative rights[494].

In his tentative of surpassing the sphere of definitions that limit the liability to a sanction or mere obligation of bearing a legal sanction, M. Costin was proving that the legal liability, having the illegal action as a basis and the application of the legal sanction as a consequence, represents a complex of rights and obligations

[492] Baltag D. Referenced publications, p. 109.
[493] Ibidem. p. 110.
[494] Avornic Gh. Referenced publications, p. 488.

which create the *content of the legal relation of constraint* that ties the state, as a unique active subject, and the author of the illegal action, who is the passive subject of the respective legal relation. The object of this legal relation is the legal sanction borne by the author of the illegal action with the aim of re-establishing the legal order, with the ultimate goal of guaranteeing the observance of the legal order. [495].

Of course this kind of analysis is praiseworthy, because it tries to express a notion, surprising, in the most general and abstract manner, the content and essence of the phenomenon, keeping the criteria of any definition. The author makes a synthesis and shows that the "legal liability is a complex of rights and connected obligations which, according to the law, *are created as a result* of the perpetration of an illegal action and which constitute the *framework of the fulfilment* of a state-imposed constraint by the application of a legal sanction with the aim of ensuring the stability of the social relations and of guiding the members of the society in the spirit of observance of the legal order"[496].

In one of her works, L. Barac, an illustrious expert in this issue, states that the legal liability cannot be reduced to a mere "*obligation*". The content of this institution is neither defined sufficiently by its association with the notion of "*legal relation of constraint*". Analyzing the different forms of the legal liability in different legal fields, the author concludes that the legal liability represents more than just a complex of rights and connected obligations, and the legal relation of constraint aims more at facilitating the comprehension of the content of the institution than defining its essence[497].

Taking into account the above-mentioned elements, L. Barac considers that the *legal liability* could be defined as the *institution* that includes the totality of the legal norms on the relations that are created in the field of the activity carried out by public authorities, according to the law, against all the persons who violate or ignore the legal order, with the aim of ensuring the observance and support of the legal order and public welfare[498].

Professor I. Craiovan[499] puts forward an interesting hypothesis, according to which we shall take into account the place and role of the legal liability in the complex process of fulfilment of the positive law. According to his opinion, the legal liability can be defined as a relation consolidated by the law, by the legal norm, between the author of the violation of legal and state norms, represented by the agents of the authority, which can be courts, public officers or other agents of

[495] Costin M. Legal Liability in Romanian Law. Cluj: Dacia, 1974. p. 27-33.
[496] Lupu Gh, Avornic Gh. General Theory of Law. Chisinau: Lumina, 1997. 27-33.
[497] Barac L. Legal Liability and Sanction. Bucharest: Lumina Lex, 1997. p. 39.
[498] Ibidem.
[499] Craiovan I. Elementary Scientific Work on the General Theory of Law. Bucharest: All Beck, 2001. p.283.

the public authority. The content of this relation is complex, being formed in its essence by state's right, as a representative of the society, of applying the sanctions foreseen by the legal norms to the persons who violate the legal provisions and the obligation of these persons of being submitted to the legal sanctions in view of re-establishing the legal order.

Together with this, Professor B. Negru detaches some peculiar features of this relation, and namely:

- the state is an obligatory subject of this relation, and the other one is the person who has committed the illegality;

- the content of this relation includes correlative rights and obligations, as well as state's obligation of applying exclusively the sanctions regulated by law for a concrete committed action and the right of the liable person of being applied exclusively this sanction and in no way another one;

- the sanction shall be applied in the name of the state and shall aim both at re-establishing the legal order that has been violated by the perpetration of the illegal action and at strengthening legality[500].

The interpretation of the legal liability as a legal relation has extended considerably the methodology of researches. This is *firstly* explained by the fact that any legal relation, including the relation of protection, presupposes the elucidation of a group of persons who can, in one or another moment, fall under the incidence of the legal norm. *Secondly,* we presuppose the determination of a concrete variant of behaviour that the persons who are in a certain legal situation shall have(or are entitled to have). *Thirdly,* we apply the mechanism of bringing the special legal means of ensuring subjective rights and legal obligations into execution[501].

From the point of view of the general theory of the legal liability, the special attention that we pay to the perception of the liability as a legal relation is as well explained by the fact that the researches fulfilled by certain experts, as B. Negru, D. Baltag, I. Humă, Gh. Mihai, V. N. Kudreavţev, B. L. Nazarov, T. N. Radiko etc. have proved that the possibility of including the *legal liability* in the general picture of the legal responsibility appears exactly in this way.

The idea of the legal liability(positive liability) that exists alongside of the legal responsibility, an idea that is supported by the adepts of the *fourth trend,* was elaborated by the representatives of the philosophical science, who saw in the legal liability(positive liability) a distinctive sign of development of the social relations.

We do not find a common opinion in the autochthonous doctrine in the consideration of this issue; moreover, the notions of "liability" and "responsibility" sometimes are even confounded as identical. Thus, Professor Gh. Avornic

[500] Negru B. General Theory of the Law and State, Chisinau: Bons Offices, 2006. p. 490.
[501] Baltag D. Referenced publications, p. 110.

considers that the authors of the Civil Law Dictionary have acted judiciously, using only the word "liability", and this is as well the state of things in the contemporary doctrine[502]. A. Bloşenco considers that the positive and retrospective aspect which is peculiar to the political, moral liability and to other types of social liability is not acceptable for the revelation of the essence of the legal liability[503].

Professor E. Cojocaru uses the term of "civil responsibility" together with the term "civil liability" as synonyms [504]. Other authors have completely another opinion. Thus, for instance, Professor V. Guţuleac dedicates a whole chapter to the notions of legal "responsibility" and "liability". Thus, in the publication "Scientific Work on Contraventional Law", the 6th chapter is named "Legal Responsibility and Liability in Contraventional Law". The author considers that the legal responsibility and liability are the constitutive elements of the administrative and legal status of the subjects of administration in the field of combating contraventionality[505].

In the vision of Professor B. Negru, the responsibility has a larger application domain than the liability. While the responsibility is related to the activity carried out by one person pursuant to his or her own will, according to his or her free choice of objectives out of several possible variants, the liability presupposes a predefined behaviour determined by the legal norms[506].

Generalizing the opinions expressed above, we sustain the opinions that: *the legal liability represents a category which determines the obligation of the responsible legal subject to bear the consequences of the inobservance of a legal norm in force in view of re-establishing the legal order in the society[507]*.

This is a doctrinarian definition containing some specified *meanings[508]*:

- the legal liability is the *obligation of bearing* the legal consequence of an illegal act, of a contravention, a civil offence or a disciplinary case (the obligation of carrying the punishment in case of criminal liability, the liability of repairing the loss in case of civil liability, the obligation of bearing a deprivation in the administrative law), thus, the legal liability consists of *the obligation to bear*, it does not represent the action of bearing the consequences that result from the content of bringing to responsibility itself;

- this obligation rests on a *responsible legal subject* that can be both an individual subject, a natural person, and a collective subject (a legal entity, NGOs, state authorities, the state itself). The legal subject is responsible, i.e. he/she/it

[502] Lupu Gh, Avornic Gh. Referenced publications, p. 284.
[503] Bloşenco A. Referenced publications, p. 16-17.
[504] Cojocaru E. Referenced publications, p. 23.
[505] Guţuleac V. Referenced publications, p. 125.
[506] Negru B. Referenced publications p. 491.
[507] Baltag D. Referenced publications, p. 111.
[508] Mihai Gh. Theory of Law. 3rd Edition, Bucharest: C. H. Beck, 2008. p. 156.

disposes of the capacity of being accountable or of acting freely and consciously, of assessing the consequences of his/her/its actions correctly and of understanding that the obligations that fall on him/her/it as a consequence and the action of bearing the sanctions foreseen by law and applied by the competent authorities. With the aim of ensuring the complete guarantee against the lawlessness, the concrete determination of the legal liability presupposes, besides the social assessment (from the part of a team, of the public opinion), an official statement, fulfilled by the specially authorized state bodies.

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SCIENTIFIC AND PROCEDURAL ASPECTS OF CRIMINAL-LEGAL EXPERTISE

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Summary

The justice based strictly on truth, as a supreme value. A science which has devoted its existence to this great purpose is the legal-medicine. In an era of scientific progress this science forms jurist's a field that must light the various issues by applying its scientific knowledge in the judicial process. The expertise is rightly considered to be a scientific assessment of the evidences. All laws recognize the expertise as an evidence. Scientific and technical progress enhances the role of expertise in criminal proceedings. Criminal Procedure Code has reconfirmed the importance of expertise institution in the process of criminal probation, which is multilaterally regulated.

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

During the criminal case and in the process of crime investigation appears the necessity to solve questions that relate to the typical characteristics of different areas of knowledge (science). Because, as skilled and professional people would be, that criminal actions carried out, they may not possess the deep knowledge, to solve all problems, which are part of different branches of technological and industrial science. Therefore, in the investigation of crimes, from antiquity, they invited (attracted) for consultancy qualified persons from different areas which role was in this case to help them conduct the investigation, and make the necessary examination and expertise[509].

If justice is based strictly on truth, then, the scientific truth has the greatest ability to form joust's belief about truth and to insure scientific objectivity of judicial decision.

Criminal justice, therefore, constitutes a part of a wider and more complex activity that is called a criminal procedure. In criminal procedure there are cases which can be clarified just by using specialized knowledge of certain specialists[510]. Specialists and experts' findings as modern means of research and authentication of various objects, substances or phenomena that represent or may become

[509] Spasovic V.D. *Opere alese.* Vol.4, SPb.1893. p.297.
[510] Manzini V. *Trattalo di diritto processuale penale*. Vol. III. Torino, 1931-1932. nr.329.

evidences in the trial, are becoming increasingly indispensable due to the development of technology and its involvement in everyday life[511].

The expertise is rightly considered to be a scientific assessment of the evidences[512]. All laws recognize the expertise as an evidence. Scientific and technical progress enhances the role of expertise in criminal proceedings. Criminal Procedure Code has reconfirmed the importance of expertise institution in the process of criminal probation, which is multilaterally regulated[513]. Besides the proper expertise, technico-scientific and forensic (medico-legal) conclusions are also recognized as evidences. However, the findings are made only in emergency cases, and if their objectiveness is doubtful the expertise is compulsory. The role of the parties in making the expertise has lately increased. Thus, the parties have the right - on their own initiative and for their own account - to submit an application for making an expertise to ascertain the circumstances which, in their opinion, can be used in defense of their interests. Since the forms of expertise are permanently diversified, it is difficult to present their characteristics[514].

Besides the right to propose the expertise carrying out, the parties have the right to recommend an expert to participate in its performance. The expert must meet the requirements of Article 88 of the Criminal Procedure Code of R. Moldavia. The application for the recommendation of an expert is submitted to the prosecution body or court, entitled to reject the request, specifying the circumstances of the experts' incompatibility. If the parties propose their own expert, the prosecution body or court may reject the application unless there are circumstances under Article 89, paragraph 1, p.1-5 of the Criminal Procedure Code.

Art. 6 of the European Convention on Human Rights does not clearly mention the rules applicable to expert testimonies. The text of paragraph 3, point d) Art. 6 refers to witnesses, not to experts. However, ECHR jurisprudence has developed certain rules under the provisions of par. 1 and 3. The Court found that the right to a fair trial does not suppose the obligation of national courts to appoint experts at the defense's requirement when the opinion of the expert appointed by the court supports the findings of the prosecutor. However, the European Court does not hesitate to apply Art. 6, para. 3, point d) in the same way as the

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511 Саханов Т.В. *Институт судебной экспертизы в системе доказательного права. Материалы народной научно-практической конференции «Теория и практика судебной экспертизы в современных условиях»*. Москва, 2007. с. 37.

512 Constantin R., Drăghici P., Ioniţă M. *Expertizele - mijloc de probă în procesul penal*,.Bucureşti: Editura Tehnică, 2000. p.113.

513 Dongoroz V. ş.a. *Explicaţii teoretice ale codului de procedură penală român*. vol. I, Bucureşti: Editura Lumina Lex, 1975.

514 Bocăneţ Şt. *În legătură ca actul prin care se dispune efectuarea expertizei în faza urmăririi penale*. În: „Revista Română de Drept", nr. 4/1977.p.28.

application of the expertise if the appearances objectively suggest that the expert has a role of prosecution witness. That institution has performed the following analysis: an expert may be considered a witness if there are doubts about his/her neutrality.

These doubts must be objectively justified; the opinion of the accused may have importance, but it is not a decisive one.

The role of the expert role in the process and the manner in which he fulfills his duties are some crucial elements of particular importance. Doubts on the neutrality and objectivity can be considered justified if criminal suspicion comes from the expert who is also called an official expert[515].

When the expert is considered to be the prosecution witness, it can be heard during the trial, but only if in order to contest the experts' conclusions the persons cited by the defense in any role, are questioned under the same conditions as the expert. When the people cited by the defense are not interrogated under the same circumstances, the principle of equality of arms is violated. However, the breach does not occur if the query has not been fully performed under the same conditions, if the witnesses of defense had the opportunity to contest the expert's findings by means of the same arguments and methods. In other words, although the witnesses of defense compared to expert of prosecution was in a disadvantage, the principle of "equality of arms" was not broken if the inequality refers to the issues that are not crucial in determining guiltiness or innocence of the suspect.

According to art. 143 of the Criminal Procedure Code the expertise is compulsory in some cases. Thus, in determining the cause of death, degree of severity and the character of body injuries a forensic (medico-legal) expertise is carried out. The expert competency does not include the issue whether it was murder or suicide, as the expert only determines the cause of death and nature of injuries. It is not also the subject of the expertise to include the determination of "distinctive cruelty" since this phrase is not a medical term.

A case of murder can be examined without carrying out a forensic expertise only when the body was not discovered and all possibilities of its discovery are out. In such situations the case is disclosed on the basis of other evidences in the dossier, if the fact of murder committing is confirmed.

To establish the ability of victims to have a sexual conduct forensic expertise or a complex medical and psychological one is assigned. In case of application of coercive medical measures to alcoholics and drug users (Art. 103 of the Criminal Code), the forensic conclusion act is required. If this act does not contain sufficient data, a medical and psychiatric examination is assigned.

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[515] Niculescu O., Golubenco Gh. *Expertiza judiciară: noţiuni, conţinut, specific*. Rev. „Legea şi viaţa", 2009. nr.4. p.50.

An autopsy is performed not only on the basis of the disposition of its carrying out, but also according to the disposition to perform a medico-legal examination in order to discover some signs that can serve as a basis to start criminal investigation (art.140; art.144 Criminal Cod). In such situations, a forensic report is concluded; it cannot substitute the medical one[516].

To determine the mental state a psychiatric examination is carried out and here knowledge in Psychology is useful.

The mental state of the suspect, the accused, the defendant being examined, the character and the motive of the offence committed by the accused/the defendant are analyzed as well as the behavior of the person during and after committing the crime. It is also necessary to take into account some data characterizing the behavior of the perpetrator before the crime, and those ones related to the diseases from which he suffered. In such situations, the expert may ask for different documents, medical certificates, etc from medical institutions where the person was treated. In case of necessity, for example, when there are data that the person gets tired quickly, his attention is dispersed, has an unstable emotional state, and the person has reached the retirement age, a complex psychiatric-psychological investigation is carried out.

Age expertise of the suspect, the accused, the defendant or the injured party is performed by a doctor and a psychologist, being assigned not only when some certain documents are absent or are doubtful, but if they are impossible to be obtained. In finding the age it should be taken into consideration that, following the expertise, the birthday is considered to be the last day of the year established by the expertise. If the expert determines a maximum or minimum number of years, the birthday is considered to be the last day of the year corresponding to the minimum number of years. It is considered that the person has attained the age of 14, 16, 18 at midnight of the day of birth, i.e. beginning with the next day at 00.00 A.M.

A forensic or psychiatric examination of the injured party and of the witness is made without their consent in compulsory ambulatory conditions. It should be noted that the prosecuting authority and the court must necessarily fix these people's attitude towards the expertise to be carried out and their acceptance or refusal to undergo such an investigation. In case of refusal, the prosecution body and the court has to establish its reasons, while the proper circumstances have to be mention in the disposition. The examination of the injured party and of the witness without their consent has to be made only when the other evidences do not reflect important circumstances of the case. The establishment of physical or mental condition of victims and witnesses is made without the individuals' consent only in cases where their statements will be later exclusively or essentially released on the

[516] Astarastoae V., Scripcaru Gh., Boisteanu P., Chirita V., Scripcaru C. *Psihiatria judiciară*. Bucureşti: editura Polirom, 2002. p.24.

basis of judgments in criminal case and other evidences are not available or are insufficient.

To establish physical and mental state of victims and witnesses it is necessary to take into account the particularities of individual behavior, the conditions under which the phenomenon was comprehended, information on the suffered diseases , data on individual development, memory capacity etc. The degree of psychological injuries caused to the victim's is determined by a psychiatric expertise.

Both the suspected, the accused or the defendant and the victim or witness may be subjected to the expertise to determine the state of receptive organs if it is necessary to verify the statements of these persons[517].

In some cases a psychological investigation can be ordered to determine the person's mental state at time of the crime, i.e. whether he/she was prone to suicide.

Paragraph 6 of Article 143 of the Criminal Procedure Code lets the expertise carrying out to the discretion of the prosecution body or the court. In this case, the expertise is made only if by means other evidences the truth cannot be established, such situations are common in practice. The expertise is considered a compulsory one when it is necessary to determine if the given object refers to a firearm, if the presented copy of the firearm can function; in case of the found pieces it is necessary to determine whether they represent ammunition, radioactive elements, explosives, poisons, etc. The expertise is also considered compulsory when it is necessary to determine whether the presented material belongs to narcotic substances, or if the examined plants refer to cultures containing narcotic substances. There also might be other cases when the expertise may be considered an obligatory one.

Non-fulfillment of the obligatory expertise stipulated by the law stipulates is a reason for quashing the sentence[518].

At the expertise disposition an order of prosecution bodies or the court is given.

The disposition or the conclusion of making expertise consists of three parts: introductory, descriptive and resolution. In the introduction the place and date of the disposition, as well as the name of the person who compiled it are given. The descriptive part contains a brief description of the case circumstances, this giving the expert the possibility to decide, if it is necessary, to get acquainted with the material of the case related to the subject matter of the expertise, justification for expertise carrying out the and the domain of specialized knowledge

[517] Rîjicova S. *Expertiza psihologică judiciară în cadrul sistemului judiciar*. În: Expertiza judiciară în cauzele privind minorii. Inst. de Reforme Penale; col. de aut. Chişinău: IRP, 2005. p118.
[518] Iftenie V., Dermengiu D. *Medicina legală*. Bucureşti: Ed C.H.Beck. 2009. p.18.

necessary for expertise. The resolution mentions the type of expertise, data, name and surname of the expert or the name of the expertising institutions, issues forwarded to the expert, the materials that are available to the expert are listed, including research objects, samples for the comparative analysis, some materials from the criminal dossier the expert will require (e.g. record from the scene of crime, photos, etc.). In the disposition the place of these objects is also indicated (files are attached to the dossier or found elsewhere), and form of objects' sealing. The issues put before the expert must not exceed the specialized knowledge of the person.

The expertise can be carried out only by a person designated for that purpose in accordance with criminal law procedure. The acts on the results of departmental control on certain circumstances, under the name of expertise (quality of goods, etc.) and obtained at the request of the prosecution bodies and the court, are not recognized as expert reports.

If some records of objects from the crime scene or other data are required, a specialist can be consulted. However, the specialist does not carry out the investigation independently and does not substitute official expertise's performance.

Legal expertise is usually done at the Institute of Scientific Research in the field of Legal Expertise of the Ministry of Justice. Medico-legal expertise is carried out at the Institute of forensic expertise, and the psychiatric one – at the subdivision of Republican Hospital of Psychiatry. When an external expert (who does not work at the expertising institution) is invited for carrying out the expertise, the criminal prosecution body or court checks if the circumstances of the expert's incompatibility are not present as well as and his qualification (specialization, studies, etc.)[519].

The disposition for the expertise is compulsory for the institutions or the persons authorized to perform the expertise. Only in cases when the person does not possess specialized knowledge or refers to certain aspects of incompatibility, he/she has the right not to perform the expertise.

The expertise may be carried out for the parties' account. The expertise for the parties own account is done under the same conditions as the expertise for the office. The appointed expert is given the list of issues proposed by the parties. The criminal investigation body or the court is obliged to place at the expert's disposal all necessary objects and materials.

The arrangement of the expertise includes the choice of objects as the subject of research and of samples for comparative analysis. The expert has no right to seek, to determine and use the material by himself which are not given to

[519] Baciu Gh., Pădure A. *Expertiza medico-legală a minorilor*. În „Expertiza judiciară în cauzele privind minorii„/ Inst. de Reforme Penale; col. de aut.: Igor Dolea, Simion Doraș, Gheorghe Baciu,...- Chișinău: IRP, 2005. p54.

him according to the law. However, the expert has the right (with the permission of the prosecution body or court) to participate or assist in trial, to ask questions that refer to the objects of expertise, particularly when the samples are collected.

When the expert is not provided with sufficient materials the nature of research conducting becomes improbable, as there is the risk of the reliability of conclusions to be questioned.

A particular importance is given to the acquaintance of the parties with the expertised object. Acquaintance with the order or the disposition for expertise is the right of parties which is realized as soon as possible. This is done in order the parties to be able to comment on the issues put to the expert, to request the change or the appointment of another expert recommended by the parties. If the order for the expertise carrying out has been drawn up before the identification of the suspect or the accused, it must be available to the person immediately after the offender has acquired the status of the suspect or the accused, his rights being compulsory announced. The advocate is entitled to be acquainted with the order once he is appointed as the defender in a certain case.

The person can use his/her right to submit the expert's challenge when in order or in the disposition a concrete expert is mentioned. This happens in cases when an external expertise is made. Submitting the refusal, the person must be given the opportunity to give reasons for his/her refusal, the reasons being included in the minutes of the action preceding the expertise carrying out.

If the parties request the appointment of an expert recommended by them, the applicant should substantiate the need for experts' inclusion, and determine whether it is the profile of the expert, these data being included in the minutes. Both the expert recommended by the parties and the appointed expert participate in expertise. This expert (as the others) is warned on criminal liability for false conclusion that it is under Article 312 of the Criminal Code.

Typically the requests for the amendment or addition to the issues must be upheld if the suspected, the accused or the defender insists on its proper formulation, even if it is wrong. It is also necessary to indicate the formulation developed by the parties, indicating in the order/disposition that the formulation is proposed by them.

The participation of the suspect, the accused, or the defender or the injured party in carrying out of an objective and comprehensive expertise facilitates the compiling a comprehensive report. Their presence is useful if some types of expertise as economic, merchandise, autotechnical etc is performed. There are no barriers from the parties for the objective compilation of the report, as a rule, they should be admitted. If the request for participation was rejected by the parties their written explanations should be made available to the expert. These can be written by the person who has applied or must be included in the minutes of the action preceding expertise making.

The Parties are entitled to know the expertised report and as well as the notice of failure to make the expertise. Having received the report, the prosecuting authority or the court must submit it to the parties as quickly as possible. When the injured party or witness has been the subject of an expertise, they also have the right to get acquainted with the report of the expertise.

The deadline fixed by the prosecuting authority or the court is strict for the expert. If the latter is unable to carry out the survey in a certain period, he must inform the prosecution body or court, giving reasons for procrastination.

In conclusion we should mention that the expertise is made under the provisions of the Criminal Procedure Code, unless other issues are provided by the law; forensic (medico-legal) expertise represent the means of evidence by which the judicial organs are notified about the specialists' findings on certain circumstances for the explanation of which special knowledge is required. The experts' opinion is formed based on the proper research of the case and the application of specialized data by competent persons appointed by the judiciary bodies. The conclusion of the expertise reflects a particular scientific statement confirmed by practice and, therefore, the judicial bodies are presented the results of reasoning by which scientific laws are applied to certain cases.

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LEGAL SANCTION- IN THE SOCIAL PUNISHMENT SYSTEM

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Abstract

The diversity and complexity of the social relations inevitably determine a variety of reaction modes, ways to demonstrate the society's disapproval or approval towards its members' conformist and non-conformist behaviour. The social liability, as a form to adjust the human behaviour in society, is not specific only to law but it is met in all the domains of our social life. We can consider that social liability is even preceding legal responsability. The liability involves an anticipated reflection upon the tracking of our deeds. From the moral point of view, it occurs as a solution against an anti-social behaviour and then occurs the responsability from the legal point of view. The sanction is then regarded as a society's natural reaction towards its members.

Key words: *social responsibility, human behavior, legal liability, social norm, legal norm, legal sanction.*

The history of human societies is practically confused with the history of public order maintenance systems, namely, with the existence of rules of conduct and their specific sanctions. The sanction is a fundamental concept of law. The law would not have substance and finality without sanction. The sanction is the very subject of the legal constraint. Gh. Boboş states that "sanction, whether referring to the individual offender of the illicit act, to its property or the validity of some legal documents, always represents the act of the state constraint, with all its negative consequences that the state imposes to the sanctioned person."[520] However, the sanction does not identify them with the constraint. The domain of legal sanction concept is much broader than that of constraint. For example there are some legal sanctions, especially in branches of private law that can be applied without using constraint, for example, such as the cancellation of an unlawful act. Another definition is given by V. Dongoroz, according to which the sanction is "any measure that the legal norm establishes as a consequence, in case its precept will be ignored, it is a consequence of non-observance of the precept, as its reason arises from the assumption that any precept may be disregarded." In deciding whether a

[520] Boboș Gheorghe, *Teoria generală a dreptului,* Ed. Dacia, Cluj Napoca, 1994, p. 215.

measure is or is not a legal sanction it must be examined whether "this measure is a corollary precept imposed by a rule of law and whether the measure comes after factum, i.e. after committing a breach of the precept from that rule of law."[521] According to the technical aspect, the legal sanction is a part of the legal norm; usually the last one in which it is clearly indicated the consequences that attract action, unlawful inaction indicated in the legal norm text.[522] At the author above mentioned, we also find an approach to legal sanction, namely that it would represent the state constrain force applied to the offender for violating the state legal order.[523]

Some authors identify the sanction notion with that of responsibility and that is why I considered that it is appropriate to explain the differences between these two institutions of law. Social responsibility, as a form to regulate human behavior in society is not specific to law but it is found in all the spheres of our social life. We can consider that social responsibility is even preceding the legal liability. Responsibility implies an anticipated reflection upon the results of our actions. From the moral point of view it comes as a solution against an antisocial behavior and then comes liability from the legal point of view. Legal liability is one of the basic institutions of law, that accompanies it as a guarantee during its affirmation[524] and it is also one of the ways of achieving the law order as a natural consequence of the regulatory sanctions for violating the law order and of making the person who disobeyed the norms of conduct in society to execute these sanctions through constraint. The concept of liability designates the society's reaction of disapproval, toward an attributable human action, and primarily of the individual. But still, we believe that the concept of responsibility is not identified and it is not reduced to that of sanction. Liability and sanction are two different concepts, the first being the social or legal frame for achieving the second one. In the specialty literature we find another point of view reflected. For example, the classic of the legal doctrine, Mircea Djuvara, fully identifies these two concepts, determining that the last one represents the placing of the organized state power in the law service, being a part of the positive law that accompanies it everywhere.[525] We remain at the conclusion that liability and sanction are two inextricably linked sides that belong to the same social phenomenon. However there are links and connections between these two notions, they cannot be identical, meaning that liability is the legal framework for

[521] Dongoroz V., *Drept penal*, București, 1939, p. 571.
[522] Baltag Dumitru, *Teoria răspunderii și responsabilității juridice*, Tipografia Centrală, Chișinău 2007, p. 47.
[523] Baltag Dumitru, *op.cit*., p. 47.
[524] Dvoracek Marie, Lupu Gh., *Teoria generală a dreptului*, Ed. Fundației Chemarea, Iași, 1996, p. 299.
[525] Djuvara Mircea, *Teoria Generală a Dreptului. Drept Rațional. Izvoare și drept pozitiv*", Editura ALL BECK, București 1999, pp. 354-355.

achieving sanction:" Legal liability is a legal constraint report and legal sanction is the subject of this report ".[526]As a conclusion we can say that the legal responsibility as a social phenomenon has a complex character. Firstly, it involves conscious and correct application of the behaviors contained in the social norms, secondly, a valuable judgment upon personal behavior and of the social consequences that arise, and thirdly, the possibility of a future application of constraint as well as the injury repair caused by this behavior.

The individual always lives within the social life, but social life includes all the phenomena that occur among people in any moment of their existence. Human action constitutes, develops, changes, stops and ends inevitably under the human responsibility, shaped by his spirituality, in which the capitalization is the product of his thought, his volition and his affection. Let's remind Aristotle's formulation "the reasoning deadline is the end point of the action." As the person is aware of the social values and norms, being taken in his personality individuality, he remains the only one responsible for himself and for his actions. Therefore, a variety of dimensions are characteristic to human activity. From our point of view the normative dimension is the most important. According to certain social values this imposes a particular pattern of behavior to the individual (political, ethical, moral, religious, etc.). The diversity and complexity of social relations inevitably determines a variety of the society's ways to react, to manifest its disapproval or approval towards to the conformist or nonconformist behavior of its members. According to a system of principles and criteria the human action requires us to respect certain rules, as well as to subordinate it to certain goals and interests. Hence the conclusion that the law cannot exist outside the society (" ubi societas, ibi jus""), as no society can function normally in the absence of law („ ubi jus, ibi societas"). Therefore, in any society there is "corpus ", more or less formalized, articulated and hierarchical norms, rules, obligations and social practices that normatively regulate the legal actions, relationships and individual and social behaviors.[527] The social norms contain some rules addressed to people's behavior, describing and detailing the ways in which the values must be materialized in legitimated and by society accepted behaviors. Any norm involves as acceptance as assumption and compliance by people.

Foreign researchers believe that members of a social group accept and support the norms and rules of conduct for two reasons: firstly, because they are learned and accepted in the socialization process, the individuals wishing to comply with these norms, because they consider them as a part of their social responsibility, which creates a sense of guilt when they do not respect them , and secondly, the members of a group expect one another to behave according to a

[526] Boboș Gheorghe, *Teoria generală a dreptului*, București, 1996, p. 264.
[527] Banciu D., *Sociologie juridică*, Editura Hyperion, Bucureşti, 1995, p.7.

group of norms, and then when they deviate from this behavior the others express their disagreement in different ways.[528]

These expressions of approval or disapproval expressed by social group towards a certain type of the individual behavior form a system of social sanctions.[529] Social sanction begins to act in the moment when the internalized control becomes ineffective when the individual loses the inner feeling of what he is and what he is not allowed, becoming necessary to be the interest of the group, brought to order by others or removed from the group.[530] Therefore, not respecting the norms and the social values causes a reaction of the social environment, the reaction resulted in a series of sanctions, based on constraint and social pressure that the community exerts against nonconformist or deviant behaviors. The sanction is therefore regarded as a natural reaction of the society against its members, which hurt it in a value: in most cases the sanction does not appear as something ordinary, but rather it is related to the idea of evil, a "harm that the state applies to one who defeated the prescription ... " In modern societies, the association of legal sanction to the idea of "evil" is limited, as the reaction of the society can be not only negative but also positive. In connection with this case, the professor Nicolae Popa pointed out that "in both situations, but especially in the positive one, the sanctions - which are based on a harmonized assessment system of values and criteria - is a powerful element of the social control."[531] Through the legal system of rules the society seeks to protect its existence, to defend itself against those who would attempt its integrity. Therefore, in the case of not-respecting the imposed normative requirements, the society assumes the right to interfere and to punish anti-social behaviors.

Thus, according to the shape and the intensity of the social reaction to a certain type of behavior, social sanctions may be:

- *Positive sanctions*, which represent the ways of approval and the rewarding ways of non-conformist behavior;
- *Negative sanctions*, which are reactions of disapproval of nonconforming behavior.

We believe that in the modern societies there can't be only negative sanctions and penalties but also positive ones. In both its aspects, the sanctions are a strong element of social control. The sanction application, after excoriating, in the case of legal liability, is provides through the state constrain force, compared to other forms of social responsibility. No person, to whom his rights were violated, does justice himself.

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[528] Pinto R., Grawitz M., *Metodes des sciences sociales*, Paris, Dalloz, 1967, p. 74.
[529] Banciu D., *op.cit.*, p. 79.
[530] Bădescu Mihai, *Teoria răspunderii și sancțiunii juridice*, Lumina Lex, 2001, p. 107.
[531] Popa N., *Teoria generala a dreptului*, Editura Actami, București, 1998, p. 164.

Both positive and negative sanctions can be *formal* and *informal*. The first are the formalized institutions' reactions (police, prosecutors, judges, etc...) towards certain behaviors of citizens. With regard to informal sanctions, they are the public opinion's, the colleagues', the neighbors', and friends' reactions and they find expression in the actions of the informal institutions.

The author D. Banciu has another classification, namely that both positive and negative sanctions may be: *direct* (organized), which represents the social reactions carried out in accordance with certain recognized traditional procedures and *indirect* (spontaneous, unorganized), which are spontaneous expressions of approval or disapproval from community members.

At the author M. Badescu, we find a sanction classification according to the sanction's "character" criterion, and namely: satirical sanctions, ethical or moral sanctions, religious and legal sanctions.[532]

The *satirical* sanctions represent a system of humiliations, of ironies shown for individual whose conduct is regarded as frivolous, funny, silly; satirical sanctions are extremely painful, as they strongly humiliate the individual's personality and subjective self.

The *ethical* sanctions are those rewards and punishments for the behavior described as moral or immoral. Moral punishments may be: the inner punishments of the subject who violates a moral rule such as regrets, remorse, sorrows and so on; the exterior punishments of the subject who abuses moral norms embodied in the form of the social reaction against immoral attitude such as disesteem, disgust, marginalization of the concerned etc.

Religious sanctions are rewards and punishments provided by the system of dogmas and beliefs of any religion for compliance or breach of orders, its interdictions, such as: penances, eternal conviction for people who believe in it etc.

Legal sanctions are the system of punishments and rewards provided by the legal stipulations and enforced by the coercive force of the state. Unlike moral and religious sanctions, the legal sanction is more severe, faster and more effective, having an obligatory character. Liability and sanctions are not (and cannot) in any case forms of blind revenge, but ways of legal recompense, the repair for violating the order, the reinstatement of a damaged heritage and a social defense.

Legal liability is analyzed in the specialty literature, as a constraint report whose purpose is sanction. Analyzing the historical development of legal sanction, we conclude that it is present since ancient times, with the appearance of the first laws, some of them being considered "veritable legal monuments". Of course the society is interested in respecting the legal rules, primarily through our consciousness, without recourse to sanctions and coercion. That is why the media,

[532] Bădescu M., *op. cit*., pp.110-111.

school, culture, etc. perform through various means an activity to educate citizens in the spirit of compliance. The preventive effect of its application increases in order to have a maximum social resonance of the sanction and in order to achieve its aim, namely the elimination of insecurity and mistrust in society. The sanction is concerned about the negative aspect of liability – the disapproving reaction of society. Based on the above mentioned, we justified the conclusion that legal liability and legal sanctions are effective only to the extent that they will be able to prevent the potential individuals from committing illegalities and they will help repair the legal norms violated. In this respect, a balance, regarding the establishment of a variety of sanctions - from the milder to the most severe ones is imposed.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

GENERAL CONSIDERATIONS ON THE SPECIAL PART OF THE NEW CRIMINAL CODE

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Abstract

The new Criminal Code adopted by Law No 286/2009[533] and applied by Law No 187/2012[534] represents a legislative work of art based on a modern philosophy on the role and functions of the criminal law, retaining numerous traditional institutions, thus representing continuity and stating novelty institutions, being inspired by modern European legislations.

The special part of the new Criminal Code has some features in terms of systematization, sanctioning treatment, simplification of incrimination texts and abrogation of other texts without discrimination.

Keywords*: new Criminal Code, systematization, sanctioning treatment, simplification, abrogation*

1. Under the aspect of systematization, the creators of the new Criminal Code abandoned the structure of our previous Criminal Codes, in the favor of firstly stating offences against persons and their rights, followed by offences against property and after that the offences against the state or other fundamental social values. This structure is found in most recent European codes (Austria, Spain, France and Portugal) and reflects the actual conception on the place of person and his rights and fundamental freedoms in the hierarchy of the values protected.

Thus, offences stated by the special part of the new Criminal Code were grouped in 12 titles (offences against persons; offences against property; offences against the state; offences that prevent the accomplishment of justice; corruption and offences at the workplace or related to the workplace; offences of forgery; offences against public safety; offences infringing upon relations that concern

[533] Published in the Official Gazette, No 510/24 July 2009
[534] Published in the Official Gazette, No 757/12 November 2012

social community life; electoral offences; offences against national security; offences against the fighting capacity of armed forces; genocide, offences against humankind and war) each of them with sub-divisions.

The special part has 249 texts compared to the 209 texts of the code in force. The increment of the number of incriminations is due either to the takeover, with few modifications, of some texts from the special legislation with criminal provisions (for instance, trafficking in human beings, minors, simple bankruptcy, fraudulent bankruptcy, informatics fraud, illegal crossing of state borders, etc.), or to the introduction of new incriminations (for instance: murder at the victim's request, harming the fetus, violation of professional office, violation of the private life, breach of trust by defrauding creditors, fraud in insurances, misappropriation of public auctions etc.) even if some of these were no longer demanded in our doctrine or practice.

De lege ferenda should be considered that, due to the importance of the protected social values and relations, stability or frequency of committing offences, it is not really necessary the codification of incriminating acts or terrorism, trafficking and illicit use of drugs, offences against intellectual property or, last but not least, offences against the environment.

2. The commission in charge with drafting the new Criminal Code considers that the **sanctioning treatment** for offences stated by the special part was established in normal limits in order to give expression to the contemporary vision on the role of punishment in the social reintegration of the offenders[535].

According to this standpoint, the extent and intensity of criminal repression shall remain within well-defined limits, first of all in relation with the importance of the harmed social value for those who break for the time the criminal law, having a subsequent and progressive increment for those committing more offences before their final conviction and even more for recidivists.

In the same vein, we mention that, unlike the actual Criminal Code, the new regulation states the compulsoriness of the addition for the plurality of offences punished only by imprisonment (judicial cumulus with compulsory addition), arithmetic cumulus (totalizing) for the sanctioning treatment of post-serving relapse or compulsory increment by half of the special limits stated by the law for the new offence committed.

This is why the limits of penalty stated by the special part must be correlated with the provisions of the general part, allowing a proportional increment of the sanctions stated for plurality and relapse, causing an aggravation of the penalty for the active subject.

[535] See in this regard Government Decision No 1183/2008 for approval the prior thesis of Criminal Code, published in the Official Gazette No 686/08 October 2008

Finally, it must be mentioned that the limits for the penalties stated by the special part of the Code are in accordance with the limits stated my most European Criminal Codes for similar offences, and also with the limits traditionally stated by our legislation, both in previous Codes, as well as in the actual Criminal Code before the modifications inserted by Law No 140/1996[536].

This thesis, to which we have some observations, does not check for all situations, so for example, it must be considered the fact that such a dramatic reduction of the special limits of the penalty stated for most offences against property, shall contribute to reduce crime in this area. According to our standpoint, the answer can only be negative. The prompt criminal repression and a more firm action against the causes of offences against property would contribute to the decrement of the number of offences or to the removal of damages caused by it.

3. It was also tried, with success in most cases, the simplification of the incriminating texts (an exception is formed by the legal content of the offence of first degree theft with over 16 aggravating circumstances), by avoiding overlapping between different incriminations or reducing the number of the aggravating circumstances stated by the general part of the Code.

Thus, if a circumstance is stated by the general part as a general aggravating circumstance it was not reiterated in the content of the incriminations stated by the special part, the general text being applicable. For example, if the general part states aggravating circumstances for the offence committed by three or more persons – Art 77 Point e), with certain exceptions, the special part no longer states the circumstantial element of aggravation consisting in committing the offence by two or more persons, the difference between one and two offenders being properly made in the legal individualization of the penalty. From the *de lege ferenda* stanpoint it is necessary the removal from the aggravating element of offences stated by Art 218 (rape) and Art 219 (sexual harassment) of the circumstances of committing these offences by two or more persons. It should also be considered the removal of the circumstance of committing the offence stated by Art 414 (desertion) and Art 418 (constraining a superior) by two or more members of the military.

4. However, in some cases were abolished only special aggravating elements or similar versions of certain typical incriminations or even independent offences without decriminalize them. Thus, Art 244 of the new Criminal Code stating fraud is included in the category of those offences against property characterized by breaching trust, stated by Chapter 3 of the second title of the special part. The text no longer reiterates Para 3, 4 and 5 of Art 215 of the actual

[536] Published in the Official Gazette, No 289/14 November 1996

Code, apparently decriminalizing fraud in conventions, with checks or with serious consequences. But the abrogation of the incrimination stated by Art 215 Para 3, 4 and 5 of the 1968 Criminal Code does not mean that this type of antisocial actions was decriminalized[537]. This will be, in accordance with Art 244, factual means of committing the offence of fraud, first degree fraud etc.

Same reasoning is valid also regarding the actions assimilated to the offence of fraud, stated by the actual Criminal Code. The new Code no longer states some of these actions assimilated to fraud stated by Art 296 (fraud in measurements) or by Art 297 (fraud in the quality of goods) from the 1968 Criminal Code, but these offences, if are committed again[538], shall be included in Art 244 of the new Criminal Code as factual means of fraud.

Moreover, abrogation is not synonym with decriminalization because the abrogated offence can still be incriminated by another law with the same *nomen iuris* (as the case of fraud) or under a different name (for instance, calumny stated by Art 259 of the 1968 Criminal Code shall be incriminated by Art 268 of the new Criminal Code generically named "misleading judicial authorities").

[537] Otherwise, see Ivan Gh. *Drept penal. Partea specială*, 2nd Edition, C.H Beck Publishing-House, Bucharest, 2010, p.310 regarding fraud in conventions and with checks, the author states that are no longer incriminated, although the factual reality does not require decriminalization (*abolition criminis*).

[538] Supreme Court of Justice, Penal Department, Decision No 4012/2001 published in the Penal Law Review No 2/2003; High Court of Cassation and Justice, Penal Department, Decision No 5524/2003 published in the Penal Law Review No 1/2005, p.165

THE INTERNATIONAL CONFERENCE
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PREVENTIVE ARREST IN THE CEDO JURISPRUDENCE

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Abstract

Right to liberty and security of person in order to prevent arbitrary deprivation of liberty of a person by the authorities, and the limitation period of imprisonment is regulated in Article 5 of the European Convention on Human Rights.

European Court of Human Rights has shown consistently that compliance with the principle of legality of state organs at interference with the right to liberty of the person represent one of the fundamental principles of a democratic society.

In this context, we propose to analyze european standard established minimum CEDO with regard to meaning and its applications in criminal matters.

Keywords*: arrest, the right to liberty and security, CEDO*

The European Court of Human Rights in relation to the legality of the arrest custodial measure entails analysis of two conditions:

- On the one hand, the measure is prepared in compliance with the substantive and procedural law and,

- On the other hand, is consistent with the purpose of Article 5 of the European Convention for the protection of the individual against arbitrary.[539]

The European Court[540] found that the phrase "legal ways" used in Article 5, paragraph 1, the national legislation, stressing the need that the procedure provided by law, obviously, domestic law must, in turn, under the European Convention, including the general principles those expressed or implied in this notion that expression underlying the procedure is fair and adequate.

[539] See: CEDO, judgment of 20 February 2003 in Hutchison Reid v. the United Kingdom, paragraph 46, CEDO, judgment of 3 December 2003, because Hertz against Germany, paragraph 42.

[540] See: CEDO, judgment of 8 July 2004 in Case Ilaşcu against Moldova and Russia paragraph 461, CEDO, judgment of 4 May 2006 in Case Ambruszkiewicz against Poland, paragraph 26-27.

This means that any deprivation of liberty should be prepared and implemented by a competent authority does not have an arbitrary character. Domestic law must be accessible and foreseeable. Accessibility law the possibility of a person to know the content of the laws upon which the deprivation of liberty. Predictability of drafting its law with sufficient precision to enable any person to provide a reasonable degree, the consequences of actions in the circumstances. The law must be sufficiently clear about the circumstances or conditions that justify its application and contain measures to protect persons against arbitrary interference.

C.E.D.O. analyzed the lack of a legal basis for detention where a person is deprived of liberty by a final judgment in which the court ordered his release.

The existence of a minimal delay on enforcement of judgment release is acceptable and usually inevitable to practical considerations of conducting the business of the courts and the need to fulfill certain formalities.[541]

On the other hand, custodial measure must fall in the six cases referred to in subparagraph strict and limiting. a - f of Article 5 paragraph 1 of the European Convention, namely:

Imprisonment lawfully generated by a judgment of conviction by a competent court mentioned in Article 5 paragraph 1 lit. a. It is therefore an exception to individual freedom and the CEDO require, as a condition, following domestic legal remedies and legal ownership of a person on conviction by a competent court.

First, the situation requires a prerequisite convictions in the sense of self given by the European Convention. It is not necessary that the sentence is final. Thus, a person convicted of first instance may be deprived of liberty under the sentence given in the first instance, during the proceedings on appeal, as they fall under Article 5, paragraph 1 lit. a. European Convention, Article 5, paragraph 1 lit. a to be references to the lawful deprivation of liberty, and not the legal conviction. Conviction must be ordered by a court under Article 6 paragraph 1 of the Convention that are prescribed by law, independently and impartially and to the conditions relating to substantive jurisdiction, territorial, functional and personal. In this respect, because Ilaşcu against Moldova and Russia[542], CEDO found that *"plaintiffs have not been convicted by a court and prison sentence handed down by a judicial body according to the Transnistrian Supreme Court that the proceedings in question can not be regarded as legal custody."*

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[541] See: CEDO, judgment of 22 March 1995 in Case Quinn v. France paragraph 42, CEDO, judgment of 1 July 1997, Case Giulia Manzoni v. Italy, paragraph 25, CEDO, judgment of 27 November 1997, Case K.-F. against Germany. paragraph 7i, CEDO, judgment of 6 March 2007 in Case Gebura against Poland, paragraph 34.

[542] See CEDO, judgment of 8 July 2004 in Case Ilaşcu against Moldova and Russia, paragraph 462.

Length of imprisonment shall not exceed the sentence imposed by the judgment of conviction. Thus, C.E.D.O. found a violation of Article 5 para 1 lit. a, the continued detention of the applicant for a period greater than two months time we had to actually execute the sentence imposed as a result of late finding applicability to a decree of pardon.[543]

Imprisonment by a court for disobedience to a judgment by law or in order to secure the fulfillment of any obligation prescribed by law is provided for in Article 5, paragraph 1 lit. b of the Convention and therefore governs two cases of deprivation of liberty.

The first case concerns the arrest or lawful detention for disobedience to a judgment according to law by a court. Such confinement is based on the failure by a person of the obligation established by an act of a court. The European Court term[544], "*the court*" is characterized, in the material sense of the term, the judicial function. This requires the ability to decide, based on rule of law and organized proceedings, of any factual and legal situations falling within its competence on the case you need to resolve. Likewise, it must meet other requirements, such as independence, especially the executive, impartiality, the term of office of its members, the existence of procedural safeguards. However, deprivation of liberty under Article 5, paragraph 1 lit. b, it must be based on a ruling by law and is consistent not only with the law but with the Convention. Deprivation of liberty finds its application in relation to the arrest of a person in order to bring before a court because of its absence despite several summons sent, incarceration as a result of non-payment of a criminal fine, psychiatric hospitalization for an inspection ordered by the court.

The second case refers to deprivation of liberty in order to secure the fulfillment of any obligation prescribed by law. C.E.D.O. showed that there must be a breach of an obligation incumbent on a person it would have to comply. Deprivation of liberty must be willing to ensure its execution, having a punitive character. Obligation shall be provided by law, be specific and concrete nature and not generally correspond to the requirements of the Convention and to be prior to imprisonment.

Deprivation of liberty in case of reasonable suspicion of an offense provided for in Article 5, paragraph 1 lit. c of the Convention. Thus, a person may be deprived of liberty for bringing him before the competent legal authority when there is reasonable suspicion of having committed an offense or when it is

[543] See CEDO, judgment of 20 July 2003, due to Grava v. Italy, paragraph 43 ^ 46.
[544] See: CEDO, judgment of 21 February 1984, Case Demicoli against Malta paragraph 41, CEDO, judgment of 30 November 1987, in H. against Malta paragraph 50, CEDO, judgment of 29 April 1988, in Case Belilos against Switzerland, paragraph 64.

reasonably considered necessary to prevent it from committing an offense or fleeing after having done thereof.[545]

Thus, in order to impose imprisonment following conditions are met:

• have a reasonable suspicion that a person: commit an offense, intention to commit a crime or intending to flee after committing the crime. By, "*the existence of reasonable suspicion*" means the existence of data information to convince an objective and impartial it is possible that a person has committed an offense.[546] The concept of crime has an autonomous meaning in the jurisprudence of the European Court, including the fact that criminal liability or disciplinary.[547] Requirement of reasonable suspicion is an essential part of the safeguards against arbitrary deprivation of liberty and must be assessed in light of all the circumstances of a case.[548] The provisions of Article 5, paragraph 1 lit. c refer to the concept of suspicion, since the time of arrest, it is necessary to clearly establish that an offense has been committed or is the exact nature of the offense, or that the investigators have enough evidence to bring a charge. The facts that gave rise to suspicion (suspicion) should not be flush with the facts necessary to justify a conviction or even to make a charge which must be at a time later in the criminal procedure.[549] Not be determined, therefore guilt of a person at this stage is the purpose of criminal prosecution to be derived from the reality and nature of the offenses for which a person is accused.[550]

• reasonable suspicion must relate specifically to commit a particular crime determined[551] and not an offense in general. In this respect, C.E.D.O. found a violation of Article 5 paragraph 1 lit. c while the offenses for which he was the

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[545] For a detailed analysis of the custody of the institution and its implications for criminal procedure law see Predescu O., M. Udroiu *European Convention on Human Rights and Criminal Procedure law Romanian*, CH Beck Publishing House, Bucharest, 2007, p . 104-168.

[546] See CEDO, judgment of 30 August 1990 in Case Fox. Campbell and Hartley v. UK, paragraph 31-32.

[547] See: CEDO, judgment of 22 May 1984, in the De Jong, Baljet and Van den Brink v. the Netherlands, paragraph 51, CEDO, judgment of 4 August 1999, in Case Douiyeb against Holland, paragraph 51.

[548] See: CEDO, judgment of 30 August 1990, because of Fox, Campbell and Hartley v. UK, paragraph 32, CEDO, judgment of 6 November 2007 in Case Stepuleac against Moldova, paragraph 68.

[549] . See: CEDO, judgment of 29 November 19Ş8, Case Brogan et against Great Britain, paragraph 53, CEDO, judgment of 28 October 1994 case Murray v. UK, paragraph 55, CEDO, judgment of 22 October Turkey-paragraph 51, CEDO, judgment of 16 October 2001 Britain paragraph 36.

[550] See CEDO, judgment of 11 January 2001 in NC caijza against Italy, paragraph 45

[551] See: CEDO, judgment of 6 November 1980 in Case Guzzardi v. Italy, paragraph 102, CEDO, judgment of 6 November 1980 in Case Ciulla v. Italy, paragraph 40.

applicant's detention were subject to the amnesty law.[552] European Convention regulates the possibility of imprisonment in case of reasonable suspicion that the intention to commit an offense. Another case of deprivation of liberty regulated by the Convention refers to the situation where a person against whom there is reasonable suspicion of having committed an offense intended to flee after committing it. In this situation, the preventive measure may be ordered in relation to the first hypothesis.

The doctrine[553] has been shown how to formulate the provisions acres. 5 paragraph 1 lit. c European Convention may raise questions about the need for this distinct theme of imprisonment while the other two cases, in itself, sufficient reason to drive to a deprivation of liberty. Appeared,[554] therefore, that in this case met the grounds for the arrest of the extension has custody.

In this way,[555] considered that the provision of Article 5, paragraph 1 lit. c should be regarded as: arrest is possible in case of a reasonable suspicion that an accused has committed an offense or arrest can be reasonably considered necessary to prevent the commission of a crime by a person who is suspected of planning to commit. In addition to continuing deprivation of liberty is necessary to have a reasonable suspicion that the person has committed a crime that he intends to run after having done so after the release of the arrested person or that it will commit further crimes.

However, the national laws of Member States have rules in addition to the requirement of suspicion of a crime and other grounds to be satisfied to impose imprisonment (eg danger to public order, the risk of circumventing procedures and so on).

Regarding the action was taken in order to bring the person before the competent judicial authority CEDO is almost nonexistent.[556] The term *"judicial authority*" means CEDO judge or other officer authorized by law to exercise judicial power and referred to in Article 5 paragraph 3 of the European Convention.[557] CEDO found that Article 5 paragraph 3 of the European Convention refers only to cases covered by Article 5, paragraph 1 lit. c, the hypothesis has not governed by Article 5, paragraph 1 lit. a has, with which it forms a whole about the situation of the arrested to be brought before the competent judicial authority when

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[552] See CEDO, judgment of 19 May .2004, Case Gusinskiy against Russia, paragraph 68 - 69.
[553] A see E. Bleichrodt, *Right to liberty and secwerity of person* in P. van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaalc, *Theory and practice of the European Convention on Human Rights*, op. cit, p 471-472.
[554] Ibid, p 472.
[555] Ibid, p 472.
[556] Cu an example, see ECtHR, judgment of 27 May 1997, Case Eriksen v. Norway.
[557] See CEDO, judgment of 4 December 1979, Case Schiesser v. Italy, paragraph 29.

there is reasonable suspicion to suspected of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so.

The two terms have an autonomous meaning.[558] The term "judge" coincides with the meaning given in Article 6 of the European Convention, the term "*court independent and impartial*."[559] However, to believe that a "magistrate" exercise "judicial functions" for the purposes of this provision it must meet certain conditions to represent the person arrested, safeguards against arbitrary and unjustified deprivation of liberty.[560] So "*magistrate*" must be independent of the executive and of the parties when making remand.

If the magistrate can intervene in subsequent criminal proceedings when taking the measure as an organ instrumental independence and impartiality may be questioned.

The judgments in cases against Romania[561] (the existing legal provisions were analyzed before changes Romanian criminal procedural law in July 2003), the CEDO found that prosecutors, acting as representatives of the Public Ministry, General Prosecutor subordinates first, then Minister of Justice, judges can not be considered under Article 5, paragraph 3 thereof do not meet the independence in relation to the executive. Bringing to assume authority or person before its presentation to the police or prosecutor or judicial body movement to where it is held.

According to Article 5 paragraph 3, bringing the judge or other officer authorized by law to exercise judicial functions should be made as soon as a person is deprived of liberty, in order to avoid arbitrary or unjustifiable disposition of a measure. Thus, it is an obligation established by the State, which has be automatic in the sense that it is not necessary a request to that effect from the person deprived of liberty, as opposed to guarantee the right of appeal provided for in Article 5 paragraph 4 of the European Convention.

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[558] For analysis of the notions that have an autonomous meaning in CEDO, see E. Kastanas, Unite et Diversity; Notions Marges autonomes et des etats d'appreciation dance jurisprudence from Cour européenne des droits de l'homme, Ed Bruylant, Brussels, 1996.

[559] See DJ Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights, Butterworths Publishing* ', London, 1995, p 132.

[560] . See: CEDO, judgment of 4 December 1979, case Schiesser against Italy, paragraph 23-31, CEDO, judgment of 23 October 1990 due to Huber v. Switzerland, paragraph 43, CEDO, judgment of 26 November 1992 in Case Brincat v. Italy, paragraph 21, CEDO, judgment of 18 January 1978, in the case Ireland v. United Kingdom, paragraph 199.

[561] See: CEDO, judgment of 3 June 2003, because Pantea v. Romania, paragraph 236, CEDO, judgment of 26 April 2007, Dumitru Popescu no. 2. contra Romania, paragraph 68-86, CEDO, judgment of 22 May 1998 case against Romania Vasilescu wrath, paragraphs 40-41.

The doctrine[562] has been shown that, in principle, bring a person before a judge or other officer authorized by law to exercise judicial functions within 24 hours of imprisonment, with the possibility of extending this period once it reasonable and should be considered to meet the requirements of the term "immediately".

The doctrine[563] stated, correctly, that deprivation of liberty based on Article 5, paragraph 1 lit. c ends when the arrested person is convicted by the first court. Subsequently, the legality of the deprivation of freedom is analyzed in terms of Article 5, paragraph 1 lit. a. Where no conviction has a solution because it appears that the detained person is not criminally responsible due to mental alienation, the possible extension of the deprivation of liberty is available under Article 5 paragraph 1 lit. e.

In other news the European Court of Human Rights referred to the two major issues related to reasonable length of preventive detention and bringing the arrested before an impartial judge.

The duration reasonable, the Court held, by five votes to four, that the duration of arrest for nearly four years without indictment has not contrary to Article 5 paragraph 3 of the Convention. In fact, plaintiff Swiss businessman, was arrested on March 27, 1985 for committing economic crimes and had been sued only in February 1989. During investigations, particularly complex, it formulated a number of 22 applications for release, all charges dismissed by the Chamber of the Canton Bern. In motivating its decision, the Court held that due to the large number of witnesses have been questioned (350), the surveys conducted and accounts that had investigated the duration of arrest did not exceed the limit set in Article 5 paragraph 5 of the Convention, especially since the time of arrest by the judge he had the danger of absconding from the process, influencing the course of justice and committing new crimes. In these circumstances, the right of the accused arrested have examined due to prompt should not impede the efforts of the courts to fulfill their duties diligently so that the length of detention was mainly the result of the particular complexity of the case and the applicant's conduct.[564]

The European Court in its case-law analyzed and the arrested to be brought before an impartial judge or magistrate, to verify the legality of the arrest. This law was a truncated takeover of the institution of British origin Habeas Corpus

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[562] See J-F. Renucci, *Lived Droit Europeen des droits de l'homme, General Librairie Droit et de Jurisprudence*, Paris, 2007, p. 319.

[563] See E. Bleichrodt, *Right to liberty and security of person* in P. van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, op. cit., p. 473.

[564] Adrian Ştefan Tulbure, *Romanian law and requirements of the European Convention on Human Rights,* RDP nr.2 1995, p.23, quoted by Costin Florian, *Public arrest in Comparative Law, Criminal Law Review* no.4/2005, p.131.

guaranteeing person deprived of liberty by arrest, the right to challenge the legality of such a measure before a magistrate independently.[565]

This type of test cases before the Court arose especially after the accession to the European Convention former communist countries that had criminal procedural law based on the Soviet legal system, that the prosecution, and particularly the prosecutor, had full jurisdiction to take measures preventive against accused persons. After accession to the European Convention on Human Rights, the main problem that put both in Romania and in other former communist countries, legislation was consistent with the requirement that the person arrested or detained under paragraph 1 lit. c of this article (arrest for a crime) must be brought promptly before a judge or other officer charged with the exercise of impartial judicial functions and the right to trial within a reasonable time or to release during the procedure .

The legislation does not require Member mentioned that the arrested to be brought before a judge or other officer to verify the legality of arrest, leaving this task not as an obligation of the judiciary, but as a feature of the arrested left to reach it the possibility to complain or judge, on the legality of his arrest.[566]

The European Court ruled on the obligation to bring the arrested under paragraph 1 lit. c before a judge or magistrate charged with the exercise of judicial functions in different case, the prosecutor who interrogate and arrest has not issued these circumstances, he having among tasks, perform instruction case, the issue of the indictment and combat support of the defense during court hearings.

[565] Adrian Stephen Cloudy, Romanian law and requirements of the European Convention on Human Rights. RNP. No. 2, 1995, p 23., Quoted by Costin Florian, *The institution arrest in Comparative Law, Criminal Law Review* no.4/2005, p.131-138

[566] Costin Florian, *Public arrest in Comparative Law, Criminal Law Review* no.4/2005, p.131.

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THEORIES REGARDING THE CRIMINAL GUILT IN THE FOREIGN DOCTRINE CONCEPTION

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The problem of guiltiness has frequently been discussed in the criminal doctrine, especially in the last decades, determining not only changes of paradigms, but also legislative solutions. So, the notion of guiltiness is more often researched through its reference to criminal law. It is true that in establishing the criminal liability, guiltiness has deeper inclinations than other branches of law but this doesn't justify the opinion that the notion of guiltiness would be characteristic exclusively to the contravention content. All the illicit facts, regardless to their nature and form of liability that they generate, can practice the liability only as far as the author has a certain subjective position toward the negative consequences produced by them.

The majority of authors define the guiltiness as the subjective psychic attitude of a person that commits an illicit deed toward this fact and its consequences. Other authors affirm that guiltiness consists of " the offender's attitude of awareness and will toward the deed and the consequences, synthesized in the intention or the guilt with which he commits a dangerous deed for the society", in the perpetrator's psychic attitude, the act of awareness and will toward the committed deed and its consequences, the attitude that evinces under the form of intention or guilt, in the psychic attitude of a person who with a free will commits an act that represents a social danger, had a real, subjective possibility of this representation.

Key words*: guilt, psychic attitude, illicit deed, intention, guilt, free will*

Guilt is the main component of the mental processes underlying the relation between the author and the criminal acts committed. The meaning of guilt is multi aspectual, both in terms of etymology and functionality. The analysis of scientific literature which addresses the problems of guilt and the enforced legislation indicate the multifunctional importance of this concept. The problem of guilt has frequently been discussed in the criminal doctrine, especially in the last decades, determining not only changes of paradigms, but also legislative solutions. It is true that in establishing the criminal liability, guilt has deeper inclinations than other branches of law but this doesn't justify the opinion that the notion of guiltiness would be characteristic exclusively to the contravention content. All the illicit facts, regardless to their nature and form of liability that they generate, can practice the liability only as far as the author has a certain subjective position toward the negative consequences produced by them.

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In this way, in the criminal code of Republic of Moldova, the legislator conceives the guilt as an institution of criminal law (art.17-20) as a necessary condition of criminal liability (Article 6 and Article 51 pass. (2)), as well as an essential feature of the offense (Art. 14 pass. (1)). The Roman Criminal Code provides the guilt as an institution of criminal law (Article 19) and as an essential feature of the offense (Article 17 pass. (1)), but according to Roman Criminal Procedure Code, guilt is an indispensable condition of criminal liability (art .1 par. (1)).

A lot of theories, regarding to criminal guilt have been developed and supported in the doctrines of many European countries and other countries from the system of compared criminal law, among which may be mentioned:

1. *The neuro-physiological and psychological theory* which appreciates the correlation between the wrongful act and the author through mental processes as some parts of guilt that takes place *as any psychic process, in the subject's inner forum* and become relevant through its exterior manifestations. These *processes* are not other than those which constitute *the common psychic substrate* of all human actions, that differ from a praised moral act, so they are not the neuro-physiological " mechanisms" which are at the basis of an action, but *the way in which they are conducted* to achieve the purpose for which they are triggered. [567] These *mental processes* of guilt do not present a specific content; they deserve to be known even in a summary form, both from the *neuro-physiological* and *psychological* aspects:

- *The neuro-physiological bases of the act of will* in the case of the human being involve the motor action analysis which is a result of contradictions and muscle relaxation, which is *an expression of volitional aspect of behavioral acts*. [568]
- *The psychological bases of the act of will* represent the mental activity directed toward achieving some of their goals and are consciously managed to overcome the obstacles related to any internal processes or

[567]G. Antoniu, *Vinovăţia penală,*Ed. „Academiei Române'',Bucureşti, 1995, p.20-21

[568] Giuseppe Bettioi, *Diritto penale, parte generale,*Ottava edizione, CEDAM, Padova, 1973., p359-361

external factors of the body, which actually would oppose to achieve the purpose. [569]

So that if there were no such intervention of consciousness all the movements would be reflexes, but the will would be a free transition of impulses. And so the purpose intended to be achieved does not organize the movement, but it gives a direction, a plan according to which the movement takes place.Besides the expected reaction, the person may also introduce some "spontaneous" acts, as a consequence of an interior excitation[570].

Regarding to the neuro-physiological basis of intellectual processes (of consciousness) it is appreciated that the human being becomes aware of the basic properties of the matter as a result of the objects' and the environmental phenomena' action upon the sense organs that creates the triggered excitation of the contraction processes (in muscle cells) or the secretion processes (in neurons and glandular cells). In the process of synthesis and integration of all psychic processes (including knowledge and volitional) that occur in the crust, consciousness has an important role in this aspect[571].

Regarding to the psychological bases of the intellectual processes (cognitive) it is mentioned that when some mental processes appear, the processes of finding out the surrounding world and our own body as one of the fundamental forms under which the activity of human consciousness is presented, the voluntary act is indispensable from finding out the object upon which we act: the conscious behavior is always preceded and oriented by a cognitive process, moreover, this process subordinates and motivational-affective phenomena, feelings, the needs, acknowledged desires which are at the basis of the decision to act[572].

2. The theory of representation [573]requires that the action of will is considered as a mere bodily movement which depletes in the same time with it and does not influence the production of the result.

The proponents of the theory of will[574] on the contrary , mention that it must be given priority because only *result representation* could not attract criminal

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[569] Paul Popescu Neveanu, *Dicționar de psihologie,* Editura ,,Albatros'',București 1978., p. 216.

[4] C. Rădulescu-Motru, *Responsabilitate penală,* în ,,Revista de drept și de științe penale'' nr. 1-2, 1940, p. 283-287

[5]G. Antoniu, *op.cit.,* p. 37

[572] *Ibidem,* p. 37-40

[8]Hans Heinrich Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teii, vierie Auflage, Duncher and Humblot, Berlin, 1988., p. 218; 263

[9]Francesco,Antolisei, *Manuale di diritto penale. Parte generale,* Milano 1994, p. 294

liability if the result was not wanted (sought or accepted) by the subject, either the conclusion fully accepted, according to which guilt would assume an act of will of the author, because in such a statement an essential aspect is not revealed and namely the character of the agent's will in order not to do something contrary to the precept of the rule (as opposed to debt that he had to behave according to the norm's provision), in the case when subject's behavior wouldn't be contrary to the duty prescribed in the norm, it could not be regarded as being based on *intention* or *fault.* [575]

In this way, the theory of action of will and the outcome of conceiving the intended act as wanted, both regarding the action (inaction) and the result found in the executor's representation, restores the influence equality of the intellectual and volitional element of the content of intention.

3. The normative theory demonstrates that guilt *is not a psychological reality* but *a normative concept expressing a contradictory relationship* between the *subject's will* and *the rule of law*. This *normative concept* is a dominant one today in the *German, Italian, Swiss* or *Spanish* doctrines. In such a view, *guilt is no more a global concept* that generalizes the common features of *intention* and *fault*, but this time they are regarded as belonging to *the objective side of the incrimination content*. They are also designed as *the subjective elements of volitional action*. Or that is why neither *intention* nor *fault* constitutes the *guilt*, i.e. they are not appreciated as its forms, but are regarded as *necessary elements* but *not sufficient for its existence*[576].

Although the authors of this theory call it "normative "is not difficult to observe that in its table of contents *the mental processes*, that accompany and manifest themselves when *taking the decision* to act as well as *the enforcement of that decision*, are again analyzed. But, in the same time, paying less attention to the guilt of these constitutive mental processes, even though this theory can't abandon them at all, the natural logic of things is obliged to consider and evaluate them as *the assumptions of guilt.*

Many authors *reject the idea of guilt as psychic process*, affirming that this is a *contradiction* report between *the subject's will and the will of norm* (*normative theory*). As a result, the guilt would be a valued judgment upon the behavior of the agent, a reproof belongs to the person that observes the agent and not to the perpetrator whose psychic process interests us[577].

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[8]Hans Heinrich Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teii, vierie Auflage, Duncher and Humblot, Berlin, 1988., p. 218; 263

[9]Francesco,Antolisei, *Manuale di diritto penale. Parte generale*, Milano 1994, p. 294

[11]G. Antoniu, *op.cit.*, p. 25

4. The characterological theory detaches the idea that guilt, as a psychic process can't be treated as a personality characteristic of the author (characterological theory), as a symptom of social dangerousness of the agent, but it must be analyzed in close conjunction with the exterior manifestation through which the psychic process is revealed and which may not necessarily be the expression of a socially dangerous personality. As a rule such a correlation could not be established neither in the breach case that presents a serious danger nor in the breach case that has a low or medium risk, in fact, an incriminated act is punished in comparison with the general interests to protect certain social values and not in relation with the anti-social personality of the perpetrator.

Besides the broad concept of guilt, in the German doctrine according to the concept of guilt by the author, the guilt by the author (Täterschuld) is used by some authors to express the psychic characteristics of the agent and his subjective state. Guilt in this case constitutes a reproof not at his incorrect exterior manifestation directed towards defeating the law, but at the individual's personality to his inclination towards crime, for his malice even if the offender could have a different mental state.

Some authors (Mezger) refer to guilt for the conduct of life, others (Welzel) characterize it as a lack of control of the higher functions upon the inner life but the identification of such traits would justify the legal worsening of the sanction. It was replied[578]that this kind of guilt would be a fiction because it presumes the agent's ability to build a different psychic aspect, that would claim to distinguish cases where the subject can overcome innate tendencies of character, his hereditary feelings, his bio- psychiatric anomalies, from the cases in which the subject does not have such a possibility, in reality it can't be determined to what extent the agent has or does not have such a possibility and even no judge would be able to make such an investigation.

5. The theory of inevitable ignorance tends to deny the concept of guilt by exaggerating the role of general and special prevention of the punishment, denying its retributive character.

If guilt is related to the accusation that could be made to the subject, it means that it ceases to be taken into account to the extent that it proves that the subject could not act otherwise than acted, in this case the punishment would not be applied as a reward (fee) for a bad will, but only in a special or general preventive purpose. Guilt is thus a useless concept. To avoid this contradiction, the authors of the analyzed theory admit that, however, a normal and middle man can choose between good and evil, he can effectively determine his will, which is not necessarily conditioned in this way, it is admitted the possibility of reproach, but

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[577] Hans Heinrich Jescheck, Lehrbuch des Strafrechts. Allgemeiner Teii, vierie Auflage, Duncker and Humblot, Berlin, 1988, p. 383-386.

[578] F. Antolisei, *Manuale di diritto penale. Parte generale,* Milano 1994 , p. 300.

only for a conduct which stood against the duty to respect the law, which also removes the traditional function of guilt[579].

6. The causative theory of action provides that the action was defined as *a body movement dominated by the will* that can produce *a change in the outside world*[580]. The essence of this theory was then the existence of *an exterior manifestation dominated by the will*, without being interested in its content (what the author actually wanted), which was analyzed *only in the subjective way*. For example, there is action for a driver who hit a pedestrian, as there is a change in the outdoor world (pedestrian injury) caused by body movement (driving the vehicle) dominated by the will (driving is undoubtedly a voluntary act). It is relevant for the definition of the action will content (if the driver wanted to hit pedestrians or just to drive the car).

7. The finalist theory considers that the action is an activity aimed to achieve a goal. This theory brings a significant change in the structure of the offense. The intention in this case no longer belongs to guilt, but it is integrated into the structure of the action, becoming a part of this. In this way it is considered that a person can foresee the possible consequences of his action, he can choose some specific objectives and he can lead the action in order to achieve them. [581]
The analyzed theory proved its limits in the case of offenses caused by fault and in this case it is clear that the action is not directed towards producing results, so it was considered, in a first phase, that the action of the fault has a potential finality. Later it was recognized that in the case of the offenses of misconduct there is final action (driving a car, making a surgery), but its finality is irrelevant for the purpose of criminal law and in this case, what interested them was only the way to achieve the final action (excessive speed, the surgical intervention without examining in advance the patient, etc..).But there is no unanimity of opinion upon the domain coverage of guilt and from a certain point of view, guilt implies a subject that is able to understand and want. Therefore, persons who don't have appropriate age and normal mental state can't commit an act of guilt. However, it was replied that, in fact, guilt is a legal concept and not a moral one: guilt in the sense of a mental attitude with moral content would imply reporting the agent's behavior to the moral obligations that belong to him and which derive from the norm, while there is guilt

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[14] *Ibidem,* p. 297.
[580] A se vedea F. Mantovani, Diritto penale, parte generale, secondo edizione ,,CEDAM'',Padova, 1988, p. 130; G. Fiandaca, E. Musco, *Diritto penale, parte generale,* Zanischelli editore Bologna, 1999.p. 190.
[16]F. Streteanu, *Drept penal partea generală,* Ed.,,ROSETTI'',2003,p.339-340

in a legal sense even if the agent does not know the criminal norm, being only presumed that he knows it[582].

In the Romanian criminal doctrine it was also expressed the opinion according to which the incapable persons can have a mental state specific to intention (for example, a paranoid can kill the victim deliberately), but in the case of incapable persons some safety measures may be taken. The conclusion that we can identify the psychic processes specific to guilt in case of incapable persons appears implicitly[583].

The idea that some measures of criminal punishment can be taken against incapable people led to the elaboration of a new theory upon guilt in the German doctrine. According to this conception mental processes do not belong to guilt, a questionable concept, but to the agent's action, his way to behave, to manifest, which indisputably exist at incapable persons.

8. The social theory of action considers the action as being any socially relevant human behavior. This theory has been criticized because the content is too general, so that it does not identify the behavior characteristics for each criminal category and because the social relevance of behavior is ambiguous.

9. The negative bail concept theory considers that the action is causing an individually avoidable result. This theory has been criticized firstly because it involves an appreciation of guilt[584] without which it can't determine the avoidable character.

10. The theory of the acts derived from the inertness of the will relates the fact that the discussion in this context about the controversy over the guilt does not take place only on a global general plan but also regarding the mental processes as components of the criminal-law institutions.

It is known that in a certain vision, the fundamental element of guilt is the subject's conscious will, the will is seen as a volitional impulse, as a conscious impulse to act or not to act. If the will presumes a conscious volitional process, it means that the acts wanted by the subject could not be considered those automatic acts, instinctive reflexes, and those which do not seem to be said at a consciousness control (ex. the reflex act of the perpetrator that pushed back when the train starts, hits a person in the back). Adhering to such a position in the German doctrine the instinctive acts, automatic reflexes are considered as not having at their basis the

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[17]G. Fiandca, E. Musco, *Diritto penale, parte generale.*, Zanischelli editore Bologna, 1999, p.297.

[583] V. Dongoroz, *Tratat de drept penal*, București 1939, p. 311.

[19]A se vedea F. Mantovani, Diritto penale, parte generale, secondo edizione „CEDAM'',Padova, 1988, p. 131; G. Fiandca, E. Musco, *Diritto penale, parte generale*, Zanischelli editore Bologna, 1999., p. 191

conscious will and as such, they have no criminal relevance[585]. Likewise, in the case of the omissions determined by forgetfulness (ex. The surgeon who forgets into the patient's body a cotton swab) there is no consciousness, a conscious directing of the exterior manifestation, in the case of omission by forgetting, the agent's psyche remained idle, passive, so that it might not justify the treating of the omission as a conscious act (Massari).

Another conception affirms[586] that the acts which do not go through the lucid consciousness also belong to will. Some of these acts, with an energy effort could be inhibited (ex. Such reflex acts as cough, sneezing, retracting the arm as a result of a jab etc). Similarly, the instinctive acts, the automatic acts become habits. Even omissions can be avoided with a careful effort.

Therefore, not only the acts that begin through a conscious effort can be attributed to guilt, but also those arising from the inertia of the will. As such, there may be criminal liability for conscious acts, but also for those acts that need a volitional effort to be avoided.

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THE CONSTRUCTED PRINCIPLES AND THE METHAPHYSICAL PRINCIPLES OF LAW

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Abstract

Any scientific intercession that has as objective, the understanding of the significances of the "principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of the law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law. Thus are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and 'constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.

Key-words: *Principles of the law/ / "given" and "constructed" in the law / Moral value / juridical value/ metaphysical principles/ constructed principles*

I. INTRODUCTION

In philosophy and in general, in science, the principle has a theoretical value and an explanatory one as it is meant to synthesize and express the basis and unity of human existence, of existence in general and knowledge in its diversity of manifestation. The discovery and the assertion of the principles in any science concedes the certitude of knowledge, both by the expression of the *prime element*, that's exist by itself, without having the need to be deducted or demonstrated, as throughout the achieving of cohesion within the system, without which the knowledge and scientifical creation cannot exist.

The principle has multiple significances in philosophy and science, but for our scientifical approach, one keeps in mind this one:" as element, idea, basic law on which a scientifical theory is grounded, a norm of conduct or the totality of laws

and basic concepts of a discipline"[587]. The common place of the meanings of the term of principle makes the essence, a common category important both for philosophy as for the law.

The principle represents the *given as such*, that may have a double significance: a) what existed before any knowledge as aprioric factor and grounda for the science; b) theoretical and resulting element of the synthesis of the phenomenon diversity for the reality of any type. The distinction, but also the relationship between "given" and 'constructed" are important in understanding the nature of the principles in science and mainly in law. In his work "*Science et tehnique en droit positif"* published at the beginning of XX century, François Geny[588] analyzes for the first time the relation between science and juridical tehchnique starting from two concepts" the 'given" and the 'constructed". In his opinion Geny one thing is"given" when it exits as an object outside the productive realities of human. On this meaning the author distinguishes four categories: the *real given, the historical given; the rational given;* the ideal given. From our researching theme's perspective two of these categories are of interest, namely:" the rational given" that consists of those principles that come out from the consideration that needs to be shown to the people and human relationships, and the "ideal given" throughout which is being established a dynamic element, respectively the moral and spiritual relationships of a particular civilization.

One thing is being "constructed" when being achieved by man, as a reasoning, a juridical norm, etc. The "given" is relative in the meaning that is being influenced by a 'constructed", by human activity. Regarding the "given", man's attitude consists in knowing it by the help of science. Regarding the "constructed" the man is by hypothesis the "constructor", he can make from this respect, art or technique. The sphere of the constructed stretches out onto the social and political order.

The question that arises is if the law is "given", object of science, in other words for a finding, recording or it is "constructed, as technical work? From historical perspective, the law is obviously "given", object of science, such as it appears in the old law, in the international or national contemporary law. The drafting of the positive law yet assumes a "construction" and the juridical rules are the work of technique on this respect.

In the juridical literature this distinction has been retained, in compliance with which the science explores the social climate that requires a certain juridical normality, and the technique is aiming towards the modalities through which the law maker transposes them into practice, "builds" the juridical rules. It was

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[587] *Romanian explanatory dictionary*, Publishing House of the Socialist Republic of. Români, Bucharest, 1975, p.744.

[588] Author quoted by Ion Craiovan, in the Monography *Introduction into Law's Philisophy,* Publishing House All Beck,Bucharest, 1998, p.63.

emphasized nevertheless upon the relativeness of this distinction, having into consideration that the juridical technique also assumes a creation, a scientifical activity[589].

Therefore the principles represent the "given" as ideal or background for the science and the 'constructed" in situation they are developed or transposed into a human construction, included by juridical norms.

A good systematization of the meanings which the principle notion has is done in a monography[590]: "a) the founding principle of a field of existence; b) what would have been hidden to the direct knowledge, and requires logical-epistemological processing; c) logical concept that would allow the knowledge of the particular phenomenon."

This systematization, applied to the law means: a) the discussion referring to the substance of law; b) if and how we may know the substance; c) the efficiency of placing into the phenomality of the law, related or not with the substance."[591]

The need of the spirit to raise up to the principles is natural and mostly persistent. Any scientifical construction or normative system must relate to the principles that will guarranty or substantiate them. This regressive motion towards unconditioned, towards what is prime in an absolute way is for exemple of the motion that Platon follows in the Book VII of the Republic[592], when he puts the essence of the "Good" as a prime and nonhypothetical principle. In the same meaning another great thinker[593] speaks about the "first principles" or the eternal principles of the "Being", non demonstrable, a ground for any knowledge and of any existing one, beyond which is nothing else but ignorance.

The question then is to know if what seems necessary, in the virtue of logics of knowledge is necessary also in the ontological order of the existence. In the "Critic of the Pure Reason",[594] Kant will show that such a passing, from the logic to the existing, (the ontological argument) is not legitimate. If the unconditioned, as a principle, is put in a necessary way by our reasoning, this fact cannot and must not lead us to the conclusion that this unconditioned exists outside it and independently of any reality.

In consequence, as the principles aim the existence in all its fields, they cannot and must not be immutable, but are the outcome of the becoming. They are

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[589] Jean Dabin, *Théorie générale du Droit*, Bruxelles, 1953, p. 118-159.
[590] Ibidem, *op.cit*., p.20
[591] Ibidem, *op.cit*., p.20
[592] Platon, *Works* – volume V, Scientifical and Encyclopedic Publishing House,Bucharest, 1982, p.401-402
[593] Aristotel, *Metaphysics, Book I,* Ed. IRI,Bucharest, 1996, no.9-69
[594] Immanuel Kant, *Critique of Pure Reason*, Publishing House IRI, Bucharest, 1994, p.270-273.

a "given", but only as a result of the existential dialectics or as a reflection of becoming into the phenomenal world and of the essence.

II. PAPER CONTENT

Since the law is assuming a very complex relationship, between the essence and the phenomena, and also a dialectics specific to each of the two categories in the plane of theoretical, normative and also social reality, cannot be outside the principles.

The problem of the statute of the principles of law and their explaining was always a concern for the theoreticians. The natural law school argued that the source, origin, and therefore the grounds of the juridical principles are of human nature. The historical school of law, under kantianism influence. The law historical school, under kantianism's influence, opens a new view in researching of juridical principles' genesis, presenting them as products of the people's spirit (Volkgeist) which shifts the grounds of law from the universe of pure reasoning, to the junction of some historical origins scattered in a multitude of transient forms. The versions of the positivist school claim that the principles of law are generalizations induced by the social experience. When the generalization covers a series of social facts, in a sufficient number, we are in the presence of principles. There are authors such as Rudolf Stammler that deny the lastingness of any juridical principle, considering the contents of law diversified in space and time, lacking universality. In the author's concept the law could be a cultural category.[595]

Referring to the same problem, Mircea Djuvara asserted: "All law science does not consist in reality, for a very serious and methodical research, but merely in releasing out of a multitude of law dispositions, their essential, which are precisely these last principles of justice of which other dispositions derive from. In this way the entire legislation is of a large clarity and what it is called the juridical spirit comes into being. Only thus the scientifical drafting of a law is being done. "[596]

In our opinion this is the starting point for understanding the principles of law.

In the specialized literature there is no unanimous opinion regarding the definition of the principles of law[597]. A series of common elements are identified, which we mention below:

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[595] Rodolf Stammler, *Theorie der Recktswissenschaft,* University of Chicago, Press, 1989, p.24-25.

[596] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitv, General Theory of Law. Rational Law, Source and Positive Law.* Publishing House All Beck,Bucharest, 1999, p.265.

[597] On this meaning see also : Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului, Introduction in Law General Theory* Publishing House All,Bucharest, 1993, p.30; Gheorghe Boboş, *Teoria generală a statului şi dreptului, General Theory of State*

- The principles of law are general ideas, guiding postulates, fundamental provisions or bases of the law system. They characterize the entire law system, constituting in the same time features specific to a certain type of law;
- The general principles of law configure the entire structure and the development of the law system, provide the unity, homogeneity, balance, coherence and its development capacity;
- The authors differentiate between fundamental principles of law, that characterize the entire law system and which reflect what is essential within the respective law type and the principles valid for certain law branches or juridical institutions.

Thus in the doctrine were identified and analyzed the following general principles of law: 1) providing the juridical bases for state's functioning; 2) the principle of liberty and equality; 3) principle of responsibility; 4) principle of justice[598]. The same author considers that the general principles of law have a theoretical and practical importance that consists in: a) the principles of law are drawing the guiding line for the juridical system and orientates the activity of the law maker; b) these principles are important for the administering of the justice as "The man of law must ascertain not only the positiveness of the law, he has to explain the reason of its social existence, the social support of law, its connection with the social values"; c) the general principles of law take the place of the regulating norms when the judge, in the silence of the law, solutions the cause based on law general principles[599].

One of the main problems of the juridical doctrine is represented by the relation between the law principles, law norms and social values. The oppinons expressed are not unitary they differ pending on the juridical conception. The natural law school, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside their norms, positive and superior to them. The principles of law are grounded on the human reason and configure valorically the entire juridical order. Unlike this, the positivist law school, the Kelsian normativism considers that the principles are expressed by the norms of law and in consequence there are no law principles outside the juridical norms system.

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and Law Didactical and Pedagogical Publishing House, Bucharest, 1983, p.186; Nicolae Popa, *General Theory of Law,* Publishing House Actami,Bucharest, 1999, p.112-114; Ion Craiovan, *Tratat elementar de teorie generală a dreptului, Elementary Treaty of Law General Theory* Publishing House All Beck,Bucharest, 2001, p.209,; Radu Motica, Gheorghe Mihai, T*eoria generală a dreptului, General Theory of Law* Publishing House Alma Mater, Timişoara, 1999, p.75.

[598] Nicolae Popa, *quoted works.*, p.120-130

[599] Ibidem, *quoted works,* p.119.

Eugeniu Speranţia established a correspondence between the law and law principles:"If the law appears as a total of social norms, mandatory, the unity of this totality is due to the conseqvence of all norms related to a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them. "[600]

In connection to this problem, in Romanian specialized literature was emphasized the idea that the law principles are fundamental provisions of all juridical norms[601].In another opinion, it was considered that the law principles orientate the drafting and enacting of the juridical norms, they have the force of some superior norms, that are found in the text of normative acts, but they can be deduced from the "permanent social values" when they are not expressly formulated by the positive law norms[602].

We consider that the general law principles are delimited by the positive norms of law, but undoubtedly there is a relationship between these two values. For instance, the equality and liberty or equity and justice are valoric foundations of social life. They need to find their juridical expression. In this way appear the juridical concepts that express these values, concepts that become foundations (principles) of law. From these principles derive the juridical norms. Unlike the norms, the general principles of law have an explanatory value because they contain the grounds for law's existence and development. [603]

Besides other authors[604] we consider that the juridical norms relate to the law principle in two meanings: the norms contain and describe most of their principles; the functioning of the principles is achieved by putting into practice of the conduct provided by the norms. In relation to the principles the juridical norms have an explanatory, teleological narrower value, the purpose of the norms being to preserve the social values, not to explain the causal reason of their existence. The principles of law are the expression of the values promoted and defended by the law. One can say that the most general principles of law coincide with the social values promoted by the law.

For a correct understanding of the problematic of the values in law and their expressing by the principles of law some brief comments are needed in the context of our researching theme. The different currents and juridical schools, from

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[600] Eugeniu Speranţia, *Principii fundamentale de filozofie juridică, Fundamental Principles of Juridical Philosophy* Cluj, 1936, pg.8. On this meaning see also Nicolae Popa, *op.cit.*, p.114.
[601] Nicolae Popa, *quoted works,* p.114.
[602] Ioan Ceterchi, Ion Craiovan, *quoted works* p.30
[603] Nicolae Popa, *quoted works*, p.116-117.
[604] Nicolae Popa, *quoted works,* pg.116-117, Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului. Curs universitar, General Theory of Law. Academic Course* Ed. Alma Mater, Timişoara, 1999, p.78.

antiquity up to the present, have tried to explain and substantiate the regulations and juridical institutions by some general concepts appreciated as being special values for the society. The law is grounded on judgements of value. Indeed by its nature the law implies an appreciation, a value rendering of human conduct in relation to certain values, representing the finality of juridical order such as: justice, common good, liberty etc [605]

The values are neither of a strict nature nor of an exclusively juridical nature. On the contrary, they have a larger dimension, moral, political, social, philosophical, in general. These values must be understood in their historical-social dynamics. Though some of them are to be found in all law systems, for instance the justice, nevertheless the specific and historical particularities of the society leave their print on them. The values of a society must be primordially deduced from philosophy (social, moral, political, juridical) which leads and guides the social forces in the respective society.

The law maker, in the enactment process, oriented be such values, expressed mainly in the general principles of law, transposes them into juridical norms, and on the other side, once these vales "enacted" they are defended and promoted in the form specific to the juridical regulation. The juridical norm becomes both a standard for the appreciation of the conduct pending on respective social value, or a means to ensure the achieving of the exigencies of such a value and the prediction of the future development of society. Needs to be added that the juridical norms substantiate the juridical values in a relative way because, either as a whole or individually, they don't show totally a juridical value, they do not exhaust its richness in contents.

In regard to the identification the values promoted by the law, the oppinions of the authors do not coincide, yet they stay in closed related spheres. Thus, Paul Roubier named few such values *the justice, juridical security and social progress*[606]. Michel Villey named four large finalities of the law: *justice, good conduct, serving people and serving society*.[607] François Rigaux speaks about two categories, namely: the primordial ones called by him formal, *order, peace and juridical security* and the material ones *equality and justice*.[608]

The undeniable value that defines the finality of the law, in the concept of the most distinguished thinkers, yet from the ancient times, is the *justice.* The most complex concept *justice* was approached, explained and defined by numerous thinkers – moralist, philosophers, counselors, sociologists, theologians – that start in defining it from the ideas of *just, equitable*, in the meaning to give everyone

[605] Paul Roubier, *Théorie générale du Droit,* L.G.D.J., Paris, 1986, p.267.
[606] Paul Roubier, *quoted works*, p.268.
[607] Quoted by Jean-Louis Bergel in *Théorie générale du Droit*, Dalloz, Paris, 1989, p.29.
[608] Quoted by Ioan Ceterchi and Ion Craiovan in *Introducere în teoria generală a dreptului, Introduction into General Theory of Law* Publishing House All,Bucharest, 1993, p.27.

what deserves. The general principle of law, equity and justice is the expression of justice as a social value. Many concepts about the law would be suitable, be it on a rationalist line or in a realistic one. The rationalists argue that the principle of justice is innate to men, it holds onto our reasoning in its eternity. The realists argue that the justice is an elaborate of history and human general experience.

Regardless of theoretical orientation, the justice undoubtly constitutes a complex ground of the juridical universe. Giorgio del Vecchio assterts that the justice is a conformation to the juridical law, the juridical law being the one that contains the justice. According to Lalande the justice is the owner of what is just; Faberquetes considers the law as a unique expression of the principle of justice, and the justice, as, naturally, the unique content of the expression of law. It has been said that the justice is the will to give everyone what it is his; is the balance or proportion of the relationships betwenn people, is the social love or the harmonious fulfilling of the human being essence. [609]

The justice as a value and principle of the law exists throughout the juridical norms contained in constitutions, laws etc. This does not mean that the objective law, with expressings, carries on entirely and unavoidably the "justice": not all that is lawfully in force is just. On the other side there are juridical norms, such for instance, the technical ones that are indifferent to the idea of justice. There are circumstances when the positive law is inspiring more utility considerents than the justice ones, in order to maintain the order and stability in society.

In our opinion, the justice, as social value and also as a general principle of law, dimensions itself in the ideas of just measure, equity, lawfulness and good faith. Mainly the concepts of just measure and equitly express the proportionality.

The principle of justice has a guidance contents on the cognitive-acting line: to give eachone what deserves. A law system is unitary, homogenous, balanced and coherent if all its components "provide, protect, establish" in such a way that every physical and juridical person be what it is, to have what he deserves without injuring one another or the social system.

The equity is a dimension of the principle of justice in its consensuality with the moral good. This concept moulds the formal juridical equality, makes it human, introducing into the law systems in force the categories of the moral from the perspective of those for which the justification is a making for good and for liberty." Thus considered, the equity disseminates till the farthest spheres of the juridical norms system, fructifying even the strictly technical or formal fields, appearantly indifferent towards the axiological concerns" [610]. Understood by the idea of proportionality, the equity regards the diminishing of the inequality there

[609] For enlarging the topic see Gheorghe C. Mihai, Radu I. Motica *Fundamentele dreptului. Teoria şi filozofia dreptului, Law Fundamentals. Theory and Philosophy of Law* Publishing House All,Bucharest, 1997, p.128.
[610] Ibidem, *quoted works. p.133.*

where the establishing of a perfect equality (also named formal justice) is impossible due to the particularity of the situation in fact. In other words, in relation to the generality of the juridical norm, the equity suggests to take into consideration the situations in fact, personal circumstances, unicity of the cause, without falling into extreme.

The idea of justice develops under the influence of the social-political transformations. Thus, in the contemporary democratical states, in order to underline the economical, social, cultural rights, one speaks about the *social justice.* The achieving of the social justice is mentioned as a requirement of the lawfull state in the document adopted at the Conference for European Security and Cooperation, Copenhague 1990.

Another problem of the juridical doctrine is to establish the relationship between the principles of law and those of the moral. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[611], dinstinguished between the mission of the right to protect the external relationships of human individuals through provisions that form perfect and sanctionable obligations and the mission of the moral to protect the inner live of individuals, only throughout provisions that form imperfect and unsanctionable obligations. This difference between morals and law has become classic.

Undoubtedly, the law cannot be mistaken with the morals, for several reasons analyzed in specialized literature[612]. However, law and morals are from ancient times in a closed relationship that cannot be considered as accidental. The respective relationship is axiological. The juridical and ethical values have a common origin, respectively the conscience of the individuals living in the same community. The theory of justrationalism – the modern form of justnaturalism – tried to argument that there is a background of universal and eternal justice, because they are written within human reasoning where they connect with the principles of good and truth. Therefore, as law is rational, it is natural and because it is natural, it is also moral.

Of course, the law is eminamently governing the outer conduct of human individual. Nevertheless the law is not disinterested by the morals, "by the fact that by means of equity it seeks the good acting to harmonize the exterior with the inside of the individual, throughout the same equity"[613]

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[611] Quoted by Ion Dobrinescu în *Dreptatea şi valorile culturii, Justice and Values of Culture* Romanian Academy Publishing House, Bucharest, 1992, p.95.

[612] See also Giorgio del Vecchio, *Lecţii de filozofie juridică*, *Lessons of Judicial Philosophy* Publishing Europa Nova,Bucharest, 1995, p.192-202; Ion Dobrinescu, *quoted works*, p. 95-99; Gheorghe Mihai, Radu I. Motica, *quoted works*, pg.81-86; Ion Ceterchi, Ion Craiovan, *quoted works*, p. 39-42.

[613] Gheorghe C. Mihai, Radu I. Motica, *quoted works*, p.84.

We consider that indeed the morals and law have a common valoric structure and it can be deducted only from the assertion pretty often met and according to which "the law is a morals minimum" but also from the observation that there isn't a moral assertion to be denounced as unfair, yet sometimes are being discovered juridical assertions in disagreement with the moral principles. It is noticed the tendency of the law to make appeal to values with a moral character so that they can be introduced into juridical regulations. In this respect Ioan Muraru stated that: "the moral rules, though usually are closer to the natural rights and customary laws, they express ancient and permanent desires of mankind. The moral rules, though usually are not fulfilled, in case of need by using the coercive force of the state, they need to be juridically backed up in their fulfilling when they defend human life, freedom and happiness.Therefore in Romania's Constitution the referrings to moral hypostasis are not missing. These constitutional referrings provides efficiency and validity to the morals. Thus, for example, item 26, item 30 protect « good habits », item 35 mentions the « public morals » also the « good faith » which is obviously first a moral concept consecrated by item 11 and item 57[614]. Therefore the general principles of law and those of the morals have a common background of values. The norms of the law can express values that at their origin are moral and are to be found in the contents of the general principles of law, such as is for example the equity or its particular form, the proportionality.

The principles of law have the same features and logical-philosophical significances as the principles in general. Their particularities are determined by the existence of two systems of dialectical relationships specific to law:

a) principles – categories – norms;
b) principles – law, as social reality.

Few of the most important features of the principles of law can be identified, useful in order to establish if the proportionality can be considered a principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with an actual case or with an individual assesment of juridical relations. The principle must represent the stability and balance of the juridical relations, regardless the variety of normative regulations or particular aspects specific to juridical reality. In consequence, the principle of law must be opposed to the aleatory and should express the necessity as essence.

However, the principle cannot be a pure creation of the reasoning. It has a rational dimension, abstract of maximum generality, but is not a creation of metaphysics. Yet of substance order, the principles of law can neither be eternal nor absolute, but they do reflect the social transformations, they express the

[614] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii publice, Constitutional Law and Public Institutions* Publishing House All Beck,Bucharest, 2003, vol.I, p.8

historical, economical, geographical, political particularities of the system which they contain and at their turn, which they substantiate. [615] The principles of law develop so that the realities they reflect and explain be subject to improving. The scientifical improving of the juridical analysis could never be ended. But in law, one needs to give immediate solutions so that the practical life does not wait"[616].

Being of the substance order the principles of law have a generalizing character, both for the variety of the juridical relationships as for the norms of law. At the same time expressing the essential and the general of the juridical reality, the principles of law are grounds for all other normative regulations.

There are great principles of law that do not depend on their consecration on the juridical norms as it is the juridical norm that determines their concrete contents in relation to the historical reference time.

B) The principles of law are consecrated and acknowledged by constitutions, laws, customary, jurisprudence, international documents or formulated by the juridical doctrine.

The principles must be accepted internally and must be a part of the national law of each state. The general principles of law are consecrated in constitutions. The characters of the state's juridical system influence, and even determines, the consecration and acknowledging of the principles of law. The work of consecration of the principles of law in the political and juridical documents is in full progress. Thus, in the international documents such as U.N.O Charta or the Declaration of U.N.O. General Assembly in 1970, are consecrated principles [617] that characterize the democratical international law order. The regional law systems had known and acknowledged their own principles. For example, the community law consecrates the following most important principles : principle of equality, protection of the human fundamental rights, principle of juridical certitude, principle of subsidiarity, principle of authority of res judicata and principle of proportionality[618]. Most democratic constitutions consecrate principles such as: principle of sovereignty, principle of juridicality and supremacy, constitution, principle of democracy, principle of pluralism, principle of representation, principle of equality etc.

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[615] On this meaning see Mircea Djuvara, *Drept şi sociologie, Law and Sociology* I.S.D.,Bucharest, 1936, pg.52-56 and Nicolae Popa, *op.cit.*, p.113-114

[616] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, *General Theory of Law. Rational Law, Source and Positive Law* Publishing House All Beck,Bucharest, 1999, p. 265.

[617]Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, *Drept internaţional contemporan, Contemporary International Law* Publishing House All Beck, Bucharest, 2000, p.52-71. ONU Charta specifies the "General Principles of Law Acknowledged by Civilized Nations" as source of law

[618] Ion Craiovan, *quoted works* p.211.

The jurisprudence has a significant role in the consecration and applying of the principles of law. There are situations when the principles of law are acknowledged by jurisprudential ways, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to the judges to decide in the absence of some texts, in the light of the general principles of law.

There are systems of law in which not all principles have a normative consecration. We refer mainly to the great system known by the name of *common law*, consisting in essence of three normative, autonomous and parallel subsystems: common law (in a narrow meaning); equity; and statute-law. Equity represents a set of principles coming out from the practice of the instance and is a correction brought to the common-law rules.

With all variety of the consecratation manner and the recognition of the principles of law, comes out the need at least for their recognition in order to be characterized and enacted in the system of law. This consecration or acknowledging is not enough to be doctrinary, nevertheless it must be realized throughout norms or jurisprudence. However, a distinction between the consecration or acknowledging of the principles of law must be made, and on the other side, in their enacting.

C) The principles of law represent values for the law system, because they express both the juridical ideal, as the objective requirements of society, have a regulating role for the social relations. In situation in which the norm is not clear or it does not exist, the solving of the litigations can be achieved directly based on the general or special principles of the law. As ideal, they represent a coordinating ground for the work of law making.

D) In classifying the principles of law it is started from the consideration that between them there is a hierarchy or relation from the general to particular[619]. Starting from this observation one can distinguish:

1. General principles of law which form the contents of some norms with universal application with a maximum level of generality. These are acknowledged by the doctrine and expressed by the normative acts in the internal law or internationally treaties as having a special importance. As a rule these principles are written in constitutions having thus a superior juridical force in relation to the other laws and all law branches. Referring to the theoretical and practical importance for studying the law branches, Nicolae Popa remarks:"the general principles of law are fundamental provisions that cumulate the creation of law and its enacting…. In conclusion the action of the principles of law has as a result the conceding of *certitude of law* – the guarranty granted to individuals against the unpredictibilities of the coercive norms – and the congruence of the legislative

[619] Ioan Ceterchi, Ion Craiovan, *quoted works,* pg.31. Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului, General Theory of Law, quoted works,* p.77.

system, namely the concordance of the laws, their social character, credibility, opportunity."[620]

The general principles have a role also in the adiministering of justice, because those in charge with the law enforcing must know not only the letter of the law, but also its spirit, and the general principles' make up of this spirit. As part of them one can include: principle of lawfulness, principle of consecration, respecting and guaranteeing human rights, principle of equality, principle of justice and equity etc.

2. The specific principles that express particular values and as a rule have a limited action to one or several branches of law. They are mentioned in codes or other laws. In this category can be included the principle of lawfulness of penalties, binding of contracts, presumption of innocence, principle of compliance with international treaties etc. The special principles have their source of values in the law's fundamental principles.

For instance the proportionality is one of the oldest and classic principles of law, rediscovered in the modern age. The significance of this principle, in a general meaning, is that of an equivalent relation, balance between phenomena, situations, persons etc, but also the idea of just measure.

Ion Deleanu specifies that: "At the origin, the concept of proportionality is outside the law; it calls up the idea of correspondence and balance, but also of harmony. Appeared as a mathematical principle, the principle of proportionality was developed also as a fundamental idea in philosophy and law receiving different forms and acceptions: "reasonable". "balance", "admissible", "tolerable", etc[621]. Therefore, the proportionality is a part of the content of principle of equity and justice, considered as being a general principle of law. At the same time by its normative consecration, explicit or implicit, and by jurisprudential applying, the proportionality has particular significances in different branches of law: constitutional law, administrative law, community law, criminal law etc. This principle definition, understanding and applying, in the above shown significances result from the doctrinary analysis and the jurisprudential interpretation.[622]

III. CONCLUSIONS

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general

[620] Nicolae Popa, *quoted works,* p.117.
[621] Ion Deleanu, *Drept constituţional şi instituţii politice, Constitutional Law and Political Institutions* Publishing House Europa Nova, Bucharest, 1996, volume.I, p.264.
[622] For details see, Marius Andreescu ,*Principiul proporţionalităţii în dreptul constituţional* , *Principle of Proportionality in Constitutional Law* Publishing House C.H. Beck,Bucureşti , 2007.

principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law methaphysics, these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law.*The distinction which we propose has as philosophical grounds the above shown difference between 'constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequenlty, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's

enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given" and not a transcendent of the law, consequently, are not "beyond' the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental 'given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty.* In a future study, we will explain extensively the considerents that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this

problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the pruinciples of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"* (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about.[623]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality[624].

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The juristprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal

[623] For more details see also , Constantin Noica , *Devenirea întru fiinţă*, *Becoming into Being* Publishing House Humanitas,Bucureşti,1998,p. 332-334
[624] Constantin Noica , *quoted works. p. 327-367*

Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawfull state and the social state"[625].

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

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CONTEMPORARY POLITICAL DOCTRINES REGARDING THE STATE OF LAW

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Abstract

A new and superior step of modern civilization is the affirmation of the state of law, which exerts its legal attributions based on laws, using the force of argument and not the argument of force. An incipient form of a state of law has existed even since the Antiquity. In its classical form, we see it in the modern age, when a series of principles emerged in the social life, insuring the function of democratic societies. The concept of the state of law was suggested by Montesquieu in its paper "The Spirit of the Laws", where he states his famous quote that no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. Also in the modern age the state begins to legitimate itself by the civil society and not by divine emanation, for instance in the view of J.J Rousseau, the state appeared to be as a contract between citizens and public authorities. Regarding the essence, purpose, and form of manifestation of the state, in the literature there are numerous doctrines, among which we mention: the doctrine of the state of law, the doctrine of the state of general welfare, the Marxist doctrine on the state.

Key words*: state of law, legitimacy, principles, political power, doctrine*

In time, it was considered that it goes without saying that the state must insure the satisfaction of its citizens' interests, to promote the public welfare, to aim the achievement of the main purposes of a community. The state, vital institution for the political system, is a specific form of political organization of the society, in the context of some constitutive elements referring to: territory, population, form of political organization, spiritual life, community structure etc.

According to the political scientist Armand Cuvillier, the state is an aggregate of political, administrative and legal organisms, materialized in the society which has reached a certain level of differentiation, management and power of constraint. Maurice Duverger considers that the state is a mean of insuring a certain social order, a certain integration of all its members in a collective for the common good[626]. From Antiquity until the present, the concept of the state was and still is the object of numerous controversies. Therefore, in Antiquity, the state was considered to be a divine force, conception which shall be found also in the next social structures. The Augustinian theory of 2 cities, namely the Divine City

[626] Francois Chatelet, Evelyne Pisier, *Concepţiile politice ale secolului XX*, Humanitas Publishing-House, Bucharest, 1994, p.70

and the Earthly city, as two different forms of culture, roman and Christian, prevailed in the Middle Age. In this context, the Earthly city is just a passage in the way towards the Divine city[627].

Modern age influences in an important way the political thinking until contemporaneity. Montesquieu (1689-1775), who, in opposition with the providential thinking, in its work "The Spirit of the Laws" (1748) presents the state as a natural and centered institution based on laws and structured on 3 elements of power: legislative, executive and judicial. He has the credit of clearly presenting and motivating the principle of the separation of powers[628].

J.J Rousseau (1712-1778) in his work "The Social Contract" (1762) defines the state a contractual power, legitimated by a social contract, namely a political institution separated by society, to which are yielded some rights in order to serve the community. The contractual ideas have a more distant history, being presented in the view of Sophists, for in the modern age thinkers like Bodin, Hobbes, Spinoza or Locke to contribute to the development of the theory of the contractual state[629]. Immanuel Kant sees the state as a group of people subjected to the rules of the law, true but not entirely, because he considers that what correlates the unity of the group within the state it is not entirely explained by the purpose of that group of people. Hence, the German philosopher considered only the legal feature, not the political one of the state[630].

A new and superior step of modern civilization is the affirmation of the state of law, who exerts is own attributions based on the laws, using the force of argument, and not the argument of force.

An incipient form of a state of law has existed even since the Antiquity. In its classical form, we see it in the modern age, when a series of principles emerged in the social life, insuring the function of democratic societies. The concept of the state of law was suggested by Montesquieu in its paper "The Spirit of the Laws", where he states his famous quote that no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. Also in the modern age the state begins to legitimate itself by the civil society and not by divine emanation, for instance in the view of J.J Rousseau, the state appeared to be as a contract between citizens and public authorities. Right from the beginning of its existence, the state of law counted on the principle of separation of powers, thus it exerted its power according to the laws[631].

In this context, the state has as base for its activity a series of features, namely an adequate legislative framework, which will settle social relations between all members of society; the organs of central and local state power, elected by citizens, either by universal, direct, secret and free vote, based on options from the political plurality; the separation of

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627 Ion Mitran, *Politologie*, România de Mâine Foundation Publishing-House, Bucharest, 2000, pp.55-60

628 Jacques Chevallier, *Statul de drept*, Universitaria Publishing-house, Craiova, 2012, p.29

629 Idem, p.54

630 Maurice Duverger, *Janus.Les deux faces de l'Occident*, Fayard Publishing-House, Paris, 1969, p.14

631 . Ball, R. Dagger, *Ideologii politice și idealul democratic*, 2nd Edition, Polirom Publishing-House, Iasi, 2000, p.78

powers; the obligation of the government and political authority to compel with the Constitution and to act according to the law; clear delimitation between the state and political parties; military and police forces to be placed under the control of the civil authority, to which they must answer; free movement of information and persons, freedom of speech and political and professional organization of all citizens, according to the law, which will control the political power in a civil society; compliance with human rights in accordance with the international statements in force[632].

The state of law, as an essential element of the political power, is a basic element of the general progress. Regarding the essence, purpose and form of manifestation, in literature there are numerous doctrines.

The doctrine of the state of law, emerged in the beginning of the Modern age, during the Age of Enlightenment, having Montesquieu and Rousseau as main representatives, is shared today by most political scientists, as well as by politicians. Starting from the law, the state of law is based on a series of political principles, the separation of powers; the free election of political organs in the conditions of political pluralism; freedom of speech and organization[633]. Both the activity of authorities, as well as of citizens is regulated by the legal system, in whose framework the law has four functions. Thus, it delimits the area of law and of the civil society, offering for the latter one the right to control the activity of the acts of power. In the same time, it prohibits the access of authorities within the perimeter of private life and interests, which represents the area of the absolute individual freedom[634]. The theory of the authentic state of law, Rechtstaat, does not assume only an abstract subordination of the executive power, but, even more, a control exercised by citizens on the will of the representative body. Or, in other words, "The state of law would be the form by which citizens can freely enjoy their natural rights"[635].

The doctrine of the general welfare state or of "abundance", places the state above the social classes. It states that the state in developed societies (USA, Japan and Western Europe) would have insured stabilizing potentialities, which become factors of balance and development of society, of the regulations and of social organization. The state appears to be an animator and integrative referee of the wills for economic and social development of the citizens, a referee for the development[636].

The Marxist doctrine on the state sees it as an instrument of domination of a social class superior to another social class or classes, being a dictatorship of classes specific to that social arrangement, such as: the slave-owning system, with the dictatorship of slave owners, the feudal state, with feudal dictatorship, the capitalist state with the dictatorship of the bourgeoisie, the socialist state with the dictatorship of the proletariat.

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[632] See Ramona Duminică, Andreea Tabacu, Incapacitatea statului de drept actual de a asigura accesibilitatea și previzibilitatea legii, in the volume of the Conference "Science and Codification in Romania" – "Acad. Andrei Rădulescu" Legal Reseach Institute of Romanian Academy, Bucharest, 2013, pp.577-584

[633] Norman Barry, *An Introduction to Modern Political Theory*, Macmillan, 1995, p.83

[634] Daniel Barbu, *Șapte teme de politica românească*, Antet Publishing-House, Bucharest, 1997, p.120

[635] Idem, p.132

[636] Norman Barry, *Bunăstarea*, Du Style Publishing-house, Bucharest,1998, p.53

The dictatorship of the proletariat is considered to be superior to the other forms of dictatorship, because it represents the dictatorship of the majority over the minority. Also, it is stated that, with the edification of a society without classes, in communism, the state permanently disappears[637]. This form of state, of dictatorship of the proletariat, proven to be historically bankrupt, by representing a form of sui-generis dictatorship generating one of the most pronounced forms of alienation contrary to the state of law and to any form of democratic state – by promoting the cult of personality and totalitarianism, by deepening the political and judicial oppression of the citizens, by narrowing the programmatic level of understanding and consciousness of the people. The fact that once again proves the rationality of the state of law – form of state which insures the highest level of social and democratic life, having as essential principles the thesis of political pluralism, of the freedom of individuals and human rights, and the control of civil society over the political power.

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CRIMINAL LIABILITY CONDITIONS A LEGAL ENTITY

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Abstract

The life of the state, the role of the legal entity, such as public and private law, has become particularly important, and at the same time, these entities have become particularly useful in order to commit crimes. As civil and administrative penalties are not able to face the increasing number of crimes committed through or by businesses, countries have adopted regulations allowing criminal liability of legal persons. Most important concerns related to this topic can be found in the Council of Europe and the European Union, concerns that were reflected in a series of recommendations and conventions.

The question whether a person can see committed criminal liability on account of its actions or inactions, the subject of a dispute which marked the criminal doctrine throughout the last century.

Therefore, we focus our analysis on detailing the general conditions for criminal liability of legal persons, as enshrined in the Romanian criminal law.

Keywords*: legal, natural, criminal liability*

INTRODUCTION

Introducing the Romanian legislation the concept of "criminal liability of legal persons" was made by Law. 278 of 4 July 2006, which added to the Criminal Code Article 19[1] called "Conditions of criminal liability of legal persons".

Regarding the recognition as an active subject of a legal offense, and there was no controversy.[638] Some authors, who reject the thesis introduction into the subject of active criminal law legal claims so-called theory of fiction that legal persons can not be active subjects of crime because they have no independent existence, but are a creation of law, or a fiction of law. This argument is based on the principle of *non potesta delinquere societas*, which states that firms can not commit crimes.[639]

[638] For details on supported contradictory theses doctrine, see Camelia Serban Morăreanu, *Elements of criminal law and criminal procedure - university course*, Hamangiu Publishing House, 2010, pp. 34-35.
[639] T. Pop, *Comparative criminal law. General Part*, Vol II, Cluj, 1928, p 272.

Other authors, representatives of modern criminal doctrine,[640] the contrary, based on the theory of reality on businesses. According to this theory, the legal entity is not a fiction but a reality that has its own will and conscience.

From the text, it appears that this form of liability proceeding "for crimes committed in achieving the object of activity or interest or on behalf of the legal person, if the offense was committed as guilty under the criminal law". Text exclude liability of the State, public authorities and public institutions "engaged in an activity that may not be the private domain", *per a contrario*, if performing an activity that may be the private domain, they could be held accountable prosecution.

Note that the criminal liability of legal persons does not exclude criminal liability of the natural person who has contributed in any way to commit the same offense. Regulation is justified by social and economic realities, given that there have been instances where businesses have been created and used by individuals as tools or as a cover to commit crimes.

Amendments to the Criminal Code reflects the procedural plan by Law no. 356/2006 for the amendment of the Criminal Procedure Code. The most important procedural regulatory treatment businesses is contained in Articles 479^{1}-479^{15} of this act[641] detailing the procedure criminal responsibility of legal persons.

Currently has adopted a new Criminal Code - Law no. 286/2009 whose entry into force is imminent. Article 135 par. 1 of this new law sets exclusively or area of occurrence of the criminal liability of legal persons, the categories of legal persons may be held criminally liable, in par. 2 is set rule limited criminal responsibility of public institutions and in par. 3 is set rule that criminal liability of legal persons does not exclude criminal liability of individuals who contributed to the commission of the same act.

1. LEGAL PERSONALITY

One of the general conditions for criminal liability of legal entities is *that it have legal personality.* That the conditions resulting from the use by the legislature of the expression "legal person".

A legal entity is a form of organization which meet the conditions required by law, is entitled to have rights and obligations. Every person should have a stand-alone organization and their own assets affected to achieve a legal and moral purpose in accordance with the general interest.

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[640] A. Jurmala, *Criminal liability of legal persons*, The RDP no. 1/2003, pp. 94-118.
[641] 4 Camelia Serban Morăreanu, *Criminal Procedural Law – university course*, second edition, Hamangiu Publishing House, 2009, pp. 28-30.

Private legal persons acquire legal personality on the specificity of each, which are classified, usually into two major categories: for-profit businesses and non-profit legal entities (non-profit).

For companies, cooperative societies, agricultural societies, co-operatives, economic interest groups, European economic interest groups, national companies and autonomous administration, legal personality is acquired, usually from the date of registration with the Trade Register.

A special situation companies have illegally constituted, but registered in the trade register. Given that companies constituted unlawful acquired legal personality and the finding of invalidity, according to art. 58 of Law no. 31/1990, takes effect only for the future, we believe that criminal liability may be engaged them.[642]

Legal entities are private non-profit legal entity established with finality nonprofit, established to carry out certain activities patrimonial interest generally of some communities, or of some individuals. It's about associations, foundations, unions, employers, political parties, religious organizations and ethnic.

According to art. 8. para.1 of Government Ordinance no. 26/2000, Associations and Foundations acquire legal personality upon registration in the register of associations and foundations held in graft court and federations of federations when entered in the register kept by the clerk of court. Loss of legal personality of such legal dissolution occurs.

Please note that associations, foundations and other non-profit legal persons criminally liable even if they were declared public because by this as they are not public authorities or institutions.

2. LEGAL CAPACITY

A second general condition to be criminally liable legal person is that it does not fall within the excluded, because not all legal persons criminally liable. State and public authorities are not criminally liable because no criminal legal capacity so that it can enter the criminal liability ratios as passive subjects of these reports. Also, public institutions are not criminally liable for offenses committed in the exercise of activities that may not be the private domain.

Regarding the exclusion from the scope of state legal persons criminally liable, it is justified by the fact that the state is among the only businesses that can not be removed, and on the other hand it is the only active subject of reports of criminal responsibility. The state is not required to be sanctioned, as in the case of the fine, the only main punishment applicable to legal persons, and it would make a single payment. Additional penalties can not find the application in the case of

[642] Dorina Maria Costin, *Legal Liability of Romanian criminal law*, Legal Publishing House, Bucharest, 2010, p 282.

State as state activity may be suspended, it can not be dissolved, he does not participate in public tenders.

Therefore, in our system of law, the state is not criminally liable and are not grounds for a bill ferend establishment of such liability, regardless of the facts that he would be criticized. Ground state can respond to other branches of law (civil, international, etc.).

Regarding public authorities - the important provisions relating to public authorities contained in the Constitution. Basic Law states that are public authorities' Parliament, the President of Romania, Government, Public administration, Judicial authority.

Public authorities belonging to central government ministries include specialized, specialized bodies subordinate to the government, professional bodies organized ministries, professional bodies organized as autonomous administrative authorities, The armed forces, The Court of Accounts.

In the category of public authorities belonging to the local government are: local councils in villages, towns and administrative subdivisions - territorial municipalities, mayors, county councils and prefect. Since, the judiciary, the courts, prosecutor's offices attached to courts and the Superior Council of Magistracy.

Regarding ***public institutions***, according to art. 19^1 para. 1 of the current Criminal Code, not criminally responsible public institutions "engaged in an activity that may not be the private domain". These public institutions are legal persons operating private initiative excluded, which means that it can be performed by individuals or private legal persons.[643]

In each case, the judiciary must verify the legal provisions applicable legal person, and if it finds that the offense was committed in the exercise of activities that may not be the private domain, exclude the possibility of criminal liability, and if the offense was committed in the exercise of activities that may be subject fields, the judicial body shall justify legal requirement to be met, having accordingly. Are public institutions, for example, the National Institute of Magistracy, Institute of Forensic Medicine, "Mina Minovici" National Forensic Institute, the National Institute for Professional Training Association, the National Bank of Romania, the National Association of Romania, the National notary public, etc. For example, not covered by legal persons excluded from criminal liability state universities and other public institutions whose activities subject to private initiative.

Ras may not be included in public institutions even if they have a legal mixed (private law and public law) as art. 136 of the Constitution provides them distinct, so that may be held liable.

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[643] Streţeanu Florin Radu Chirita *Criminal liability of legal persons*, Second Edition, Publishing CH Beck, Bucharest, 2007, p 395.

Private legal persons may be held liable regardless of the type of activity that it carries with observing the limitations set by law.

3. CRIME IN ACHIEVING THE OBJECT OF ACTIVITY OR INTEREST OR ON BEHALF OF THE LEGAL PERSON

A third general condition for engaging the criminal liability of legal persons is that the offenses are committed in achieving the object of activity or interest or on behalf of the legal person.

Regarding this condition must be solved content link between the individual who performs the act proper conduct of the crime and the legal entity, because, according to art. 19^1 Criminal Code, the criminal liability of legal training is necessary that offenses should be committed for achieving the object of activity or interest or on behalf of the legal person.

By committing a crime in achieving the object of activity means that an organ, servant or representative of the legal person has committed an offense occasion to implementing the activities which the law or the articles of incorporation, legal entity can perform. The facts must be related, "the main activities aimed at achieving the social object and not the facts that were only indirectly related activities arising from this object".[644]

Romanian legislator, from the ability to use specialty rule, only took into account the specific scope of business activities of the legal person, whether it is primary or secondary is one of the objects: for example, if a person who is to the artistic activity, may commit acts of trafficking for prostitution.

An offense is committed in the interests of legal entities in all cases when using - material and moral - returns obtained by crime, in whole or in part, the legal entity although the offense is committed in achieving the object of activity. Crime in achieving the objects of the legal person, entity or interest of the legal person - not cumulative conditions, but there are three alternative situations and whenever the requirements of at least one hypotheses, regardless of the fact that the offense was committed or in the interest of the legal person, or whether or not committed in its name, of course, the performance objective and subjective conditions provided by law for the offense imputed is criminally liable.

For the purposes of criminal law, a crime is committed on behalf of the legal person if the individual performing the material element of the offense acting as agent or representative of the legal person officially sworn in without offense be committed in achieving the object of activity or on behalf of the legal person. For the illegal activity of an individual can attract criminal liability of legal persons is not required provided a formal investment decision in a function, representation or

[644] 7. Streteanu Florin Radu Chirita *Criminal liability of legal persons*, Second Edition, Publishing CH Beck, Bucharest, 2007, p 400

control, is sufficient only natural to have acted on behalf of the legal person or to be had such power of law or fact.

It is possible to hire only the act of individual criminal responsibility, especially in cases where the offense are legal interests of victims, but because the act is against its interests, but it may not make content subjective element because guilt is related to the attitude of some individuals within the legal person. In analyzing the conditions of criminal liability of legal persons should be pointed out that Art. 19 [1] Criminal Code provides that the act be committed with guilt form under the criminal law. Guilt of legal persons and bodies relating to its organization, being able to say that apportioning blame to individuals that make up the corporate bodies equivalent to legal person proven guilty.

If the offense is committed by bodies corporate but representatives or representative, legal person's guilt is determined by reference to the attitude of its organs. The existence of guilt or form or how it will be detached from objective aspects of how decisions were adopted by the governing bodies of the legal person or the practices, known, accepted or tolerated in corporate activity. In the case of intentional acts necessary to a decision of the pre-existence of the legal entity under which the act was committed by the criminal law. For the offenses of negligence, guilt is established by legal entities verification obligations. With regard to offenses committed by persons other than the bodies of the legal person, the existence of the crime it is necessary that they knew or should have known about the criminal activities of individuals. It is therefore exclude liability of legal persons when the offense is committed by an agent of unexpected entity or if criminal acts are not tolerated within a practice or legal person consents. Also, if legal person created a well organized system of supervision and control which was reasonably able to prevent crimes, liability legal person must be excluded. Is there the same form of guilt when both the legal entity and the physical act both recklessly or both intentionally. For example, if the board of directors of a legal diversion took the decision to conduct the activity object trafficking activities, the same attitude towards this activity with subjective and individuals involved in the implementation of the decision of the Board .

Another example can be noted here is that when the work causing an accident that caused several deaths were culpable attitude so individual that has energized the equipment that failed and due to which the accident occurred as and the governing bodies of the company, who have not made the safety briefing. Criminal liability of legal entities can coexist with individual responsibility, who is an organ of the legal person and the natural person who performed the material element of the offense, but the three groups of subjects may be located in other positions. For example, the legal person is not criminally responsible, but the two individuals responsible. Or, the legal and material author criminally liable without

physical Persian leading legal person is criminally liable, or it is possible that only legal persons to criminal responsibility.

The fact is that the introduction of criminal liability of legal entities, Romanian legislature did not intend to build a, umbrella "under which to shelter individuals who have achieved material element of the offense. On the contrary, art. 19^1 para. (2) Criminal Code states that "criminal liability of legal persons does not exclude criminal liability of the natural person who has contributed in any way to commit the same offense".

Individual are met on objective, factual matters under criminal law criminal responsibility while and legal entity in respect of which the offense of criminal responsibility. Sometimes there are cases where the legal person criminally responsible exclusively. Exclusive possibility of criminal liability of legal persons under the provisions of art. 19^1 para. (2) Criminal Code, under which criminal liability of legal persons does not exclude criminal liability of individuals.

Based on these provisions can be said that the criminal liability of legal persons may be added to that of the individual, but not assumed, so that there may be cases where the legal person is criminally liable, although the judiciary failed to retain the load conditions any individual criminal responsibility. In such cases, the doctrine is discussed in relation to how it can be that the conditions of criminal liability of legal persons, without reporting to an individual.

Establishing criminal liability of legal entities assumed in all cases reference to one or more individuals who have achieved material element of the offense under the criminal law. Without such reporting, criminal liability of legal persons would be arbitrary. For example, if the body belongs to a collective decision can not determine which individuals have participated in the decision, the legal person criminally liable if an individual put into practice the collective body of the legal entity resolution. "Executor" - natural - criminally responsible if his action in the form of guilt under the law, but the legal entity shall criminally responsible, regardless of the criminal status of the individual as a deed in which the offense was committed in Clearly, the guilt.

Also, if the decision of the group made itself the objective elements of an offense, the material element of the offense is estimated according to the individuals involved in making that decision.

Assuming that the offense under the criminal law is attributed to a collective body and can not establish that at least some of the individuals that make up this body have committed the act with guilt as required by law, the consequence will be excluded and criminal liability of legal persons.

Although the criminal liability of the legal person can be held without retaining criminal liability of at least one individual each time subjectivity must be charged at least one natural person, even if you can not establish its identity (for collective bodies, for example).

Unlike other legislation providing for criminal liability rule excluding overlapping criminal liability for legal entities and individuals of our legislation establishes the rule that criminal liability of individuals and legal entities are not mutually exclusive but cumulative.

As the principle of the personal nature of criminal liability, the legal entity may not require payment of the fine by a criminal action for recovery, but will require the perpetrators individual damages under tort. Also, associations legal person can not be forced to answer for criminal penalties applicable to the entity to which an association, because it would violate the principle of criminal liability personality.

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EXECUTION OF ORDERS PRONOUNCED BY ADMINISTRATIVE COURTS

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Abstract

The procedure for the execution of orders pronounced by administrative courts is carried out by specific rules expressly stipulated in Law no. 554/2004, with subsequent amendments.

Administrative Litigation Law only contains provisions on the enforcement of court orders concerning the obligation of public authorities to conclude, replace, or modify an administrative act, to issue a document or to perform certain administrative operations.

Therefore, for all cases where the order of an administrative court concerning categories of obligations is different from those stipulated by art. 24 in the law, the provisions of common law become applicable, respectively the provisions of the Code of Civil Procedure.

Where, by court order, the public authority is obliged to pay money, the provisions of G.E.O. no. 22/2002 shall also be taken into account, concerning the enforcement of the obligation of public institutions to payment, established by enforceable title.

Keywords*: administrative, court order, execution, court.*

1. INTRODUCTORY ELEMENTS

The procedure for the execution of court orders pronounced in the matter of administrative litigations is regulated by art. 22-25 of Law no. 554/2004 concerning the administrative law, with subsequent modifications and completions.

By enforcing the orders pronounced in the matter of administrative litigations, the full reestablishment of the legitimate right or interests violated by the public authority is pursued.

As such, it is not enough for the litigant to obtain a decision "convicting" the public authority, but it is also necessary that the matters established within the enactment be brought to completion by the public authority to which the obligation has been established.

Law no. 554/2004 sets up a special procedure concerning the modality for the execution of orders pronounced on its basis, but this procedure only targets the decisions by means of which certain obligations falling to public authorities are established, whereas, for the other categories of orders, the provisions of the Code

of Civil Procedure shall apply, which aspect results from the provisions of art. 24, paragraph (2^1) and art. 28 of the law[645].

In the case of orders whose object constitutes the obligation of the public authority to payment of certain amounts of money, in addition to the provisions of common law, the provisions of Government Ordinance no. 22/2002[646] shall also be taken into account, regarding the execution of payment obligations by public institutions, established by means of enforceable titles, as well as the provisions of Order no. 2336/2011[647] for the approval of application of enforceable titles, based on which the establishment of garnishment on the accounts of the public authorities and institutions opened at the level of the State Treasury shall be requested.

According to the provisions of art. 632 paragraph 1 of the new Code of Civil Procedure (hereinafter NCCP), "execution may only be enforced based on an enforceable title." In the matter of administrative litigations, final court orders pronounced on the basis of Law no. 554/2004 represent, according to art. 22 of the law, enforceable titles.

According to art. 634 paragraph 1 NCCP, final court orders are (among other things) the orders given in the trial court, with no right of appeal, not subject to appeal, and the final court orders given after a second appeal, even if by means of these the substance of the case has been solved.

Consequently, in the matter of administrative litigations, the final decisions are those decisions which are pronounced on the merits by administrative courts, which were not subject to appeal, as well as the orders pronounced after the second appeal.

The enforceable character of these decisions shall, however, be established according to the contents of the enactment in the court order, and only the orders by means of which the fulfillment of certain obligations was provisioned may be enforced (payment of an amount of money, the conclusion, replacement, or modification of certain administrative documents, issuance of a written record etc.), and not the orders cancelling administrative documents, nor the orders by means of which the requests were dismissed and no court costs were granted.[648]

Next we will briefly refer to the enforcement of final court orders by means of which the public authorities were forced to conclude, replace, or modify the administrative document, to issue a different document, or to perform certain

[645] Published in the Official Journal of Romania no. 1154 from 7 December 2004.
[646] Published in the Official Journal of Romania no. 81 from 1 February 2002.
[647] Published in the Official Journal of Romania no. 523 from 25 July 2011.
[648] Concerning court orders which are not enforceable titles, please refer to Tabacu Andreea, "The execution of court orders in the matter of administrative litigations, de lege lata, and following entry into force of the new Code of Civil Procedure" in the Transylvanian Review of Administrative Sciences, 1(30)/2012, p. 189.

administrative operations, as well as to the orders whose object consists of amounts of money.

2. ENFORCEMENT OF FINAL ORDERS PRONOUNCED ON THE BASIS OF LAW NO. 554/2004, BY MEANS OF WHICH OBLIGATIONS TO PERFORM WERE INSTITUTED TO PUBLIC AUTHORITIES

The modality for enforcing court orders pronounced based on Law no. 554/2004, by means of which certain obligations to perform were instituted to public authorities, is regulated by art. 24 of the law, according to which if, "following granting of the party's motion, the public authority is forced to conclude, to replace, or to modify the administrative document, to issue a different written document, or to perform certain administrative operations, the enforcement of the final and irrevocable order shall be achieved within the term specified in its contents, and, in the absence of such a term, within at most 30 days of pronouncement of the irrevocable order".[649]

In order to assure the enforcement of this category of orders, the lawgiver provisioned, in paragraph 2 of the same article that, "in the event that the term is not observed, the manager of the public authority, or, as the case may be, the obligated person, shall suffer a fine to the value of 20% of the gross minimum wage, per day of delay, and the plaintiff is entitled to penalties, within the terms of art. 894 (become 905 following republication) from the Code of Civil Procedure."

Unlike the old regulation, which provisioned the fact that the plaintiff is entitled to delay compensations, the present regulation stipulates the plaintiff's right to request penalties according to art. 905 NCCP.

Thus, according to the provisions of art. 905, "when the obligation cannot be assessed as an amount of money, the creditor may request the court to force the public authority to payment of a 100 to 1000 lei penalty, set per day of delay, until full execution of the obligation provisioned in the enforceable title".

If, within three months of the date of communication of the conclusion for the application of the penalty, the debtor does not execute the obligation established in the enforceable title, the executing court, upon the creditor's request, shall establish the final amount owed according to this title, by means of final conclusion pronounced with citation of the parties [art. 905, paragraph (4) NCCP.].

By way of appeal for annulment, the penalty may be reduced or removed, if the debtor performs the obligation established in the enforceable title and proves the existence of strong reasons which justified the delay of execution (art. 905, paragraph 5, NCCP).

[649] According to art. 8 of Law no. 76/2012, the present sense for "irrevocable" is "final".

The wording of art. 24 from the special law does not clarify whether the enforcement of the court order shall be applied at the creditor's request or ex officio, by the public authority.

In the doctrine prior to the entry into force of NCCP, it was shown that "enforcement of the court order must be expressly requested, so that the public authority may not successfully invoke the fact that the injured party manifested disinterest in the execution".[650]

The new Code of Civil Procedure clarifies this aspect in art. 622, paragraph (4), stipulating that the execution of a certain obligation to perform may be obtained upon the mere request formulated by the legitimate person.

We believe that the public authority may proceed directly to the enforcement of the order, with no need to expect a request from the creditor, taking into account the brief term in which it must be executed, thus avoiding to exceed it, which would entail the application of non-execution penalties.

For the application of the fine and the granting of penalties, the creditor must however address the enforcing court which, according to art. 2 paragraph (1), letter ţ of Law no. 554/2004, is the court which solved the substance of the administrative litigation.

Within the doctrine prior to the modification of Law no. 554/2004, by means of Law no. 76/2012, it was held that "the court which solved the substance of the litigation can under no circumstances be the court of appeal, as invalidation on the grounds of absence of merits shall be achieved with referral to the court which solved the merits of the litigation." [651]

The request addressed to the execution court shall be judged in the emergency advisory chamber, with citation of the parties, and may be subject to appeal, within 5 days of communication. The appeal does not defer the execution, and this results from the wording of art. 25 and, as it was emphasized in the doctrine, when the intention was for the appeal to be able to defer, the lawgiver expressly provisioned this, as is also the case with art. 20, paragraph (2) of Law no. 554/2004.[652]

The penalties provisioned by art. 24 paragraph 2 from Law no. 554/2004 have the role of fighting the resistance of the public authority and determining it to fulfill the obligation established upon it by means of the "convicting" decision.

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[650] Albu, Emanuel, "Administrative law", Ed. Universul Juridic, Bucharest, p. 262.

[651] Dragoş, Dacian Cosmin, "Administrative Law, Comments and Explanations", Ed. All Beck, Bucharest 2005, p. 309; Puie, Oliviu, Execution of court orders pronounced within the terms of administrative law, no. 554/2004, in the magazine The Law no. 6/2007, p. 129.

[652] Iorgovan, Antonie, Vişan, Liliana, Ciobanu, Alexandru Sorin, Pasăre, Diana Iuliana, "Administrative Law, Comments and Jurisprudence", Ed. Universul Juridic, Bucharest 2008, p. 363.

In addition to the penalties provisioned by art. 24 paragraph 2, the lawgiver also provisions, in paragraph 3 of the same article, a penal sanction, consisting of imprisonment between 6 months and 3 years, or a fine of 2500 to 10000 lei.

However, this sanction only intervenes in the case of non-execution, for imputable reasons or of lack of observance of the final court order pronounced by the administrative court within 30 days of the date of application of the fine penalty by the executing court.

The wording of art. 24 paragraph (3) implicates that, as emphasized also in the doctrine, the penal sanction aims at the non-execution of the order, which constitutes an enforceable title, and not the order pronounced by the execution court, by means of which the fine was applied.[653]

We believe that the penal sanction is capable of fighting the resistance of the public authority and of making it perform the obligations established by means of an enforceable title.

It should be added that the procedure of applying fines and penalties set out in Article 24, Indent 2 of Law no.554/2004 regarding contentious court matters is also appropriate to enforce the decisions of administrative courts made in order to settle legal disputes on administrative contracts.

3. EXECUTION OF THE ORDERS BY MEANS OF WHICH THE PUBLIC AUTHORITY WAS FORCED TO PAYMENT OF AMOUNTS OF MONEY

The provisions of art. 22-25 from Law no. 554/2004 do not imply the mode in which court orders may be enforced, by means of which public authorities were forced to payment of certain amounts of money, the provisions of art. 24 of the law only being applicable due to the fact that the penalties stipulated in this article only operate in express cases and in cases limitedly provisioned by the law.

In these circumstances, the common law regulations shall apply, concerning enforcement, however, these norms only become incident after having gone through a prior stage stipulated in Emergency Government Ordinance no. 22/2002, concerning the execution of payment obligations of public institutions established by means of enforceable titles.

In this respect, according to art. 1 paragraph (1) of the mentioned normative document, "payment of the claims established by means of enforceable titles devolving on public authorities may only be achieved from the amounts approved to this purpose, through their budgets or, as the case may be, from expense titles which the respective payment obligation falls under."

[653]Puie, Oliviu, "Execution of court orders pronounced within the terms of administrative law" no. 554/2004, in the magazine The Law no. 6/2007, p. 134.

In the case that the execution of the debt does not begin or does not continue due to lack of funds, the debtor institution has the obligation to take the necessary steps in order to fulfill its payment obligation within 6 months of the receipt of the demand for payment.

If the 6-month term is not observed, the creditor may request enforcement according to the Code of Civil Procedure or according to other provisions applicable on the matter. (art. 2).

If, for firm reasons, the debtor public authority cannot fulfill its payment obligation, it shall have the possibility to request the court which pronounced the decision for a grace period and/ or the setting up of a debt repayment schedule (art. 6, paragraph (1)).

Upon the request of the debtor institution, by means of enforceable decision, the court shall be able to suspend, with no need for payment of securities, the commencement or continuation of enforcement until the final solution to the request concerning the granting of payment term/ terms for the amounts due.

Consequently, the creditor shall not be able to move directly to enforcement according to the provisions of the Code of Civil Procedure, before the prior stage has elapsed, stipulated in G.O. no. 22/2002, with its subsequent modifications and completions.

We must note the fact that the procedure for the application of enforceable titles, based on which lies the request for garnishment on the accounts of public authorities opened at the level of state treasury units, is regulated by Order no. 2336 of 19 July 2011.

In this respect, the territorial unit of the State Treasury shall notify the debtor public institution or public authority, in writing, at the latest on the first working day after receipt of the address establishing the garnishment from the legal executor, concerning the date of receipt of the address establishing the garnishment and the amount for which garnishment is ordered.

The debtor public authority shall transmit to the territorial unit of the State Treasury, in writing, at the latest on the first working day from receipt of the address of notification, reports concerning the amounts existing in the accounts on the date of receipt of the address establishing the garnishment, filling in the form, according to the provisions of art. 3, with the amounts which shall be rendered unavailable.

In case of non-conformity, the territorial unit of the State Treasury shall render the amounts from the debtor's accounts unavailable, until completion of the total amount recorded in the enforceable title, and shall transfer the amounts rendered unavailable into the accounts indicated by the legal executor.

Usually, the public authority fills in the report stipulated in the order, but it does not mention amounts which cannot be rendered unavailable, motivating the lack of monetary funds.

The public authority cannot, however, stand on the absence of monetary funds in order to justify non-payment of the amounts established by means of court decisions, as they have the obligation to apply the measures provisioned in art. 4 from G.O. no. 22/2001, in order to be able to make payment of the amounts established by means of enforceable title.

The compensations which the public authority must pay are due, first of all, to the inappropriate conduct of the staff, who fail to apply, or who apply the law in an inappropriate manner, but also to the incoherent and unstable legislation, and, as such, elimination of all causes generating prejudice to the public authority is in order, by implementing the adequate measures.

4.CONCLUSIONS

The execution of decisions pronounced in the matter of administrative litigations shall be achieved according to the specific regulations stipulated by Law no. 554/2004, to be applied, as the case may be, according to the contents of the enactment which is to be executed, the provisions of art. 24-25 of the special law, or the provisions of the Code of Civil Procedure.

Thus, in the case of the decisions by means of which the public authority was forced to conclude, to replace, or to modify the administrative document, to issue a different document or to perform certain administrative operations, execution shall be achieved according to art. 24-25 of Law no. 554/2004.

In the event that, by means of the court order, the public authority was forced to payment of amounts of money, execution shall be achieved according to the Code of Civil Procedure, but only after having gone through the prior stage stipulated by G.O. no. 22/2002, also observing the procedure established by means of Order no. 2336/2001.

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THE INTERNATIONAL CONFERENCE
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THE ROLE OF NATIONAL JUDGE IN THE ENFORCEMENT OF STATE AID RULES

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Abstract

The first issue facing national courts and potential claimants when applying Articles 107 and 108 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty. Article 107(1) of the Treaty covers "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States". The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid. The case law of the Community courts and decisions taken by the Commission have frequently addressed the question of whether certain measures qualify as State aid. In addition, the Commission has issued detailed guidance on a series of complex issues. Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion. This is without prejudice to the possibility or the obligation for a national court to refer the matter to the ECJ for a preliminary ruling under Article 234 of the Treaty.

Key-words*: competition, state aid, the private investor principle, the private creditor test, the affectation of trade between Member States.*

I. INTRODUCTION

The Commission addressed the role of national courts in the Notice on cooperation between national courts and the Commission in the State aid field, published in 1995[655] ("the 1995 Cooperation Notice") in the 1995 Cooperation Notice introducing mechanisms for cooperation and exchange of information between the Commission and national courts.

In 2005, the Commission adopted a road map for State aid reform, the State Aid Action Plan[656] ("the SAAP"), to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the EC Treaty. Based on

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[655] SAAP, paragraphs 55 and 56
[656] State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

the principle of "less and better targeted State aid", the central objective of the SAAP is to encourage Member States to reduce their overall aid, whilst redirecting State aid resources to horizontal common interest objectives. In this context, the Commission has reaffirmed its commitment to a strict approach towards unlawful and incompatible aid. The SAAP highlighted the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid [657].

In 2009, the European Commission adopted the Notice[658] on cooperation between national courts and the Commission in the State aid field[659], mainly aiming to inform national courts and third parties about the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those rules and seeking to develop the cooperation of European Commission with national courts by introducing more practical tools for supporting national judges in their daily work.

II. THE NOTION OF STATE AID IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The first issue facing national courts and potential claimants when applying Articles 107 and 108 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.

The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid [660].

Article 107(1) of the Treaty covers "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States".

The notion of State aid is not limited to subsidies. The concept of state aid also comprises, inter alia, tax concessions and investments from public funds made in circumstances where a private investor would have withheld his support [661].

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[657] SAAP, paragraphs 55 and 56

[658] Official Journal C 085 , 09/04/2009 P. 0001 - 0022

[659] Replacing the 1995 Cooperation Notice

[660] Case 78/76, Steinike & Weinlig, [1977] ECR 595, paragraph 14; Case C-39/94, SFEI and Others, [1996] ECR I-3547, paragraph 49; Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, [1991] ECR I-5505, paragraph 10; and Case C-368/04, Transalpine Ölleitung in Österreich, [2006] ECR I-9957, paragraph 39.

[661] Case C-308/01, GIL Insurance and Others, [2004] ECR I-4777, paragraph 69; Case C-387/92, Banco Exterior de España v Ayuntamiento de Valencia, [1994] ECR I-877, paragraph 13; Case C-295/97, Piaggio, [1999] ECR I-3735, paragraph 34; Case C-39/94,

According to the Opinion of the Advocate-General in case Kingdom of Spain v Commission of the European Communities (Joined cases C-278/92, C-279/92 and C-280/92), "State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature.

Whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid is immaterial in this respect[662] .

But, for public support to be considered State aid, the aid needs to favour certain undertakings or the production of certain goods ("selectivity"), as opposed to general measures to which Article 107(1) of the Treaty does not apply [663].

In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States [664].

The private investor/creditor principle usually applies in case of difficulty in establishing the compatibility of state aid with the common market.

In this situation, the state authorities must justify their intervention on the market as being a commercial intervention similar to the conduct of the private investor/creditor acting in similar conditions on the market. [665]

In the practice of European courts[666], it has been held that a support measure that is attributable to the State constitutes State aid within the meaning of Article 107 TFEU only if the beneficiary of the measure gain an economic advantage which it would not have obtained under normal market conditions.

Private investor test is commonly used in cases where the state authorities have participate with capital in public or private companies without seeking social issues or eliminate the effects that would be caused by the closure of a company's economic situation in a given region. In the case of the fiscal authorities or other

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SFEI, cited above footnote 8 paragraph 58; Case C-237/04, Enirisorse, [2006] ECR I-2843, paragraph 42; and Case C-66/02, Italy v Commission, [2005] ECR I-10901, paragraph 77.

[662] Case 290/83, Commission v France, [1985] ECR 439, paragraph 14; and Case C-482/99, France v Commission, [2002] ECR I-4397, paragraphs 36 to 42.

[663] Advocate General Darmon's Opinion in Joined Cases C-72/91 and C-73/91, Sloman Neptun v Bodo Ziesemer, [1993] ECR I-887

[664] See, inter alia, Joined Cases C-393/04 and C-41/05, Air Liquide Industries Belgium, [2006] ECR I-5293, paragraphs 33 to 36; Case C-222/04, Cassa di Risparmio de Firenze and Others, [2006] ECR I-289, paragraphs 139 to 141; and Case C-310/99, Italy v Commission, [2002] ECR I-2289, paragraphs 84 to 86.

[665] C. Pilan, Principiul investitorului/creditorului privat prudent în practica judiciară în materia ajutorului de stat, Revista Profil: Concurenţa, nr.4/2007

[666] Case C-342/96, Spain v Commission, [1999] ECR I-2459, paragraph 34; and Case C-256/97, DM Transport, [1999] ECR I-3913, paragraph 25.

government revenue collectors, the decisive test in order to establish the state aid character of deletion or rescheduling of debts is the private creditor test.

In the case of sales of their holdings by states to certain companies, it has to be checked the test of prudent private seller according to principles of the European jurisprudence.

Private creditor principle applies where a private company or public has debts to the state budget, including local budget, budget or other entity which manages state resources or local resources. They can be social security contributions, unemployment fund, dividends or debt to fund risk taxes owed to local budgets etc.

The question is whether the state should foreclose such claims, to partially exempt from payment or to stagger through an agreement with the borrower. In practice, the private creditor test is applied by comparing the real beneficiary imaginary situation faced similar financial difficulties which seeks partial exemption / rescheduling of its debts to creditors.

The creditors may accept a rescheduling or waiver of the debt if the debtor demonstrates that its financial restructuring plan and anticipated financial liquidity will enable the latter to recover financially and pay amounts due. Otherwise, creditors will be in a position to ask the enforcement of the liquidation of the debtor firm.
In Case Tubacex 1999[667], the CJEU held that, if the state decided to remove or stagger certain flows, investor test has to be adapted taking into account the situation of a private creditor seeking to recover his claim.

In Case Hamsa T-152/99, the Court of First Instance held that the private creditor test is influenced by a number of factors: rank creditor's claim - whether secured creditor with privileged or unsecured debt, the extent and type guarantee, chances of the viability of the debtor company in difficulty and the amount to be recovered in the event of liquidation of the debtor company.

European Commission[668] showed that, in the case of Hamsa, there was a restructuring plan demonstrating the viability of the target company's privileged creditor status and the existence of a real budget they may recover some of its claims in the event of liquidation. European Commission stressed that it is unlikely that a private creditor having a privileged claim to agree with giving them to become main shareholder in order to more closely monitoring of the debtor's restructuring since the evidences of viability of the restoration plan are nonexistent.

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[667] Case C-342/96, par. 32.
[668] Decission 1999/484/CE of 3 February 1999 concerning State aid which the Spanish Government has granted to the company Hijos de Andrés Molina SA (Hamsa) (notified under document number C (1999) 41), published in *Official Journal L 193 , 26/07/1999 P. 0001 - 0022*

Court of First Instance found that debt cancellation can not be justified by the fact that the State is also the shareholder of a company. Thus there must be a clear distinction between the conduct of the state as a shareholder and as the public authority. On the other hand, should be kept in mind that private companies and their shareholders have the possibility of cancelling their debt to the state only if that state until they make a profit, so it would be in accordance with the principle of the private investor.

The case law of the Community courts[669] and decisions taken by the Commission have frequently addressed the question of whether certain measures qualify as State aid. In addition, the Commission has issued detailed guidance on a series of complex issues, such as the application of the private investor principle[670] and of the private creditor test[671] , the circumstances under which State guarantees must be regarded as State aid[672] , the treatment of public land sales[673] , privatisation and assimilated State actions[674] , aid below the de minimis thresholds[675] , export

[669] A good example is the Altmark ruling of the ECJ, Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, [2003] ECR I-7747.

[670] On the private investor test in general, see Case C-142/87, Belgium v Commission (Tubemeuse), [1990] ECR I-959; Case C-305/89, Italy v Commission (Alfa Romeo), [1991] ECR I-1603, paragraphs 19 and 20. As to its detailed reasoning, see Joined Cases T-228/99 and T-233/99, Westdeutsche Landesbank Girozentrale v Commission, [2003] ECR II-435, paragraph 245 et seq. See also Bulletin EC 9-1984, reproduced in "Competition law in the European Communities", Volume IIA, and Communication of the Commission on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3). As regards the application of this principle in relation to the financing of airports, see Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, paragraphs 42 to 52, p. 1).

[671] Case C-342/96, Spain v Commission, [1999] ECR I-2459, paragraph 34; and Case C-256/97, DM Transport, [1999] ECR I-3913, paragraph 25.

[672] Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

[673] Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

[674] XXIII Report on Competition Policy, paragraphs 401 to 402 and Case C-278/92, Spain v Commission, [1994] ECR I-4103.

[675] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006, p. 5); Commission Regulation (EC) No 875/2007 of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the fisheries sector and amending Regulation (EC) No 1860/2004 (OJ L 193, 25.7.2007, p. 6); and Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the

credit insurance[676] , direct business taxation[677] , risk capital investments[678] , and State aid for research, development and innovation[679] . Case law, Commission guidance and decision making practice can provide valuable assistance to national courts and potential claimants concerning State aid.

Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of this Notice. This is without prejudice to the possibility or the obligation for a national court to refer the matter to the ECJ for a preliminary ruling under Article 234 of the Treaty.

III. CONCLUSIONS

CJEU has repeatedly confirmed that both national courts and the Commission play key roles, but distinct in the application of State aid rules.[680]

The main role of the Commission is to examine the compatibility with the common market aid measures proposed, based on the criteria of Article 107 (2) and (3) TFEU. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the European courts.

If, in accordance with the case law of the CJEU, national courts do not have the power to declare a state aid measure to be compatible with Article 107 (2)

EC Treaty to de minimis aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35).

[676] Communication of the Commission to the Member States pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 281, 17.9.1997, p. 4), as last amended by the Communication of the Commission to Member States amending the communication pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 325, 22.12.2005, p. 22).

[677] Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

[678] Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2).

[679] Community Framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

[680] Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 37; Joined Cases C-261/01 and C-262/01, Van Calster and Cleeren, [2003] ECR I-12249, paragraph 74; and Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 41.

or (3) TFEU[681], nevertheless they have the power to interpret the concept of state aid, according to the European jurisprudential criteria.[682]

[681] Case C-199/06, CELF and Ministre de la Culture et de la Communication, [2008] ECR I-469, paragraph 38; Case C-17/91, Lornoy and Others v Belgian State, [1992] ECR I-6523, paragraph 30; and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 14.
[682] Case 78/76, Steinike & Weinlig, [1977] ECR 595, paragraph 14; Case C-39/94, SFEI and Others, [1996] ECR I-3547, paragraph 49; Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, [1991] ECR I-5505, paragraph 10; and Case C-368/04, Transalpine Ölleitung in Österreich, [2006] ECR I-9957, paragraph 39.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

COMPETITION LAW AND THE PRELIMINARY RULING

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Abstract

This paper is underlying the importance contribution of the preliminary ruling and its role in developing a competition culture across the Community, and the importance of ensuring consistency and uniformity in the implementation of EC competition law by national courts, principles which has been given added significance following the introduction of Regulation 1/2003[684] and the accession of new Member States.

BACKGROUND TO ARTICLE 267 (FORMER ART.234)

Article 267 TFUE facilitates a dialogue between the national courts and the ECJ in order to allow national courts to seek guidance on the appropriate interpretation of Community law principles in a particular legal dispute,[685] and from a Community perspective this process should enhance the uniform and consistent interpretation of Community law throughout the national courts.[686]

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684 OJ L1/1, 2003.

685 Article 267 provides that:-

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised before any court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

686 See J. Steiner, L. Woods, and C Twigg-Flesner, *EU law* (9th edn, Oxford, OUP, 2006) Chapter 9- The preliminary rulings procedure at pp193-224; P. Craig and G. De Burca, *EU Law Text Cases and Materials* (3rd edn, Oxford, OUP, 2002) Chapter 11- Preliminary Rulings and the Building of a European Judicial System.

National courts, and tribunals, of all levels can make a reference for a preliminary ruling. These will be discretionary references unless a ruling is necessary to enable a court of last instance to give judgment, in which case a reference is mandatory.[687] However, the preliminary ruling mechanism allows the ECJ to provide a ruling on the Community law aspect of the case without determining the actual dispute between the parties, which is the preserve of the national court in the light of the ECJ ruling.[688]

The importance of the Article 234 (now art.267) procedure has been stressed on innumerable occasions, including the following: "almost all the major principles established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 267 (former art.234, ex 177) EC." [689]

"In many ways the most important aspect of the work of the Court is its jurisdiction to give "preliminary rulings" under Article 177…As a Belgian expert has pointed out, most of the *"grands arrets"* of the Court have been under this head of its jurisdiction."[690]

Furthermore, in a competition law context, it has been noted that "the preliminary reference procedure has had a disproportionately significant impact on the substantive development of EC competition law."[691]

PRELIMINARY RULING AND ITS ROLE IN COMPETITION ISSUES AFTER 1 MAY 2004. A SYNTHESIS

The articles 81, 82 and the State aid rules were the object of some of the most important preliminary rulings regarding competition issues after 1 May 2004. As regards article 81, the notions of concerted practice, anti-competitive object and anti-competitive effect were developed in cases C-8/08, T-Mobile Netherlands

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[687] Though this is moderated by the *acte clair* doctrine. See, for example, *CILFIT v Ministero della Sanita* Case 283/81 [1982] ECR 345.

[688] Cf I. Atanasiu and C-D. Ehlermann, 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' [2002] *European Competition Law Review* 23(2) 72.

[689] See J. Steiner, L. Woods, and C Twigg-Flesner, *EU law* (9th edn, Oxford, OUP, 2006) at p193.

[690] L. Neville Brown and T. Kennedy, *The Court of Justice of the European Communities* (London: Sweet & Maxwell, 5th ed. 2000) at p.204, referring to P. Demaret, Jean – Monnet Professor at the College of Europe, Bruges, *Le juge et le jugement dans les traditions juridiques europeenns* (Paris, 1996) at p.311. (*"Grands arrets"* are landmark judgments.)

[691] M. Demetriou, 'Preliminary References and Competition Law' [2002] *Competition Law Journal* 345; see also R. M. Buxbaum 'Article 177 of the Rome Treaty as a Federalizing Device' (1969) 21 *Stanford Law Review* 1041 at 1041:- "The most important Community subject matter involved in private litigation has been antitrust law."

and Others [692], C-209/07[693], Beef Industry Development Society and Barry Brothers and C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL. [694]

In T-Mobile, the ECJ established that: "A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply

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[692] C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit; see Idot, Laurence: Entente et echanges d'infornations, Europe 2009, Aout-Septembre, Comm.no.323, p.33-34; Debroux, Michel, Chroniques. Ententes, Concurrences: revue des droits de la concurrence 2009, no.2, p.101-102 ; Wilhelm, Pascal; Provost, Elise, La Cour de justice precise la notion d'objet contenue dans l'article 81 CE et impose le niveau de preuve des pratiques concertees requis, Revue Lamy droit des affaires 2009 no.41, p.45-49

[693] C-209/07, Competition Authority v. Beef Industry Development Society Ltd,Barry Brothers (Carrigmore) Meats Ltd, ECR 2008, p.I-08637; see Debroux, Michel, Chroniques. Ententes, Concurrences: revue des droits de la concurrence 2008, no.4, p.75 ; Sarrazin, Cyril, Chroniques. Ententes, Concurrences: revue des droits de la concurrence 2009, no.1, p.104-105 ; Selinsky, Veronique, Cholet, Sylvie: Pratiques anticoncurrentielles par leur objet, Revue Lamy de la Concurrence: droit, economie, regulation 2009, no.18, p.28; Chaltiel, Florence, Berr, Claude J., Francq, Stephanie, Prieto, Catherine, Chroniques de jurisprudence du Tribunal et de la Cour de justice des Communnautes europeennes. Concurrence. Journal du droit international, 2009, p.696-699; Idot, Laurence: Droit special du contrat. Prise de la position de la Cour de justice des Communnautes europeennes sur la notion d'accord ayant un objet anticoncurrentiel, Revue des contrats, 2009, p.113-116

[694]C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v.Asociación de Usuarios de Servicios Bancarios (Ausbanc), ECR 2006, p.I-11125; see Idot, Laurence: Echanges d'infornations, Europe 2007, Janvier, Comm.no.23, p.19-20; Venayre, Florent, Echanges d'infornations sur la solvabilite des empreunteurs, Revue Lamy de la Concurrence: droit, economie, regulation 2007, no.11, p.26-27;

the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.
In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion."

More specific for the concept of anti-competitive object, in C-209/07, Beef Industry Development Society and Barry Brothers, ECJ stated that an agreement requiring, among other things, a reduction of the order of 25% in processing capacity, has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC.

The notion of anti-competitive effect was developed in Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL. Article 81(1) EC was interpreted as "meaning that a system for the exchange of information on credit between financial institutions, such as the register of information on customer solvency at issue in the main proceedings, does not, in principle, have as its effect the restriction of competition within the meaning of that provision, provided that the relevant market or markets are not highly concentrated, that that system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, in law or in fact. In the event that a system for the exchange of information on credit, such as that register, restricts competition within the meaning of Article 81(1) EC, the applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. It is for the national court to determine whether those conditions are satisfied. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable."

The concept of abuse of dominant position was also interpreted in few recent preliminary rulings: C-486/06-C-478/06, Sot. Lélos kai Sia[695] and C-52/07, Kanal 5 and TV 4. [696]

[695] Cases C-468/06 to C-478/06, Sot. Lelos kai Sia EE (C-468/06), Farmakemporiki AE Emporias kai Dianomis Farmakeftikon Proionton (C-469/06), Konstantinos Xidias kai Sia OE (C-470/06), Farmakemporiki AE Emporias kai Dianomis Farmakeftikon Proionton (C-471/06), Ionas Stroumsas EPE (C-472/06), Ionas Stroumsas EPE (C-473/06), Farmakapothiki Farma-Group Messinias AE (C-474/06), K.P. Marinopoulos AE Emporias kai Dianomis Farmakeftikon Proionton (C-475/06), K.P. Marinopoulos AE Emporias kai Dianomis Farmakeftikon Proionton (C-476/06), Kokkoris D. Tsanas K. EPE and Others (C-

In case C-486/06-C-478/06, Sot.Lelos Kai Sia, article 82 was interpreted as meaning that "an undertaking occupying a dominant position on the relevant market for medicinal products which, in order to put a stop to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet ordinary orders from those wholesalers, is abusing its dominant position." In this case, ECJ also stated that it is for the national court to ascertain whether the orders are ordinary in the light of both the size of those orders in relation to the requirements of the market in the first Member State and the previous business relations between that undertaking and the wholesalers concerned.

In case C-52/07, Kanal 5 and TV 4, article 82 EC was interpreted as "meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be

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477/06), Kokkoris D. Tsanas K. EPE and Others (C-478/06) v. GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE, ECR @008, p.I-07319; see Cheneviere, Cedric: Medicaments, exportations paralleles et abus de position dominante, Revue europeenne de droit de la consummation, 2007-08, p.425-437; Treacy, Pat, Jensen William: R&D 1: Parallel traders 1: Competition Law Insight 2008, vol.7, Issue 5, p.3-4; Idot, Laurence, Commerce parallele des medicaments et abus de position dominante, Europe 2008, Novembre, Comm.no.381, p.39-40; Chaltiel, Florence, Berr, Claude J., Francq, Stephanie, Prieto, Catherine, Chroniques de jurisprudence du Tribunal et de la Cour de justice des Communnautes europeennes. Concurrence. Journal du droit international, 2009, p.700-702; Wachsmann, Anne, Chroniques. Pratiques unilaterales, Concurrences: revue des droits de la concurrence 2008, no.4, p.84-87 ; Tumbridge, James: Syfeit II: Restrictions on Parallel Trade Within the European Union, European Intellectual Property Review 2009, p.102-108; Graf, Thomas, Hallouet, Stephanie: Dominant companies may not refuse ordinary orders with the aim of restricting parallel trade: the judgement in GlaxoSmithKline AEVE, European Company Law Review, 2009, p.194-197; Robin, Catherine, Le medicament, le droit de la concurrence et les exportations paralleles, Revue Lamy de la concurrence, 2009, n.18, p.24-26;

[696] Case C-52/07, Kanal 5 Ltd, TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) up, ECR 2008, p.I-09275; see Idot, Laurence, Abus de position dominante et redevances dues aux societes de gestion des droits d'auteur, Europe 2009, Fevrier, Comm.no.93, p.39-40; Chaltiel, Florence, Berr, Claude J., Francq, Stephanie, Prieto, Catherine, Chroniques de jurisprudence du Tribunal et de la Cour de justice des Communnautes europeennes. Concurrence. Journal du droit international, 2009, p.700-702; Wachsmann, Anne, Chroniques. Pratiques unilaterales, Concurrences: revue des droits de la concurrence 2009, no.1, p.122-124 ;

broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works." Article 82 was also interpreted as meaning that, "by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified."

The notion of undertaking in the meaning of art.81, 82 and 86 was also the object of different preliminary rulings: C-280/06[697], ETI and others, C-350/07[698], Kattner Stahlbau Gmbh, C-222/04[699], Cassa di Risparmio di Firenze and C-49/07[700], MOTOE.

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[697] Case C-280/06, Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani – ETI SpA, Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc., Philip Morris International Management SA,and Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc., Philip Morris International Management SA v.Autorità Garante della Concorrenza e del Mercato, Ente tabacchi italiani – ETI SpA and Philip Morris Products SA, Philip Morris Holland BV, Philip Morris GmbH, Philip Morris Products Inc., Philip Morris International Management SA v.Autorità Garante della Concorrenza e del Mercato, Amministrazione autonoma dei monopoli di Stato, Ente tabacchi italiani – ETI SpA, ECR 2007, p.I-10893, Arcelin, Linda, Bien mal acquis ne profite jamais?, Revue Lamy de la concurrence, 2008, n.14, p.33 ; Idot, Laurence, Imputabilite de l'infraction dans un groupe etatique, Eurpe 2008, Fevrier, Comm. 59, p.27/28, Mayer, Christian : The art of fining : Penalties in EC Competition law between personal responsability and economic continuity, European Law Reporter 2008, p.38-45 ; Sarazzin, Cyril : La Cour fait prevaloir l'effet utile du droit communautaire de la concurrence dans l'application du principe de la responsabilite personelle, Concurrences : revue des droit de la concurrence 2008, n.1, p.105-106

[698] Case C-350/07, Kattner Stahlbau GmbH v. Maschinenbau- und Metall-Berufsgenossenschaft; Sibony, Anne-Lise: Pratiques unilaterales, Concurrences: revue des droits de la concurrence 2009, no.2, p.116-117 ; Idot, Laurence : Accidents du travail, Europe 2009, Mai, Comm.192, p.20-21 ; Idot, Laurence :: Champs d'application des regles, E 2009, n.198, p.23-25

[699] Case C-222/04, Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato, Cassa di Risparmio di San Miniato SpA

[700] Cases C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio; ECR 2008, p.I-04863; see Chaltiel, Florence, Berr, Claude J., Francq, Stephanie,

In case C-350/07, Kattner Stahlbau Gmbh, articles 81 EC and 82 EC were interpreted to the effect that "a body such as the employers' liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify."

In case C-222/04, Cassa di Risparmio di Firenze, ECJ stated that, "where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health. On that hypothesis, which is subject to the national court's assessment, the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators."

Finally, in case C-280/06, ETI and others, article 81 EC was interpreted as meaning that, "in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority."

In Case C-49/07, MOTOE, ELPA, an entity organising, in cooperation with ETHEAM, motorcycling events in Greece and, entering, in that connection, into sponsorship, advertising and insurance contracts designed to exploit those events commercially, activities that constitute a source of income for it, was qualified as an undertaking.

Prieto, Catherine, Chroniques de jurisprudence du Tribunal et de la Cour de justice des Communnautes europeennes. Concurrence. Journal du droit international, 2009, p.693-694; Sibony, Anne, Chroniques. Pratiques unilaterales, Concurrences: revue des droits de la concurrence 2008, no.4, p.87-89 ;

As regards the possible effect of the exercise of public powers on the classification of a legal person such as ELPA as an undertaking for the purposes of Community competition law, ECJ noted that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities. The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity.

The Regulation (EEC) No 1984/83[701] and, after its expiry date, Regulation (EC) No 2790/1999[702] were the object of interpretation in preliminary rulings as: C-279/06[703], CEPSA , C-217/05[704], Confederacion Espanola de Empresarios de Estaciones de Servicio and C-260/07[705], Pedro IV Servicios SL.

The motor vehicle sector was also the field of three preliminary rulings concerning Commission Regulation (EC) No 1475/95[706] : C-125/05[707], Vulcan Silkeborg and C-376/05[708] and C-377/05, A.Brunsteiner and, after the replacement

[701]Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements, OJ 1983 L 173, p. 5, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997, OJ 1997 L 214, p. 2

[702]Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336, p. 21

[703]C-279/06,CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL

[704] C-217/05, Confederacion Espanola de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA,

[705] C-260/07, Pedro IV Servicios SL v. Total España SA ; see Sarrasin, Cyril, Chroniques. Ententes, Concurrences: revue des droits de la concurrence 2009, no.2, p.99-100 ; Idot, Laurence, Duree de l'exclusivite dans les contrats dits de station service, Europe 2009, Juin, Comm. N.245, p.33; Idot, Laurence, Droit special du contrat, Precisions sur la duree de l'exclusivite dans les contrats dits de station service, Revue des contrats, 2009, p.1067-1070

[706] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements

[707] C-125/05, VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S v. .Skandinavisk Motor Co. A/S

[708] A. Brünsteiner GmbH (C-376/05), Autohaus Hilgert GmbH (C-377/05) v. Bayerische Motorenwerke AG (BMW)

of this (1st October 2002), the Commission Regulation (EC) No 1400/2002[709] (C-421/05, City Motors Groep[710]).

The application of competition rules in the field of professionals services was object for two preliminary rulings: C-446/05[711], Ioannis Doulamis and C-94/04, Cipolla[712].

In the first one, concerning national legislation prohibiting advertising of dental care services, ECJ stated that article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

In the second one, in the context of freedom to provide services and national rules concerning lawyers' fees and setting professional scales of charges, articles 10 EC , 81 EC and 82 EC were interpreted in the meaning that these do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale. As regards the private enforcement of EU competition law, ECJ developed, in case C-295/04[713], Manfredi the legal basis of actions for damages for breaches of EU competition law.

According to this case, article 81 EC must be interpreted as meaning that "any individual can rely on the invalidity of an agreement or practice prohibited

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[709] Commission Regulation (EC) No 1400/2002of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

[710] C-421/05, City Motors Groep NV v. Citroën Belux NV, ECR 2007, p.I-00653; Idot, Laurence, Contrat de distribution et clause de resiliation de plin droit, Europe 2007, Mars, Comm. N.100, p.22; Idot, Laurence, Droit special du contrat, La distribution automobile a nouveau sous les feux de l'actualite, Revue des contrats, 2007, p.765-770

[711]C-446/05 Ioannis Doulamis, Union des Dentistes et Stomatologistes de Belgique (UPR), Jean Totolidis, ECR 2008, p.I-01377 ; see Idot, Laurence, Interdiction de la publicite dans les professions liberales, Europe 2008, Mars, Comm.158, p.17

[712] Joined Cases C-94/04 and C-202/04, Federico Cipolla (C-94/04) v. Rosaria Fazari, née Portolese and Stefano Macrino, Claudia Capodarte (C-202/04) v. Roberto Meloni.

[713] Joined Cases C-295/04 to C-298/04, Vincenzo Manfredi (C-295/04) v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito (C-296/04) v. Fondiaria Sai SpA and Nicolò Tricarico (C-297/04), Pasqualina Murgolo (C-298/04) v. Assitalia SpA, ECR 2006, I-6619; see Eddy de Smijter and Denis O´Sullivan, The Manfredi judgement of the ECJ and how it relates to the Commission´s initiative on EC antitrust damages actions, http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html

under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm."

It is also Manfredi jurisprudence that stated that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State: to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed; to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules; to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC; to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.In that regard, it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered. Finally, ECJ stated in the same case that, in the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

Therefore, first, in accordance with the principle of equivalence, if it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them. Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest.

In Case C-429/07[714], XBV the cooperation mechanism between the Commission, the national competition authorities and the courts of the Member States set up in Chapter IV of Regulation No 1/2003 was object for a preliminary ruling concerning the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 regarding the power of Commission to submit on its own initiative written observations to a national court of a Member State.

CONCLUSIONS

It is clear that the ECJ's role under Article 234 (art.267) has been of fundamental importance in developing EC law generally, and EC competition law specifically. Nonetheless, the ECJ is not the only adjudicative body involved in the preliminary ruling process. National courts and tribunals have an equally significant role in actually applying the ruling to the concrete facts of the case, and it is important to consider both aspects in the context of competition law-related cases.

There is considerable literature on the ECJ generally, on the institution and its law and policy-making functions, including its role under Article 234 (art.267). This consists essentially either of broad thematic studies of the development of ECJ jurisprudence[715] and the activism of the ECJ,[716] or more traditional books on the role and functions of the ECJ generally,[717] including work specifically in relation to the preliminary ruling process.[718] There is also relevant literature on the application of the EC competition law rules in the national courts.[719]

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[714] Case C-429/07, Inspecteur van de Belastingdienst v. X BV, ECR 2007, p.I-08863

[715] J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, (Oxford: Clarendon Press, 1993).

[716] For example, M. P. Maduro, *We the Court, The European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty* (Oxford, Hart, 1998); H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, (Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1986).

[717] See, for instance L. Neville Brown and F. G. Jacobs, *Modern Legal Studies: The Court of Justice of the European Communities*, (3rd edn, London: Sweet & Maxwell, 3rd 1989); K.P.E. Lasok, *The European Court of Justice: Practice and Procedure*, (2nd edn, London, Dublin, Edinburgh, Butterworths, 1994).

[718]See M. Andenas, *Article 177 References to the European Court – Policy and Practice* (London, Butterworths 1994); K. Joutsamo, *The role of preliminary rulings in the European Communities*, (Helsinki, Suomalainen Tiedeakatemia, 1979); H.G. Schermers, C.W.A. Timmermans, A.E. Kellermann, & J. Stewart Watson (Eds) *Article 177 EEC: Experiences and Problems* (Oxford: N.H.P&C, 1987).

[719] See, for instance, S.F. Hall, 'Enforcement of EC Competition Law by National Courts' in P. Jan Slot and A. McDonnell (eds), *Procedure and Enforcement in EC and US*

It will be interesting follow in the future how the case-law patterns have developed across the Member States and in particular the extent to which the Community moves to facilitate private enforcement and encourage private 'antitrust' damages actions has an impact on the numbers and types of competition-law related rulings, and whether there will be greater focus on issues derived from damages litigation than disputes concerning aspects of State market regulation.

Competition Law (London, Sweet and Maxwell, 1993); J.H.J. Bourgeois, 'EC Competition Law and Member States' Courts' (1994) 17 Fordham International Law Journal 332.

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THE EFFICACY OF CRIMINOLOGICAL METHODS IN THE ESTABLISHMENT OF THE OFFENDER PORTRAIT

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Summary

The problem of the relationship between theory and method in its general and abstract meaning falls within the general methodology of science. It is needed to specify that this issue was frequently the subject of concern for criminology. Delimiting the scope of criminology at the other disciplines which deal with crime phenomenon was followed by a process of integration across disciplines studying criminology man and his behavior in the social environment. This integration occurred mainly in the area of methodology. Most criminologists of the past few decades have been preoccupied with shaping criminological research methodology to establish its place in the industry methodologies and report them to the methodology. An important role for stimulating researchers in criminology went to the methodology of the 4th International Congress of Criminology, held in September 1970 in Madrid. The method is the order that put the learning of science. So the method is how spontaneous knowledge becomes critical knowledge and thinking becomes a research tool. Studying criminology in its object of study addressing a range of research methods that allow obtaining scientific results achieved.

Keywords: *personality, offender, crime, accused, penality.*

1. CASE STUDY

Case study reflects how the theoretical and methodological aspects of scientific criminology interact with concrete issues, a pragmatic case. DB Bromley states that the case study can be used in various areas: central and local public administration, anatomy, anthropology, social work, biochemistry, consulting, legal or financial, criminology, artificial intelligence, history, law, management, politics, psychiatry the study of personality, military studies, and sociology. He warns, however, of the danger of excessive use, when not needed, the term case study. The following are the most important features that have to meet a case study in criminology:

- case study is a strategy, an approach, rather a method such as observation or interview;
- case study involves the completion of a research, which includes elements of the final evaluation;

- empirical research must be done in order to have confidence in interviews, questionnaires, testimony, evidence, documents considered in connection with the phenomenon investigated;

- particular case study is deeply specific, it depends directly on the results of the research and how the findings can be generalized;

- case study focuses on the study of a phenomenon in the context in which it occurs, especially when the boundary between phenomenon and context are not clearly;

- case study requires the use of multiple methods of gathering information[720].

Considering these features, TD Cook and DT Campbell believes that the case study is a viable alternative for making experiments, but only in appropriate circumstances. As such the case study "is a fundamental research particular, profoundly different from other types of research, with its own plan, its proper goals."Since "if" can be virtually almost anything that an actual situation, strongly contextualized, a phenomenon, a process, an activity, an individual - manager or executing a group of people, organization or anything else that might interest us from a pragmatic point of view, the case study can refer specifically to an individual, a group, an organization, a decision. The following are six types of case studies:

- individual case studies, which places great emphasis on a person and try to focus on its history, the contextual influence factors, perceptions and attitudes. It is used to identify possible causes, determinants, processes, experiences that can lead to a result of the researcher;

- set of individual case studies is formed naturally in several individual case studies, but examines a number of people, which aims to analyze a set of common traits or attitudes manifested in a given situation;

- case Studies community (society) analyzes one or more communities. He describes and studies the relationships between them, insist on the main aspects of community life. Typically, he is descriptive, but can explore some ideas or can be used to test certain theories;

- case study focused on a social group related to both small groups (family, group, organization), and large groups (professions). It describes and analyzes, frequently, relationships and activities;

- case study focused on organizations, institutions or society as a whole can address such diverse topics as the implementation of strategies and policies to combat crime, various elements of management, organizational culture, processes of change and innovation;

[720] V. Ceoclei. *Etiological criminilogy*. Bucharest, 1996.

- case study focused on events, roles, relationships analyze human interactions, role conflicts, management styles, types of managers.

The case study can be done by an individual or a team. In the latter case, at least theoretically, researchers involved meet similar or complementary roles. Each of the persons involved must demonstrate a fair assessment of what has to be done and the reason for conducting the research. It is recommended that the whole team to be involved in the early stages of conceptualizing and establishing the issues to be investigated. Similarly, the Team members can be involved, depending on the complexity of the case study, the development of the entire investigation, which the case studies plan.

Plan case study contains details on how to collect information to be used, and general rules to be followed by the whole team. In the case of the study of the case by a single person, the most important goal of the plan is to ensure the validity of the study. The following is finalizing the structure of a case study performance:

- introduction is the part of the case study containing essential information about the study plan, research, stages, all presented in a contextualized approach and perspective taking into account the elements (including the reasons for which research is done);

- methodology is that part of the case study that includes major tasks and difficult, owing mainly to collect information. Among these tasks are emphasized: providing access to sources of information, clearly defining the necessary information, evaluating and providing resources available or desirable, scheduling activities of gathering, processing, analysis and interpretation of data, the timing required;

- questions constituted a coherent set make arrangements for obtaining information through interviews, questionnaires, testimony, evidence;

- reporting (concluding) is the part of the case study that includes outline of the research report or research report "in full" interpretation of the information obtained (according to the methodology established and according to initial research objectives), target audience, the possible conclusions[721].

A case study is recommended to meet the corollary following qualities:

- case study must be real, by reflecting a situation, a process, a phenomenon, an event in an organization or an individual activity, or very likely to have happened in the past or is happening in the future;

- case study to be significant to address a situation that is really important, relevant process, a complex phenomenon, an event occurred in a large organization or an individual activity;

- case study should be instructive in terms of education or management, or to be a useful tool for potential users-teachers, students, consultants, managers;

[721] Gh. Gladchi. *General criminology*. Chisinau, 2001.

- case study should be exciting, stimulating the interest of those involved that the situation presented, analysis and interpretation;

- case study to be complex, which includes a set of determinants that make useful information to use in various activities (educational, advisory or managerial).

The case study method is a method that is commonly applied. We started from the idea that crime and criminal investigation should be individually specific and closer to the reality. The method consists of examining all aspects of crime and its author. The offender shall be investigated in the social, psychological and medical. This act in the light of audit commission of place and time, like the offense, the seriousness, the means and manner of the commission, considering the social aspect of the perpetrator (family of growth conditions and education, occupational status) medical aspect, the psychological, emotional state - that is, the mental, emotional stability.

The method developed more cases in applied criminology and proves to be useful both from a practical as well as theoretical.

2. THE COMPARATIVE METHOD

The comparative method is encountered in all phases of criminological research, the description and explanation before the crime forecasting at all levels of interpretation - phenomenon offense, offender, victim - both in quantitative research and qualitative. The comparative method over time has always been present in criminological research. Preceded or being used succeeding parallel or associated with other methods, the comparative method is encountered in all phases of criminological research, namely, general macro criminology and special micro criminology. Experts say that by use comparative method has the largest field of application in crime research. Referring to the comparative method, E. Durkheim stated: "There is only one certain way to prove that there is a relationship between two facts logical, a causal link, to compare the cases in which they are present or absent simultaneously to investigate whether the variations that different combinations of these circumstances, prove that one depends on the other. "A comparison comprises at least two elements that are to be compared. Comparison method using such methods of induction developed by Stuart Mill, criminology using of them: reconciliation process, which consists in the fact that when the occurrence of a phenomenon is preceded in time by the action of other phenomena apparently unrelated to each other, in order to determine the cause is necessary by analyzing previous phenomena, determine existing common element therein, it is the cause.

- The process differences, which implies that when a phenomenon occurs if certain conditions are met, but it does not occur when one of these conditions is missing, then this condition is the cause of the phenomenon.

- Concurrent process variations, which states that to the extent that several phenomena precede another phenomenon, that of the previous phenomena that vary in the same way with the phenomenon that follows the cause.

Guidance sociological criminologists have tried to establish some quantitative indicators to compare against criminals who have committed antisocial acts. In this regard some studies are focused Glueck wives and studies called "cohort" M. Walgang made especially in the U.S. and N. Christie in Norway. The studies will evolve over a number of years (normally 10)[722]. It will consider a research group at the beginning of a greater number of common social characteristics. At the end of the period observed different features that appear to young people who have committed antisocial acts against those who committed such acts.Comparative research method may lead to the disclosure of crime factors not revealed by other methods. Thus, it appears that levels of training and education are weaker at the group of criminals than at non criminals group or family environmental conditions in the group of criminals are worse than the group of non-criminals[723].

The comparative method in criminology served as methodological support in the study of hereditary factors and solutions. Based on discoveries made using this method has reached the development of treatment programs and crime prevention. Also, research has been undertaken in order to know the dimensions' annual black crime. «Even if there were excellent results, the experts' show that the comparative method suffers from a certain lack of rigor, the criteria for selecting items to be compared are not always precisely determined. For these reasons it is recommended that results be comprehensive and verified by other research methods.

To perform comparative studies are required these certain conditions:

a) compared to homogeneous groups, for example.: non-criminal offenders with minor twins siblings non twins;

b) To study aspects of the same or of the same kind, ex.: social aspects - family environment in a group and other mental issues - character, intelligence (from one group to another);

c) Examination to be done in similar circumstances - time, place, condition without tiredness. Comparative research method lead or may lead to the disclosure of offenders of crime in other ways not relevant so it can be seen that the level of training and education are weaker than the group of criminals non-criminal group or family environmental conditions in group of criminals are worse than the group non-criminal. E. Dukheim on comparative method shows that: "There is only one certain way to prove that there is a relationship between two facts logical, a causal

[722] A. Bogdan. *General psychology and social psychology*. Bucharest, 1973.
[723] T. Amza. *Criminology.* Bucharest,1998.

link, to compare the cases in which they are present or absent SIMULTA and investigate whether variations posed by these different combinations of impurities prove that one depends on the other"[724].

3. THE EXPERIMENTAL METHOD

Experimental method or, as it is called, the experiment is one of the methods with high generality and is applied in many fields of science. It is also one of the complex methods, with which the scientist seeks to discover connections between different phenomena of interaction, and especially to know the causal link between them.

Experiment, the method Criminology is an observation due, having as main characteristic phenomena causing intentional changed conditions, namely modified by the researcher. This helps in finding phenomena that would not like to come forward and be seen normally, but which are important for solving the problem under study. Peculiarities of the experimental method are challenge, variation and repetition of the phenomenon studied by researcher intervention. Unlike the student of psychic phenomena based on observation, the experimenter does not expect the phenomenon to occur when conditions will arise, but it causes himself to the desired time and place and under different conditions, varying factors simulators and repeat their action if necessary, for checking and sharpening observations.

5. Several authors mention that M. Grawitz a scheme proposed for the experiment: in order to assess the action of a single factor (independent variable) on other factors (dependent variables) is necessary to compare two elements, only one of which will be subject the influence that we intend to study it. Hence the need to establish how much like two groups, experimental group and the central group C which influence the x variable to be measured to act only on the group A. If the hypothesis is correct, the phenomenon linked to the variable z x will be appearing in group A and be absent or very weak in group C. The influence of variable x there would be the difference between the intensity of the phenomenon z in group A compared to group C.To obtain the scientific results, the researcher must comply with general rules, applicable for any particular experiment and rules of order, determined by the specific object of study[725].

General rules are: study addressing the question; develop working hypotheses; creating control groups as more similar to the experimental group acted upon; operation of a single factor (a single variable) simultaneously; eliminate the influence of external factors throughout the experiment; researcher's objectivity in performing the experiment, the analysis and synthesis of data obtained.

[724] I. Ciobanu. *Criminology*. Chisinau, 2007.
[725] T. Amza. *General criminology*. Bucharest, 1998.

The composition of the two groups as more similar is done using the following methods: precision control, which is similar to the composition of a control group experimental group, so to have the same representation in both groups the totality of individual personality factors; static control, which is limited to checking frequencies similar items existing in both groups; control randomly, which consists in the formation of random samples, considering that only so happens the influence can be neutralized always present.

Regarding the types of experiments, it is classified according to: the place of experiment, the nature of the independent variable, manipulation and verification procedures used. After the venue we distinguish between laboratory experiment and field experiment. Laboratory experiment consists in causing artificially in the laboratory, a similar situation of the real. It is the most accurate and reliable method of research, which provides the ability to draw more accurately than the other methods varying relationships between phenomena. Advantages in terms of studying the influence of a factor isolated or another of mental life, excluding accidental influences and operate at will and experience to the requirements of the independent variables. Among the disadvantages of laboratory experiment were the nature and limits of the factors that can act as the experimenter may not act on the subject by any factor that may have harmful influence on the subject studied. Also, the laboratory, the artificial environment can act negatively on the mental side of the phenomenon studied. The data obtained in the laboratory will be checked to the extent possible, by shifting their actual living conditions of the subject (in school, playing conditions at work, etc.).

The field experiment is an important means of studying the human psyche as conditions more akin to real life situations by considering a natural as experimental. He has the advantage of allowing the study of the phenomenon under natural conditions. The subjects of study are subject to the conditions of daily life. The experiment can be arranged so that subjects do not know that are the object of experimental research. In these experiment difficulties, because it is less accurate than the laboratory experiment and the control variables is more difficult objective.

Depending on the nature of the independent variable, the experiment may be caused or alleged. The experiment caused supposed experimenter to act (to introduce vary) independent variable. In the case of the experiment raised by the independent variable part of pre-existing conditions that are not influenced by the experimenter, which simply marks the variable influence on the studied phenomenon.In relation to the practical aspects of handling variables are the type of experiment "before" and "after type", which involves noticing both before and after the introduction of the independent variable. To know, for example, the influence of violent movies on a group of students, the group examined how both before and after viewing. This type of experiment requires the control group. This type of experiment requires the control group. The type of experiments which are

limited to the observation after the introduction of independent variable when assessing the results requires a control group to be reported[726].

As for fixing the problem that we want to obey the experimental study and the type of experiment that we intend to use it, along with the difficulties arising on plan methodological aspects should be considered moral, ethical and legal. Penal system whose purpose is uncertain is a real experiment. The provisions regarding the suspended sentence, probation, conditional release, and the modalities of execution of sentence may be considered experimental. But it seems inconceivable challenge of criminal behavior in order to study them. The researcher must not act with any factor that give rise to anti-social reactions from the subject. The research will be limited to those behaviors that were determined criminological factors. Criminologist be estimated in such situations might evolve phenomenon and study the causative factors. In such cases will be forecasting hypothesis and the experiment will be to achieve or failure prediction[727].

Considerations of moral, ethical and legal experience caused not exclude the use in criminology. Remain available to this type of experiment that area of criminological research intended action factor contributing to crime prevention. Despite the difficulties encountered, the experimental method has a broad application in the research of contemporary crime. A special role in this context returns tests are standardized tests, well defined, involving a job to do the same for all subjects examined, and a precise technique for evaluating the results. In a broader sense, the test is defined as the standardized test administration and interpretation - marking them - and provides data on certain psychophysical or psychological characteristics. Behavior evaluated using classification aims to test the comparative statics of one over the other and appreciating individual differences of each[728].

In criminology meet the following tests with broad application: Successful tests; Personality tests.

A) Successful tests studying operational skills of the person. In this category fall intelligence tests too. In the study of behavioral disturbances and their involvement in the criminal genesis using psychological and educational tests, allowing a metrical scale of intelligence.

B) personality tests reveal certain features of the individual that make him react in a certain way in any situation would be. They use common in experimental criminological research, aimed at exploiting the offender's personality, revealing factors could differentiate non-criminal a criminal one, and then to be able to conclude on a possible correlation between crime and certain personality types.

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[726] O. Rotari*. Criminology*. Chisinau, 2011.
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VALENCES OF LOCAL AUTONOMY

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Summary

The local autonomy is considered one of the most efficient forms of administrative self-management, ensuring a higher degree of democracy, the local autonomous collectivities being "real", quality that can prevent the central Government abuse.

The principle of the local autonomy is a fundamental one governing the public local administration and the activity of their authorities, which consists in "the right of the local collectivities to satisfies their own interests without the interference of the central authorities principle who has as result the administrative decentralization, the autonomy being a right and the decentralization a system implying the autonomy".

The local autonomy is manifested by the election of the local authorities by the local population having the right to vote, by the possibility granted to the local councils to adopt the local statute, the local public services organization and the creation of public entities.

The local autonomy supposes the determination of local responsibilities through the granted right to solve local interest problems and excludes the other authorities implications in taking decisions.

Key words*: Local autonomy, central government, decentralization*

1.INTRODUCTION

One of the principles underpinning local government is the principle of local autonomy. In the academic literature, it was shown that local autonomy has three meanings:

a) organizational autonomy (manifested by choosing local authorities by members of the local community and the possibility of creating local public services)

b) functional autonomy (reflected the jurisdiction of local authorities to solve local problems)

c) management autonomy (manifested by adopting its budget for each administrative unit, the establishment of local taxes, asset management part of the public or private administrative-territorial unit). [729]

[729] O. Podaru, *Legea nr. 215/2001 a administraţiei publice comentată,* Editura Sfera juridică, Cluj-Napoca, 2004, p. 10;

2.ORGANIZATIONAL AUTONOMY

Wishing to emphasize this component of organizational autonomy, Law no. 215/2001, expressly recognizes the existence of a principle of eligibility even local authorities, along with the principles of local autonomy, decentralization of public services, legality and consultation of citizens on issues of local importance. In reality, the other "principles" that govern local government law in addition to the constitutional formulation are included in the concept of local autonomy, as defined in international documents. Both councilors constituting communal councils, town and municipal (art. 28 of Law no. 215/2001, as well as those that make up the county councils (art. 87 of Law no. 215/2001) shall be elected by universal, equal, secret and freely expressed.

But there was one difference: while municipal councils, town and city were directly elected, the county councils are elected by indirect vote once the amendment of Law no. 70/1991, through Law no. 25/1996 and since the 1996 elections, county councils were also elected by direct vote. Law no. 215/2001, regulating everything as a manifestation of the eligibility of local authorities, the election of the deputy mayors, village and county councils and Vice President.[730]
In art. 57 of Law no. 215/2001 provides: "The deputy mayor is elected by a majority of local councilors in office, from among its members." The phrase "its members" refers to local councilors, members of the local council. County council president position is a matter of heated spirits in politics. County Council is considered, rightly, under current regulations, as counterpart to the county mayor. President Powers and status but do not coincide with democratic legitimacy, he was elected indirectly among county councilors. The will of the people is representing the county council, and his need to be recognized and central position in county government. In conclusion, we can say that local communities, authorities designate themselves to represent their interests without the intervention of other structures, and this is a manifestation of local autonomy. Expressed and organizational autonomy in that the power to hold public services of the village, town, city and county councils returns in question.
In the materials used public funds to their responsibilities by promoting local interest, is recognized local councils to determine autonomously under exclusive competence, the nature and quantity of material resources used. Right appreciation of local councils in the organization of public services, in terms of number of personnel used to satisfy the interests of citizens, it is recognized practice courts. Currently used in the law local government formula "public service village, city and specialty apparatus of local authorities (under Chapter IV" institutions, local public services "). At the same time, we have a further distinction between the

[730] A. Iorgovan, *Noua lege a administraţiei publice locale şi persoanalitatea de drept public a unităţilor administrative-teritoriale*, Dreptul nr. 9/2001, p. 27;

public services of the village, town, they having an autonomous organization - because their staff is appointed by the rulers of these services, on the one hand and administrative services organized in city hall structure in their case staff was appointed by the mayor.[731]

3.FUNCTIONAL AUTONOMY

Functional autonomy Drawing on political liberalism principles, local autonomy is based, inter alia, that the very idea of local knowledge are those that can best their needs and therefore are most interested to achieve them. Therefore, both the Romanian Constitution, revised by art. 121 para. 2 which states: "Local councils and Mayors in the law as autonomous administrative authorities and manage public affairs in communes and towns" and Law no. 215/2001 on local government recognize the initiative of local authorities - as representatives of local - in solving public affairs in communes and towns. Law no. 215/2001, the wording of art. 36 which is to determine regulatory jurisdiction of the local material does not clarify what is meant by issues of local interest.[732]

Consider the functional autonomy has two main components: - the competence of the municipal councils completeness, town and city in solving local problems - determining the local council as a collegial body elected democratically. Element representing the main content of government functioning village, town and city is the unlimited jurisdiction in solving local problems. The functioning of municipal councils, town and city is determined primarily by the power given to them and the nature of single-member college or public authorities. In other words the functioning of any organ is correlated with its recognized competence, ie procedural and material resources available to perform the tasks for which it was established. Meanwhile collegial character of an organ functional order with consequences such as provided quorum and majority required for the adoption of a decision.

Unlimited jurisdiction of municipal councils, town and municipal seat material is in art. 36 of Law no. 215/2001. Unlimited jurisdiction of local councils in meeting interest resulting from: - the establishment of the rule in accordance with the municipal council, town, municipality takes the initiative and decides on matters of local interest - determination as an exception to the above rule, the cases when the Board commune, town, city has no such jurisdiction, - compliance with the laws of both the rule and the exception.[733]

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[731] I. Alexandru, M. Cărăuşan, S. Bucur, *Drept administrativ*, Ediţia a III-a, revizuită şi adăugită, Editura Universul Juridic, Bucureşti, 2009, p. 240;
[732] I. Muraru, E. S. Tănăsescu, *Constituţia României. Comentariu pe articole*, Editura C.H.Beck, Bucureşti, 2008, p. 1164;
[733] M. Preda, B. Vasilescu, *Drept administrativ. Partea specială*, Editura Lumina Lex, Bucureşti, 2007, p. 160;

In administrative practice, however, the principle of unlimited jurisdiction of municipal councils, town and city is difficult, because the current administrative law is not correlated with constitutional and local government law. Collegial nature of the municipal council, town, municipal and county As an expression of the democratic nature of the Law. 215/2001 is instituted collective leadership principle underlying the organization and operation of local councils. More broadly, the law recognizes the right of citizens to participate in the management of local interests and two parallel governing institutions, one belonging to another direct democracy and representative democracy. In essence, citizen involvement in local government designation is achieved through local councilors (who are elected representatives of the community, representative democracy), and the recognition of the institution referendum, which gives voters the opportunity to decide directly on issues of importance to the competition the representative body.[734]

The concept of collective leadership necessarily involves the participation of many people in making decisions within a body, legally constituted. Collective leadership, where it is established by a statutory provision, generates two practical consequences affecting the legality of decisions taken by these bodies, namely, the condition of quorum and majority required for the adoption of an administrative act. Or, by definition - in art. 23 para. 1 - of Law. 215/2001 on local councils as deliberative authorities, which are chosen according to the law, has established the principle of collective leadership in local council activities.[735]

In essence, the deliberative council next character is retained and other traits that are likely to render the collective governing body: - determining the composition of local councils - the existence of specialized committees of local councils; - give shape to work of the local council, ordinary or extraordinary meeting - setting the quorum requirement, ie the number of councilors to be present, to meet the local legal council - regulation majority required to adopt a decision, that the number of votes cast in favor a draft decision. The general rule is to get half plus one of the votes of the councilors present and recognize the possibility that, by statutory majority to determine other than that to which we have referred. As an exception, it is the adoption of certain judgment which stands out by regulating their important goals, by a vote of at least two-thirds of the board members.[736]

Qualification council as a collective body driving entails, practice, recognizing that the adoption of certain decisions in an area subject to its jurisdiction to produce legal effects, meeting the requirement of quorum and

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[734] C. Manda, *Drept administrativ. Tratat elementar*, Editura Universul Juridic, Bucureşti, 2008, p. 207;

[735] R.N. Petrescu, *Unele observaţii cu privire la noua Lege a administraţiei publice locale nr. 215/2001*, Dreptul nr. 4/2002, p. 107;

[736] V. Prisăcaru, *Tratat de drept administrativ român. Partea generală*, Ediţia a III-a, Editura Lumina Lex, Bucureşti, 2002, p. 747;

majority required. Another terminological distinction operated by local government law is that between the deliberative and executive. Thus, while local councils are making authorities, mayors are executive authorities. Less happy terminological distinction used by the legislature, does not mean that local councils can only deliberate decisions and act the mayor\'s decision is the result of psychological and cognitive simultaneously. By this terminology was intended to emphasize the collegial character of the local council and its features to take decisions by voting members. On the other hand, the mayor is the local authority with the deepest electoral legitimacy (that is chosen based on nominal voting), permanently, with the obligation to make decisions not only running the local council and other laws.[737]

4.CONCLUSIONS

The development of European administrative institutions one of the common factors, is the major local self recovery being driven by the principle of subsidiarity German tradition. This principle is implemented even before the advent of the Union traditionally and nationally in the relationship between central and local government. In conclusion, local autonomy can not be interpreted as representing a sovereign, independent, local authorities are out of state and are not independent from the state, and continued to exercise its full sovereignty on territorial and local. Authorities of exercising local autonomy have major policy decision makers, divorced from political decision at the state level, but operated by state political will expressed in the laws passed by Parliament, the ordinances adopted by the Government and all documents legal binding. The principle of local autonomy can be properly addressed only in the light of another principle, which is a supreme value, protected and guaranteed by the Constitution, namely the unity of the state.

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3. R.N. Petrescu, *The new law of public administration nr. 215/2001,* Dreptul nr. 4/2002,
4.V. Prisăcaru, *Administrativ law. General part* , Ediţia a III-a, Editura Lumina Lex, Bucureşti, 2002, p. 747;
5.D. Apostol-Tofan, *Administrativ law,* Vol. I, Ediţia a 2-a, Editura C.H.Beck, Bucureşti, 2010

[737] D. Apostol-Tofan, *Drept administrativ,* Vol. I, Ediţia a 2-a, Editura C.H.Beck, Bucureşti, 2008, p. 278;

THE QUALITY OF REGULATION REGARDING PUBLIC ADMINISTRATION TROUGH CODIFICATION – HIGHLIGHTS, METHODS

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Abstract

The quality of regulation is a condition without which no public administration reform can be possible both at European and national level, and the main way to comply with regulatory quality is the legal rules` codification.

Thus, in our study we find that the legal doctrine and practice were constantly preoccupied by the public administration legislation systematization and simplification in the context of normative inflation characterized by abundant normative texts and rules instability.

Therefore, the codification demarches aim at ensuring the legal certainty and a better law accessibility.

Key words: *public administration, regulation, quality, codification*

1.PRELIMINARIES

Today, we are facing a complex process that involve changes in all fields of the society, but all these changes must be subject to specific regulations, the principle of legality being an essential requirement of the modern state of law[738].

The national law of each country is influenced by the supranational legal systems, manifesting a trend of globalization, not being denied any influence and interdependence of state law, when the State, as a signatory to the international conventions, has certain obligations to achieve, including the adoption of national legal rules[739]. The contemporaneous doctrine examines the concept of law quality which requires two aspects. The first relates to issues of subsidiarity and proportionality (the choice of the appropriate instrument, choosing the scale, duration and intensity of action), which reveals the "legislative policy". It was considered that the issue of legislation "consistency" is part of this aspect, and mainly requires that a domain is regulated by a single regulation. The second issue concerns the rules regarding the drafting of legal documents, respectively the legistique, meaning "the science and technique of designing and drafting laws".

[738] G. Peiser, *Droit administraţif general*, 22 edition, Editions Dailoz. Paris, 2004, p. 17
[739] M. Petite, A. Caieros, L. Cimaglia, *L'accessibilité du droit, la méthode communautaire*, *AJDA* 2004, p. 1862.

The main argument in favour of the codification, seen as a way of ensuring the law quality, consists of legal certainty, which is one of the fundamental principles of the European legal order, assuming that any recipient of a legal act may know without ambiguity what are the rights or obligations conferred or imposed by this act. In other words, any regulation must be as precise and clear as possible.

We note that this clarity of the European law, which represents a factor likely to strengthen adherence to the construction of the European Union for the citizens, depends not only on the editorial quality of the legislative acts but also on the accessibility to these documents despite the changes which are brought[740].

2. BEST PRACTICES FOR A SYSTEMATIC LEGISLATION IN THE FIELD OF PUBLIC ADMINISTRATION

Lisbon European Council asked the European Commission, the Council of Ministers and the Member States, each as sharing competences, "to develop by 2001 a strategy for the coordination of the simplification of the regulatory framework, improving the performance of public administration, both at Member States and at EU level".

The Mandelkern Group was formed in December 2000 to develop the strategy requested by the Lisbon European Council. The Resolution which created the Mandelkern Group revealed that its research directions are:

• The systematic use of impact assessments;

• The transparency in the consultation process preceding the drafting of regulations;

• The simplification of the adopted texts of regulations;

• The general use of codification.

It should be emphasized that both the European Union and each Member States have developed their own concepts and practices for organizing the regulatory systems, but no matter how they were conceived, they take into account two aspects:

• The rapid multiplication of regulations determined the need to put all these texts together in an orderly manner, starting with key elements which can form together a legal act;

• The strengthening of democracy requires the citizens` access to legal regulations.

[740] I. Dragoman, *Dreptul administrativ global*, in Dreptul administrativ contemporan: spre o concepţie unitară în doctrina şi practica românească, coordinators Emil Bălan, Cristi Iftene, Gabriela Varia, Marius Văcărelu, Comunicare.ro Publishing House, 2008, p. 82

In any society, the development of science, of technology and social life requires regulations, but the laws are not a clear result of a decision taken by a small number of legislators (Parliament, Government), but rather the product of a large number of transactions between extra-parliamentary participants.

Therefore it is necessary to improve the implementation of laws by assessing and monitoring their implementation.

Assessment means the use of social sciences methods to predict and calculate the effects of rules and their cost. Laws must be both effective (useful) and efficient (to function well). In short, the evaluation means analysis and synthesis of the legislation s effects.

Legislative assessment covers laws and administrative decisions implicitly based on these acts. Then, legislative assessment regarding the effects, examines the changes, respectively the lack of attitudes changes, the behaviours or situations - and the consequences of these changes - which is due to (potential or real, depending on perspective) legislative action. In other words, the assessment is interested in causal relationships between the legislative and the social reality.

Evaluation has developed rapidly as a sub-discipline of legististique[741].

Legislative assessment can be made either before or after the enactment. Thus, we can distinguish two different perspectives of two types of assessments:

- Prospective (ex-ante) and
- Retrospective (ex-post).

Prospective evaluation is done prior to the decision to develop a legislative enactment in order to have a better understanding of the possible effects of the planned law. It can especially help to choose the right tools to solve a legal problem.

Retrospective assessment is made after the adoption of the rule, during implementation or, in certain cases (especially if the rules are limited in time) shortly before or after the validity of legal norms. The aim is to better know what happens after the entry into force of the legislation and understand the real effects of such legislative action.

Once a law has been in force for some time, studies may be initiated in order to determine whether the law is effective or not. This ex-post evaluation may be conducted by the relevant ministry or by an existing authority or commission. In general, in many countries, the authorities responsible for the laws supervision were tasked to report whether they work well or not and to propose appropriate changes.

The distinction between the two types of evaluation is important since the tools, methods and techniques used for the assessment vary depending on the types

[741] I. Vida, *Manual de legistică formală*, Lumina Lex Publishing House, Bucharest, 2000, p. 150; V. D. Zlătescu, *Introducere în legistica formală*, Rompit Publishing House, Bucharest, 1995, p. 13

of assessment. From the legislator point of view they are complementary and should be developed simultaneously.

Between the two types of evaluation there is the experimental legislation, respectively the legislation adopted for a limited time to examine whether a particular legislative measure is suitable to achieve certain goals. In other words the experimental law is adopted for a prospective purpose, but methodologically it requires a retrospective evaluation.

The evaluation criteria commonly referred are effectiveness, efficacy and efficiency[742].

The effectiveness is given by the implementation compliance with the legislator's intention. The question is whether the implementation meets in reality what the legislator wanted. Analyzing the law usefulness involves comparing the law beneficiaries` conduct with the normative model allowing determining the percentage of compliance or non-compliance with a legal norm[743].

The efficiency, in terms of political interests shows how important it is to clearly define the objective or objectives of a legislative decision: if the legislator renounces to define his objectives, it is impossible to estimate the yield of legislation.

Efficacy refers to the actual costs of the law, whether the maximum effect is produced with the estimated costs or if it becomes effective with minimal costs. The evaluation costs can include forecasting rules or ex-ante assessment as well as the cost control after implementation or ex-post evaluation. A comprehensive of the ex-ante assessment of the legislation effects` costs is ambitious, but almost impossible. A more limited financial effects evaluation of the legislation is possible and has become the standard in the European countries and in USA.

Ex-ante evaluation attempts to take into account the costs of implementing a law in economics and public administration, as well as the costs for individuals.

That brought pros and cons reviews. The pros refer to the fact that the assessment enhances knowledge and show clearly who is responsible for the consequences of a law draft. The cons arguments concern the fact that the evaluation results come too late to have an impact on legislation and the evaluation itself represents money and time consuming. Because of these costs, even in countries where such a process is implemented, the evaluation does not apply to all projects.

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[742] V. Pătulea, *Locul şi rolul presei juridice în cadrul acţiunii de evaluare legislativă*, in „Dreptul", no.5/2001, p.45

[743] L. Mader, *Evaluation of legislation – contribution to the quality of legislation*, and Ulrich Karpen – *Obligation to evaluate the effects of legislation on the exercise of fundamental rights*, in "Evaluation on legislation: Proceedings of the Council of Europe's legal co-operation and assistance activities (2000-2001)" (www.coe.int)

Everyone agrees, however, that the assessment does not replace the political decision, but the political decisions can be improved significantly by the evaluation.

Evaluating the impact of legislation in the last two decades has become an important element in the political process and in particular the legal process in Switzerland[744]. Introducing a new article on the evaluation in the new Federal Constitution of April 18, 1999 is the final step made in this area.

Article 170 of the Swiss Constitution states that "The Federal Assembly shall ensure that the measures taken by the Confederacy are object to evaluation".

This shall apply both to the prospective and retrospective assessment, it is not limited to the issue of efficiency, but also covers the assessment of all relevant effects of the legislation. The Swiss law theorists argue that the term "measures" is deliberately used to express the idea that the assessment should interest also the state activity, in general, not only the normative decisions.

In Germany all modern assessment methods are applied, including control charts, simulations, tests and experimental legislation. In the beginning it started with the "parallel legislation" namely tests of law drafts. In the mid-90s, it was added the prospective evaluation and today the retrospective assessment has become a common thing. To this end, the ministries and courts report their experience concerning the implementation of new laws and the chambers of commerce and manufacturers provide impressions about the legislation[745].

In Sweden, in addition to formal requirements, the legislator should pay attention to more practical aspects. For example, will the potential law be effective? What measures should be taken to have a good functioning? Should their apply be supervised by a special authority? This surveillance may be entrusted to an existing organ or should be created a new authority? What the costs involved would be?

In Romania, the economic and social transformations involved by the EU membership have emphasized the need to enhance the quality of legal regulations by a few major components of action: strengthening the rules substantiation, reducing administrative burdens, simplify national legislation and administrative procedures, and improving the regulating authorities' activity. A particular attention is given at the same time to improving the quality of regulation and to administrative procedures simplification, elements highlighted in the "Strategy for

[744] L. Mader, *Evaluation of legislation – Swiss experience*, in "Evaluation on legislation: Proceedings of the Council of Europe's legal co-operation and assistance activities (2000-2001)" (www.coe.int)

[745] U. Karpen, *Evaluation of legislation: German experience*, in "Evaluation on legislation: Proceedings of the Council of Europe's legal co-operation and assistance activities (2000-2001)" (www.coe.int)

better regulation at central government level 2008-2013". In preparing the document was taken into account the four relevant aspects: first, the impact that central government regulations have on business operators in Romania; how the users are affected by the regulations of the central government in the light of the existing administrative system dysfunction; to improve the quality of regulation at EU and Member States level.

Good regulation remains a goal and a challenge for European countries in an attempt to find solutions to specific problems in the economic, financial and social level arising from globalization. More than ever, to manage the changes imposed by globalization to the companies, governments need systematic and predictable assessment tools, with which to analyze the impact of these changes on various sectors and how they can be modelled and monitored through a regulatory framework. In the significant EU developments and the current financial and economic crisis, EU member states are becoming more aware that they can not implement the necessary changes without a coordinated approach regarding the public policies planning and formulation.

3. THE REGULATIONS REGARDING PUBLIC ADMINISTRATION'S CODIFICATION, A SOLUTION TO MEET THE REGULATORY QUALITY

The legal doctrine and practice were constantly preoccupied by the legislation systematization and simplification in the context of normative inflation characterized by abundant normative texts and rules instability. The codification's approaches aim at ensuring a better legal certainty and a better law accessibility, in accordance with the constitutional requirements related to ensuring substantial rights.

At European level there are already initiatives regarding the legal rules codification (for example the European Commission's initiative to update and simplify the EU acquis), so it is normal for this approach to be promoted internally, within the national legal systems[746]. In this context, we mention the recent Commission Communication of 8 October 2010 to the European Parliament, the European Economic and Social Committee and the Committee of the Regions entitled "Smart Regulation in the European Union" which mentions the measures taken by the Commission to ensure the quality of regulations throughout a political cycle. A smart regulation can help achieve the ambitious goals of sustainable

[746] J. Ziller, *Administrative simplification through a general law on administrative procedures for the protection of citizens` rights and economic development: the key issue of legal certainty and predictability in administrative performance*, paper presented at the „ Administrative simplification" seminary, Ankara, 8-9 May 2008

growth defined in the Europe 2020 Strategy. However, smart regulation is a shared responsibility, its success depends on all institutions involved in the formulation and implementation of EU policies, which have their own role.

Also, the clarity of legislation, another essential aspect of the modern administration can not be ensured only by the editorial quality of the normative acts, but also involves their accessibility, despite the changes that are brought. On the other hand, the principle of legality - a true constitutional postulate - requires systematic, clear and coherent rules, that govern the operations of public administration, so that the normative system to be understood by all citizens and, therefore, to be easily controlled. The law recipients must be able to know unequivocally what their rights and obligations are, and the law must be predictable. It can not be denied the difficulty of this legal approach, due to its overwhelming scale. In this context, the practical limitations of the codification process are given by the fact that absolutely all the laws or regulations of a particular domain can not be codified. However, the codification represents an indispensable aspect of improving direct knowledge of administrative texts and is therefore a "technical necessity" for the users of administrative law[747].

In terms of legislative reform, the codification has a great importance. It provides the reform projects authors a clear and orderly base of the in force texts ("the constant law"), thus creating further reform and simplification of legal acts. Moreover, the codification may be used as an opportunity to improve the regulation in a certain field.

Professor Carol Harlow, in her recent work - "Codification of EC Administrative Procedures"[748] defines codification as the procedure by which a number of legal acts that have undergone several changes are repealed and replaced by a single act, this occurring after those texts consolidation and it includes the removal of all obsolete provisions, the harmonization of the terminology used in the new act and the rephrasing of its first part considerations. This procedure reduces the volume of legislation, whilst retaining its substance.

Also legal security is a major component of modern understanding of the law and highlights the direct line that exists between the rule of law and the predictability of activities in public administration.

Prof. V. Prisăcaru believes that "administrative law may be subject, at least in its basic institutions, of a systematization, in a first step, and then, even of a codification"[749]. And we can also add that the codification can represent an important solution to meet the regulatory quality.

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[747] E. Chiti, C. Franchini, *L`integrazione Administrativa Europea*, Mulino Publishing House, 2003, p. 65

[748] Paper published in the European Law Journal (January 2009)

[749] V. Prisăcaru, *Tratat de drept administrativ român*, Lumina Lex Publishing House, Bucharest, 2002, p. 51

This will be a remedy to the fact that the abundance of regulations provides a number of special procedures and exemptions from the common law and often contains contradictions between provisions, which leads to a slow and uneven enforcement by their beneficiaries - both public authorities and citizens.

CONCLUSIONS

Although ensuring the regulatory quality by legislation's simplification in the European Union began 15 years ago, the actions began to be conducted in a coordinated manner only in the recent years.

The administrative simplification by establishing a general law which codifies the administrative law is not perceived as an immediate solution to the problems faced by public administration.

However, in the medium and long term, its impact could be seen as a very important one, especially since the administrative codification is a way to not only meet required legislative relieving demanded by the citizens but also to determine the development of the regulatory system that has a positive impact on economic development, especially in the European Union.

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PICHUP ACCEPTATIONS OF THE CONCEPT OF DIGNITY IN THE COMMUNITY LAW

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Abstract

The concept of a human person's dignity has appeared in the quasi-totality of the international legal instruments on the Human Rights protection in the second half of the 20th century and in the Constitutional Law, beginning with Germany's Constitution from 1949. In the Community Law, the concept has been gradually introduced and it was used with moderation, being associated with the victim's vulnerability condition. The drafting of the Charter of Fundamental Rights of the European Union went through a turning point in the evolution of the European Court of Justice case law on the human person's dignity. There are relevant the judgments pronounced by the Court from Luxembourg in the case file the Netherlands versus the European Parliament and the Council from October 09th 2001 and in the case file Omega spielhallen-und Automatenaufstellungs-GmbH versus Oberbürgermeisterin der Bundesstadt Bonn from October 14th 2004, in which the concept is expressly used as Fundamental Right which forms integral part of the general principles of the Community Law.

Key words*: the concept of the human person's dignity, the fundamental right to human dignity, the general principles of the Community Law, the case law of the European Court of Justice.*

1.PRELIMINARIES

Dignity is an ancient concept, with a long historical evolution in which it coagulated the contribution of some multiple philosophical trends. The primary forms of understanding of the concept have their origin in the first human communities in which the acknowledgment and valorisation of the human person was made in relation with the acts achieved to the tribe's benefit, thus resulting a concept about the dignity which states that it arises out of the acknowledgment, the position and the success achieved by a person within the society. According to this outlook, the concept was considered a definitory item of a distinct social condition for choice connected to the high positions in the State, institutional and ecclesiastic

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hierarchy. The most important mutation occurred in the modern age, when in parallel with the original meaning, through the Christianity there was created a mindset about dignity like a value marking the equality of all people before God; subsequently, under the influence of the Christian thinking, Kant building a distinct form of understanding of dignity, which in essence postulated that "things can be used as means, but never as person, it must be respected in their absolute dignity, the moral law cannot be breached, and man is a purpose in itself, as subject of this law"[751]. On these pillars there was stated a new mindset according to which dignity has a universal character, that is there is no human being without dignity, being inherent to the latter for the mere fact that he is a human being[752].

This concept is established in the Preamble of the Universal Declaration of the Human Rights from December 10th 1948 according to which the "acknowledgment of the inherent dignity of all members of the human family and of their equal and unalienable rights represents the basis of freedom, justice and peace in the world" and in article 1 which postulates that all the human beings are born free and equal in dignity and in Law. We also keep in mind the presence of the term in the International Pact on the Civil and Political Rights (P.I.D.C.P.) and in the International Pact on the Economic, Social and Cultural Rights (P.I.D.E.S.C.) from December 16th 1966 which provide that the rights they acknowledge "arise out of the dignity which is inherent to the human person". The important number of international legal instruments on the human rights protection which makes reference to the compliance with the human person's dignity, certify

[751] For more details, see Immanuel Kant, *Morals Metaphysics Creation. Practical Judgment Critic*, section 2, Passage from the Popular Philosophy to Morals Metaphysics, Scientific Publishing House, Bucharest, 1972, pages 46-58. According to M. Lequan, the third formula of the categorical imperative means «to always respect the human person dignity as purpose in itself, value opposed to the price». See M. Lequan, *La philosophie morale de Kant*, Edition du Seuil, 2001, p. 509.

[752] According to Niklas Luhman, dignity depends on the individual's possibilities and capacities (*Leistungtheorie*). Günter Dürig considered the human dignity as being «the own value always present, as something permanent and indispensable». Synthesizing the mindsets about the dignity from the German juridical doctrine, Horst Dreier identified three forms of understanding of the concept that is: *1)* dignity as «value» or « essential characteristic of the person» (Mitgiftheorie), *2)* dignity as result of the human capacity, of own conduct (Leistungtheorie) and *3)* understanding of the concept as relational-communicative base, that is as base of people's mutual respect of humans in the social communication relations (for details, see Niklas Luhman, *Grundrechte als Institution. Ein Beitrag zur polischen Soziologie*, Duncker and Humblot Publishing House, Berlin, 1974, pages 52-83; Horst Dreier, *Grundgesetz.Kommentar*, vol. I, edition 2, Mohr Siebeck Publishing House, Tübingen, 2004, p. 23.

that this principle belongs to a joint background of values and, by consequence, represents a universal principle[753].

Surprisingly, the notion of dignity of the human person is not provided by the European Council's Status either, as signed in London on May 05th 1949, or by the European Convention on Human Rights from 1950, or the Additional Protocols (no. 1-12), or by the European Social Charter from 1961.

Also, there is no reference to dignity in the European Convention for prevention of torture and of punishments or inhumane or degrading treatments from November 26th 1987 or in the original version of the Treaty on the European Union from 1992 or in the Treaty in Amsterdam from 1997[754].

2. USING THE CONCEPT OF DIGNITY IN THE COMMUNITY LAW

The European Union Law uses this concept in the context of specific categories of persons, such as the worker's dignity protection (reason 5 of Regulation no. 1612/68 and article 31 &1 of the Charter), the protection of dignity of victims during a penal trial (article 2 &1 of Framework Decision 2001/220 JAI), dignity of authors and interpreters (Directive no. 2001/29 CE).

The concept of dignity has been introduced within the original, Community Law, in connection with the *right to free passage of workers*. Thus, Regulation no. 1612/68 of the European Communities Council[755] provided that: "the right to free passage implies, so as to be asserted in objective conditions of liberty and dignity, to be insured, by fact and by law, the equal treatment with regard to all the issues connected with the development in itself of an activity for which a salary is received (...)". Dignity contributes to the integration of the community workers and their families within a host member state[756], as arising out of art. 5 of Directive of the European Parliament and of the Council 2004/38/CE from April 29th 2004 on the right to free passage and stay on the territory of the member states for the citizens of the Union and the members of their families, according to which "For the purpose of asserting in objective conditions of

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[753] K. Grabarczyk, *Les principes généraux dans la jurisprudence de la Cour européenne des droits de l' homme*, P.U.A.M., 2008, p.216.

[754] Pedro Serna, „*La dignidad humana en la Constitución Europea*", în E. Alvarez Conde și V. Garrido Mayor, *Comentarios a la Constitución Europea*, Libro II, Tirant lo blanch, Valencia, 2004, p.203.

[755] C.E.E. Regulation no. 1612/68 of the Council from October 15th 1968 on the free passage of workers within the Community.

[756] The conclusions of the General Attorney Darmon presented on October 03rd 1990 in the case Carmina di Leo against Berlin Autonomous Province and C.J.C.E. decree of November 13th 1990, case C- 308/89 Carmina di Leo/Berlin Autonomous Province, Rec. p. 4185.

freedom and dignity, the right of all the citizens of the Union to free passage and stay on the territory of the member states should be also awarded to the members of their families, regardless of the citizenship"[757]. In the case law of the European Court of Justice (C.E.J.), this connection between the dignity and the right to free passage of a worker is explained in the case Carmina di Leo versus Berlin[758] Autonomous Province from 1990: "The right to free passage of workers supposes, so that this right should be according to the principles of liberty and dignity, optimum conditions of integration of the community worker in the host country. Moreover, for this integration to be effective, it is also essential that the community worker's child, who lives with his family in the host country, should have the possibility to choose studies in the same conditions as any other child of a citizen of this member state". According to the General Attorney Jacobs, community law considers a worker as being "a human being who has the right to live in this state in objective conditions of freedom and dignity and to be protected against any difference of treatment susceptible of making his life less comfortable both materially and psychologically, than that of his fellow countrymen"[759]. It is therefore noticed the fact that the use of the human person's dignity concept is in connection with the status of a vulnerable person (for instance, due to age, gender, health condition, psychical condition, of the poverty situation in which he finds himself), any situation which places the human person on a frailty and vulnerability position, risking to entail the breaking of equality in relation with the rest of the human community members is considered as affecting dignity[760].

Pursuant to the second paragraph of the preamble of the European Union Charter of Fundamental Rights: "Aware of his spiritual and moral patrimony, the Union is based on the indivisible and universal values of the human dignity, of

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[757] Directive of the European Parliament and of the Council 2004/38/CE from April 29th 2004 on the right to free passage and stay on the territory of the members states for the citizens of the Union and the members of their families, of amendment on the (C.E.E.) Regulation no. 1612/68 and of cancellation of Directives 64/221/C.E.E., 68/360/C.E.E., 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE. Francis Kessler, Jean-Philippe Chernould and Andrei Popescu, *Social Security of Migrant Workers within the European Union*, Lumina Lex Publishing House, Bucharest, 2005, p. 25.

[758] Cauza Carmina di Leo against Berlin Autonomous Province from November 13th 1990, case C-308/89.

[759] The conclusions of the General Attorney Jacobs from December 09th 1992, case Christos Konstantinidis against Stadt Altensteig, case no. C- 168/91 . Ref I, p. 1191.

[760]For a critic of the "category dignity", see Félicité Mbala Mbala, *La notion philosophique de dignité a l'epreuve de sa consecration juridique*, Thèse, Université de Lille 2, droit et santé, Ecole doctorale des sciences juridiques, politiques et sociales, 2007, p. 222, Muriel Fabre-Magnan, „*La dignité en Droit: un axiome*", Revue interdisciplinaire d'études juridiques, 58/2007, p. 20.

liberty, equality and solidarity; these are based on the principles of democracy and of the State subject to the rule of law. The Union situates the person in the centre of its action, instituting the citizenship of the Union and creating a space of liberty, security and justice". Chapter I of the Charter refers to the human dignity and includes 5 articles: human dignity (art. 1), the right to life (art. 2), the right to a person's integrity (art. 3), forbidding torture and inhumane or degrading punishments or treatments (art. 4) and forbidding slavery and forced work (art. 5). Pursuant to art. 1 of the Charter, human dignity cannot be breached; it must be complied with and respected. The dignity concept is not only put in a relationship with other concepts (life, a person's integrity, forbidding of torture, inhumane or degrading punishments and treatments, slavery and forced work), but it is invoked as an autonomous concept. In the Explanations with regard to the Charter[761] it is specified that a human person's dignity "does not represent only a fundamental right in itself, but it represents the very basis of the fundamental rights" and "it cannot be made use of any of the rights written in this charter so as to reflect on the dignity of other person", person's dignity forming part of the substance of the rights written in this charter.

Beginning with this moment, the European Court of Justice has developed a special interest for the concept of human person's dignity, one of the important causes in its evolution in the Court case law being the case C-377/98, the Netherlands versus the European Parliament and Council[762] in which it was requested the annulment of Directive 98/44/CE on the legal protection of the biotechnological inventions from July 06th 1998. According to Plaintiff, patentability of the isolated elements from the human body was the equivalent of an instrumentalisation of the human living matter which affected the human being's dignity. The issue addressed was to know how can there be protected the elements of the human body which, without being mere things, could not be considered a person any longer. Resorting to dignity was considered, in the Court's opinion, the only means of acknowledging to them a certain form of protection, since the other fundamental rights were inapplicable or inefficient[763]. The Court

[761] Explanations on the European Union Charter of Fundamental Rights, 2007/C 303/02, Romanian Magazine of Community Law no. 1/2008, p. 239-262,

[762] Case the Netherlands against the European Parliament and Council, case C 377/98, &70, C.J.C.E., decree of October 09th 2001. For a commentary of the decree, see Christophe Maubernard, „*Le droit fondamental à la dignité humaine en droit communautaire: la brevetabilité du vivant à l'épreuve de la jurisprudence de la Cour de Justice des Communautés Européennes*", R.T.D.H., no. 1/2003, p. 418-513; Juliane Kokott, Thomas Diehn, "*Kingdom of Netherlands v. European Parliament and Council of the European Union*", The American Journal of International Law, Vol. 96/2002, p. 950-955,

[763] We keep in mind the opinion of the author M. Fabre-Magnan which draws the attention upon the fact that the principle of human person's dignity must remain in subsidiary that is

refers in its decree of rejection of the petition to the concept of dignity not as a principle or as a value, but expressly as a fundamental right forming part of the set of general principles it protects in the community juridical order, being stated as follows: "It is the role of the Court of Justice, in its check of conformity of the institutions instruments with the general principles of the community law, to watch over the compliance with the fundamental right to human dignity and a person's integrity" *(&77).* Another case in which the Court of Justice in Luxembourg qualifies dignity as a general law principle is the case Omega Spielhallen-und Automatenaufstellungs-GmbH [764]of October 14th 2004, which aimed at a society which traded laser guns in Bonn through which customers could play "killing each other". The German Police forbade the operations with such games supposing shooting at human targets. In the formulated conclusions, the General Attorney made reference to the understanding of dignity as fundamental right, admitting that the previous interpretation of the Court of Justice with regard to the human dignity seems to find a concretisation of the concept "comparable (in accordance with the German model, simultaneously as a constitutional principle of the European Union and as a fundamental right) with article 1 from the European Union Charter of the Fundamental Rights"[765]. But, moreover, in the previously mentioned decree the Court has established that the community law should not be contrary to a potential limitation "out of public order reasons", "case in which human dignity is affected".

3.CONCLUSION

The concept is cautiously used, since there are few decrees of the Court in Luxembourg in this case. Usually, it is mentioned the concept without deducting from this specific legal consequences or there are repeated Parties' arguments, with no influence upon the decision. The main control points within this case law being the decrees pronounced in the case the Netherlands versus the European Parliament and Council and in the case Omega Spielhallen-und Automatenaufstellungs-GmbH versus Oberbürgermeisterin der Bundesstadt Bonn in which it is established the fundamental right to the human dignity which forms part of the general principles of the community law. As a general principle, compliance with the human person's

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it should not be used except when no other concept or a stricter rule cannot be mobilised. In this case, dignity would remain a basic principle, emergent, very punctual and often temporary, waiting for the new problem occurred to find another technical solution. See M. Fabre-Magnan, «La dignité en Droit: un axiome», Revue interdisciplinaire d'études juridiques, 2007.58, p.18.

[764] Omega, C. 36/02, C.J.C.E., decree from October 14th 2004.

[765] A. Oehling de los Reyes, *La dignidad de la personna. Evolucion histórico-filosófica, concepto, recepción constitucional y relación con los valores y derechos fundamentales*, Ed. Dykinson, 2010, p. 360.

dignity is required both for the Union's institutions and for the member states, when these adopt decisions in the community law matter.

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ELEMENTS CONTRARY TO THE FREEDOM OF EXPRESSION.PREVIOUS CONTROL OF PUBLICATIONS

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Abstract

Contrary to the general principle of the freedom of expression, certain forms of preventive control, licenses or permits subsist. In certain cases, it is only a formal control which once met does not lead to incidents on the freedom of publications, but in other cases control takes the form of prior interventions exercised by the administrative or judicial authorities which may decide on prohibiting, seizing or other measures that are likely to arise as true events contrary to the principle of freedom.

This paper aims at the comparative study of those elements contrary to the principle of freedom of expression by analysing the existing legislation at national level and in France starting with the previous formalities (first part), previous interventions(second part) and the previous control of certain special publications (third part).

Key words: *freedom of expression, previous control, elements contrary to the freedom of expression, previous formalities, previous interventions.*

Being designed since the eighteenth century as an essential freedom, the "heart" of human rights theory, direct extension of the individual freedom, one of the major attributives of human personality, the freedom of expression consists in the freedom to search, receive and disseminate information and ideas of any kind, regardless of boundaries, in an oral, written, printed or artistic form or by any other means, at his/her choice[767], without the intervention of the public authorities which is inseparable from the person's autonomy. Thus, contrary to the general principle, certain forms of preventive control, licenses or authorizations subsist.

In certain cases, it is only a formal control (1.1.) which once met does not lead to incidents on the freedom of publications, such as previous statements,

[766] This work was supported by the strategic grant POSDRU/CPP107/DMI1.5/S/78421, Project ID 78421 (2010), co-financed by the European Social Fund – Investing in People, within the Sectorial Operational Programme Human Resources Development 2007 – 2013, University of Craiova, Faculty of Law and Administrative Sciences.

[767] Article 19 of the International Pact on the civil and political rights adopted by the General Assembly of U.N. on December 16, 1966.

mandatory mentions and mandatory deposits but in other cases the control takes the form of prior interventions exercised by the administrative or judicial authorities which may decide on prohibiting, seizing or other measures that are likely to arise as true events contrary to the principle of freedom (1.2.)[768].

1.1. PREVIOUS FORMALITIES

Article 30 paragraph 3 of the Constitution provides that "the freedom of media also involves the freedom to set up publications". Our legislation on publications does not provide any special procedure for establishing periodical magazines or not. On the whole, the establishment of publications assumes the establishment of a company in the Trade Register having the object of activity – NACE Code – which is specific to publications. Subsequently, for its protection, the publication's name can be registered in the State Office for Inventions and Trademarks. The only practical procedure aims at obtaining an international code for the identification of serial publications (ISSN) granted by the National Library of Romania which allows the international identification of a serial publication title.

Certain special provisions on the pornographic publications are provided by the Law on the prevention and fight against pornography no. 196/2003, as further amended, which constitutes according to article 1 "measures to prevent and fight against pornography in order to protect the human dignity, decency and public morality" which we are to subsequently analyse in the special publications depending on their origin, content or public to whom it is addressed.

In France, the previous control is still exercised, especially the previous administrative control where the administrative police aims at the publications which are considered to be a danger for young people.

1.1.1. As stated above, our domestic law does not provide, in principle, any prior formality such as **mandatory statements** establishing a publication against the French legislation on media, namely the Media Law as of July 29, 1881 according to which any newspaper or periodical magazine can be published without previous authorization and surety according to the statement provided for in article 7 of the law, regulating the formal content of the statement which must consist in: the title of the newspaper or periodical magazine and its method of publication, name and residence of the publication manager and printing house. This statement shall be submitted to the Public Prosecutor's Office, the judicial authority not being able to oppose or refuse, in a form of a mere certificate or acknowledgement of receipt.

[768] Emmanuel Derieux, Agnès Granchet, *Droit des médias. Droit français, européen et international*, 6e édition, L.G.D.J., Lextenso édition, Paris, 2010, p.148.

1.1.2. **Mandatory mentions** which are previous simple formalities aim at allowing the identification of the authors or persons responsible for an eventual abuse and are not regulated by our legislation.

The French Media Law in 1881 provides the obligation according to which any document made available to the public must bear the name and residence of the printing house[769], and the name of the publication manager must be printed on the lower page of each copy (article 11). By law no. 86-897 as of August 1, 1986, in order to provide transparency and independence of media companies the following have been introduced as mandatory mentions: surname and first name of the owner or main shareholder, name, legal representative, main shareholders, assignments or promises to assign the social rights, transfers or promises to transfer the ownership or operation.

1.1.3. The **mandatory deposits**, which represent a condition not required by our domestic legislator, are divided in France into two categories considering their purposes and different regulations in mandatory deposits provided for in the Media Law as of July 29, 1881 and the deposits integrated in the Heritage Code by Law as of June 20, 1992.

Thus, the mandatory deposits provided for in the French Media Law are either judicial or administrative. The judicial deposits must be performed by the periodical manager, so that two copies must be submitted to the public prosecutor's office or the city hall where the newspaper is to come out and the administrative deposits consist in submitting 10 copies for each periodical to the Ministry of Information or in case of provinces at the Prefecture or regional town halls.

1.2. PREVIOUS INTERVENTIONS.

Although the repressive and a posteriori control is a principle of freedom, in the French legal system, the preventive administrative and, sometimes, legal control is justified by the need to provide public order, guarantee immediate protection of the individual rights against serious offences and keep the means of evidence of the offence and all these in exceptional cases.

Thus, as it is noticed in literature, our constitutional formulation is restrictive, referring only to publications understood as a written media, with periodic issue, ignoring the editing activity, as provided for in the 1923 Constitution. However, paragraph 4 of article 30 of the Constitution provides that no publication can be suppressed allowing suspension while the 1923 Constitution in article 25 regulated that no publication or newspaper can be suspended or suppressed.

[769] Art. 3 French Media Law as of 1881: «tout écrit rendu public (…) portera l'indication du nom et du domicile de l'imprimeur »

In other words, the current Constitution refers only to censorship while article 25 paragraph 3 of the 1923 Constitution shows that besides censorship no other preventive measure for the issuance, sale and dissemination of any publication can be established and no bailment shall be requested to journalists, writers, editors, pressmen or transferrers and that media shall not be placed under warning[770].

1.2.1. In French Law, **administrative prohibitions and seizures** are ordered by the administrative police and aim at the defence, maintenance or reassurance of public order against the threat of disturbance by a publication.

Those measures can be ordered by mayors or prefects only in the above-mentioned cases. Although those measure are contrary to the principle of freedom of expression, the freedom of communication, it is necessary that those measures are used only in exceptional cases and their abusive use can be subject to legal proceedings belonging either to the administrative jurisdiction or the court if the purpose of the measure is not just an administrative act, employing the personal responsibility of the author of the administrative act.

1.2.2. Legal prohibitions and seizures.

Under the New Civil Code[771], actions that may be urged by the court to protect such rights resides either in: i) the interdiction to commit illegal acts, if such interdiction is threatening (art. 253 par. 1(a) of the civil Code); ii) the cessation of the breach and the interdiction in the future, if such breach continues, or the acknowledgment of the illegal nature of the action if the discomfort caused still lingers (art. 253 par. 1 (b) of the civil Code); iii) finding the illicit nature of the crime committed, if disturbing that produced it subsists (article 253 paragraph 1 letter c of the civil Code); iv) the obligation of the author to illicit acts, at its expense, to the publication of the judgment of conviction (art. 253 paragraph 3 (a) of the civil Code); v)the obligation of the author to any unlawful acts, necessary measures counted Court to enjoin illegal deed or to compensation for damage caused (art. 253 paragraph 3 (a), (b) the civil Code). The exception to the rule is given in cases of infringement of the rights of non-patrimonial rights by exercising the right to free speech, according to which the Court cannot order banning of illicit acts.

The conditions necessary for the exercise of such provisional measures are: i) the making by the person who is adversely credible proof that his governmental notication necessary subject of illegal actions; ii) illicit action to be present or imminent and iii) the existence of the risk as the illicit action to cause damage difficult to repair.

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[770] I. Dogaru, D.C. Dănişor, *Drepturile Omului şi Libertăţile publice. Vol. I. Teoria generală şi reglementarea*, Edit. „Dacia Europa Nova", Lugoj, 1997, p. 221.

[771] Law no. 287/2009 on the New Civil Code republished in the Official Journal no. 505/201, in effect as of October 1st, 2011.

In France, legal seizure is by its seriousness' an exceptional measure that the judge, whether or not on the merits of the case or under special proceedings, shall only dictate in case of emergency if the harm to one's private life appears to be „intolerable and causing a prejudice that the subsequent compensation granted by the trial judge cannot cover"[772]. Those measures can be decided by a first instance judge in order to collect and to consider the means of evidence or, in case of emergency and serious danger, to end an offence related to the publication or harmful effects due to its own fault, leading to the prevention of its publication.

Article 51 of 1881 Media Law expressly provides the possibility to decide upon the seizure of publications in case of challenge and eulogy of offence (art. 24) and assault against foreign diplomatic agents (art. 37). The court can also order as a complementary sentence not only the destruction of the publication but also the newspaper suspension, which hasn't been imposed in practice. However, those measures can be decided within a provisional procedure or in case of an infringement action.

In case of omitting the legal deposit, the judge can order the seizure of four copies, but this measure is not considered a violation of the freedom of communication, because the other copies are still offered for sale.

Those measures which are indeed exceptional and contrary to the constitutive elements of the freedom of communication, even regulated by the law, are currently decided and ordered only partially, as regards the defence of public order or protection of the individual rights to freedom of expression.

All these new changes made in the extrapatrimoniale rights protection without a history of judicial practice and doctrine, will lead the courts dealing with a terrible battle in the interpretation and proper application and probably often fragmented as to any beginning, the proportionality principle, endorsed and required by the European Court for Human Rights in its large practice and guidance.

1.3. PREVIOUS CONTROL OF CERTAIN SPECIAL PUBLICATIONS DEPENDING ON THEIR NATURE, ORIGIN, CONTENT OR PUBLIC TO WHOM IT IS ADDRESSED.

1.3.1. In France, **the publications of judicial and legal advertisements** are designed by the prefect, in each department, according to law as of January 4, 1955. At the same time, they are enlisted in a list of publications of the same type, CPPAP and must have at least a weekly issue.

[772] TGI Paris, référé du 21.02.1970, JCP, 1970, II, 16293; TGI Paris, référé du 18 janvier 1996, „Affaire du Grand Secret", seizure of the book published by the personal physician of François Mitterrand, Légipresse no 128, 1996, III, 15.

1.3.2. In France, **foreign publications** know a previous administrative control which is regulated by the 1881 Media Law and is contrary to the principle of freedom of expression, being a discretionary prohibition. The French works published abroad and French works published in France which are of foreign origin if their ideological inspiration and direction are outside France or of translation are considered as foreign publications without making a difference between periodical magazines and foreign books published abroad and in France.

In order to sustain the vexation of this procedure with the principle of freedom of expression, there is also the decision of the European Court of Human Rights which in Ekin Association v. France case as of July 17, 2001 is considered to be contrary to article 10 of the European Convention of Human Rights, the power of the Minister of Interior to prohibit the circulation, dissemination or sale of foreign publications in France, considering that this jurisdictional control which exists in administrative matters does not recognize enough guarantees to avoid the abuse.

1.3.3. Publications intended for youth and/or publications considered a danger for youth, regulated by the Law as of July 16, 1949.

a. In case of **publications intended for youth**, the French Law as of July 16, 1940, article 2 provides the compliance of those publications with a strict control conducted by the Ministry of National Education which must make sure that those publications does not favourably present ruffianism, lie, theft, laziness, cowardice, hatred or any act intended to demoralize children and youth or maintain ethnic prejudgements.

The managers of those publications must have morality guarantees and a previous statement addressed „au gard de Sceaux". The violation of those obligations is an offence, and the court may order the seizure and destruction of all copies and in case of recidivism may order the permanent prohibition of the publication. In order to supervise the activity and notification of the Minister of Justice all offences related to law, a Commission for the supervision of those publications has been established. The importation of such foreign publications intended for youth is subject to an authorization issued by the Minister and the approval of the Supervision Commission.[773]

b. The publications representing a danger for youth are represented by those publications intended for adults, which represent a danger for youth considering their licentiousness and pornography or the shares of crime or violence[774].

[773] Jean Rivero, Hugues Moutouh, *Libertés publique*, Tome II, 7e édition mise à jour, Thémis, Presses Universitaires de France, Paris 1977, pp. 180-191.

[774] Art. 14 of 1949 French Law: «(...) en raison de leur caractère licencieux ou pornographique, ou de la place faite au crieme ou à la violance».

The conciliation of freedom of adults to choose the reading and preoccupation to prevent certain works to be seen by youth, it is often difficult to achieve. The domestic law on the prevention and fight against pornography no. 196/2003, "in order to protect the human dignity, decency and public morality" provided the obligation to authorize pornographic publications by a commission of the Ministry of Culture and Cults, which the representatives of the Minister of Interior and Ministry of Tourism[775] were part of.

Once with the republication of this law in the Official Gazette, Part I no. 87 as of February 4, 2008 on the pornographic publications[776], the provisions related to the publication authorization is repealed. The only mentions or obligations legally regulated by art. 5 and 6 refer to the marking with a red square of the first cover, the presentation in packages not allowing looking into the publication on the stand, and the warning of buyers on their nature by the sellers of such publications.

At the same time, their sale is allowed only in specially installed places, being prohibited to display obscene materials on the windows of the shops.

The persons who create pornographic websites are liable to set a password and they can be accessed after paying a fee per minute of use set by the website owner and declared before the fiscal authorities. The persons creating or administering websites must clearly emphasize the number of website access in order to be subject to fiscal liabilities provided by the law. It is forbidden to create and administer websites with paedophilia, zoophilia or necrophilia nature.

The pornographic movies regardless of their media shall be rented or sold only in specially designed areas and shall not be rented or sold to children.

The French control system is intended for the Minister of Interior, conferring a role which involves more the police than the education, applying primarily to the targeted works three distinct prohibitions: i) prohibition to sell them to children; ii) prohibition to display them to the public and iii) prohibition of any forms of advertising. Those measures for display and advertising can easily lead to the early disappearance of publications, knowing very well the marketing role in a product's survival[777]. Secondly, by the French ordinance as of December 23, 1958, the obligation of the previous deposit has been introduced to the Ministry of Justice, obtaining a previous authorization condition which is tacitly granted if

[775] Art. 6 of Law no. 196/2003 on the prevention and fight against pornography published in the Official Gazette of Romania, Part I, no. 342 as of May 20, 2003, was modified by the Law no. 496/2004 for the amendment and completion of Law no. 196/2006 on the prevention and fight against pornography published in the Official Gazette of Romania, Part I, no. 1,070 as of November 18, 2004 and amended again by Law 301/2007.

[776] Art. 2 of Law no. 196/2003: (1) According to this law, pornography means the obscene acts and the materials reproducing and disseminating such acts.

[777] In 1970 the disappearance of the French periodical magazine occurred, being forbidden to be sold to the children or displayed.

the prohibition of publication subject to deposit does not occur within three months. "It is a form of censorship which is disturbing for editors because it is also applied to "similar" works, which is a too vague and elastic term"[778].

CONCLUSIONS

Although the general principle of the freedom of expression assumes the state's non-intervention in its scope, requiring unit and certain autonomy which is recognized and guaranteed by the state, there are certain forms of preventive control in Europe which are a priori and not a posteriori either as previous statements, mandatory mentions or mandatory deposits which are mostly formal, or a control shaped as previous interventions of the state leading to prohibitions, seizures or other measures risking to occur as true manifestations contrary to the principle of freedom.

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[778] Jean Rivero, Hugues Moutouh, *op. cit.*, p. 192.

HISTORICAL REFERENCES OF IDEAS (PRINCIPLES) OF HUMANISM

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Summary

In a day like the present, when the very bases of our civilization are being scrutinized critically, when the old structure of society is visibly giving way in places and the new edifice has not been decided upon, some light may be thrown upon the situation if we decide first what our objective is in the remaking of society. Probably we would all agree that our ultimate aim is man himself - the creation of a higher type of humanity.[779] *We can only reach this goal by creating a world in which every individual's worth is respected, and human freedom and behaving responsibly are natural aspirations. A way of life that teaches us that humankind must focus on what is right and just so as to contribute in the largest way possible to the fullness and freedom of human life. This is Humanism boiled down to its essence.*

Keywords: *Humanism, Humanitarian, Secular Humanism, Religious Humanism, Classical Humanism, Taoism.*

But…what is HUMANISM? The sort of answer you will get to that question depends on what sort of humanism you ask! The word ***"humanism"*** has a number of meanings, and because authors and speakers often don't clarify which meaning they intend, those trying to explain humanism can easily become a source of confusion. Fortunately, each meaning of the word constitutes a different type of humanism - the different types being easily separated and defined by the use of appropriate adjectives. So, let me summarize the different varieties of humanism in this way.

- **Literary Humanism** is a devotion to the humanities or literary culture.
- **Renaissance Humanism** is the spirit of learning that developed at the end of the middle age with the revival of classical letters and a renewed confidence in the ability of human beings to determine for themselves truth and falsehood.
- **Cultural Humanism** is the rational and empirical tradition that originated largely in ancient Greece and Rome, evolved throughout European history, and now constitutes a basic part of the Western approach to science, political theory, ethics, and law.

[779] George P. Hayes. *Cicero's humanism today*. The Classical Journal, Vol. 34, No. 5, Feb., 1939. p. 283-290.

- **Philosophical Humanism** is any outlook or way of life centered on human need and interest. Sub-categories of this type include Christian Humanism and Modern Humanism.

- **Christian Humanism** is defined by Webster's Third New International Dictionary as "a philosophy advocating the self-fulfillment of man within the framework of Christian principles."

- **Modern Humanism**, also called Naturalistic Humanism, Scientific Humanism, Ethical Humanism and Democratic Humanism is defined by one of its leading proponents, Corliss Lamont, as ***"a naturalistic philosophy that rejects all supernaturalism and relies primarily upon reason and science, democracy and human compassion"***[780]**.**

Humanism is also a *set of common ethical principles and values, virtues, and responsibilities that have evolved over time in world civilization. Although culturally relative, many of these principles and values cut across cultures and provide a general or universal basis for ethics, transcending narrow parochial interests - for example, the widely accepted doctrine of Human Rights.* Various forms of humanism have been a part of human thought throughout history. Nearly all religions have humanistic sides to them. Jesus, Socrates, and Buddha, among others, were notable largely because of the humanistic ideas they promoted. The most fundamental ethical principle – the Golden Rule or ***'do as you would be done by'***[781]– is first found in Egypt almost 4,000 years ago, and it re-appears in almost every religious and ethical tradition. It springs from human existence, not originally from any religious teaching. Humanism is certainly the oldest ethical and philosophical tradition in our civilization, that's why it has reemerged in many different times and places, each time with a unique "flavor".

I. **Classical Humanism.** Classical humanism is distinguished by emphases on philosophy, written codes of virtues and ethics, and the creation of a body of literature and art. It often looks back to a prior age of heroism. It is generally the philosophy of a privileged aristocracy. (The term, as we use it here, describes a type of humanism, and is not exactly contiguous with the Classical Era):

1. **Chou Dynasty (Chinese) Humanism (ca. 1200-200 B.C.):** Philosophy has always been crucial to Chinese identity. In the first period of Chinese Humanism, two major schools of thought were developed:

2. **Taoism, the way of virtue.** This was a highly mystical and metaphysical look at the basic nature of the universe. It advocated a system of virtue based on harmony with nature. Although too abstract to be truly humanist,

[780] http://www.americanhumanist.org/Humanism/What_is_Humanism
[781] *Dictionary of Philosophy*. London: Pan Books in associationwithThe MacMillan Press. 1979, p. 134.

the Taoist metaphysics established the foundation for the development of Chinese medicine.

3. **Confucianism,** a very different look at virtues and ethics. Confucianism was profoundly humanist, composed (as it was) of hundreds of detailed precepts on the subject of human existence and the social order. The foundational virtue of Confucianismis ***Ren*** (Chinese: "humanity," "humaneness," "goodness," "benevolence," or "love"). One could say that within the Confucian worldview, *ren* is *ren*: embodying the virtue of humaneness requires that one become an ethically mature human being.[782]

II. **Classical Greek and Hellenistic Humanism (ca.500-30 B.C.)**

The classical period in Greece, and the Greek-influenced period that directly followed, was the wellspring for philosophy and art in Western Civilization.

Perhaps the earliest person we might be able to call a "humanist" in some sense would be Protagoras, a Greek philosopher and teacher who lived around the 5th century BCE. Protagoras exhibited two important features which remain central to humanism even today. First, he appears to have made humanity the starting point for values and consideration when he created his now-famous statement "Man is the measure of all things."[783] In other words, it is not to the gods that we should look when establishing standards, but instead to ourselves. Thales of Miletus, spoke of a need to "know thyself." A century later, Anaxagoras promoted science as a way of understanding the universe. Their perspectives on the world are cited by researcher Charles Potter as early examples of humanism.[784]

III. **The Humanism of the Roman Empire (ca. 30 B.C. - 200 A.D.)**

This period was largely an extension of trends begun by the Greeks. The philosophy, art and literature was all patterned after that of the Greeks. Through the agency of the Romans, Greek humanism was spread to many far corners of the ancient world. Cicero was the one who, so far as the records of literature allow us to see, first discussed and consciously portrayed the ideal that he called ***humanitas***, term he used to designate the ***"moral/spiritual ascension"*** trough education.[785].

IV. **Renaissance Humanism**. Renaissance Humanism generally draws strongly from a classical tradition. It is less concerned with philosophy, and more concerned with the production of great art, music and theater, and with advances in science. It is self-consciously humanist and human-centered. It is often the lifestyle of an intellectual elite.

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[782] http://www.britannica.com/EBchecked/topic/302493/ren

[783] Umanismulistorichttp://cristimirt.ro/sites/umanismul/istoric.html

[784] Potter Charles. *Humanism A new Religion*. Simon and Schuster.1930, pp. 64–69.

[785] *Краткая философская энциклопедия*. М.: Прогресс, 1994. http:// svitk.ru/004_book_book/15b/3353_kratkaya_filosofskaya_enciklopediya.php

Italian Renaissance Humanism **(ca. 1300-1550):** The word "humanism" was coined in reference to this period. It was a period of amazing achievements in art and science, producing scores of great writers, painters, and sculptors. This historical and literary use of the word "humanist" derives from the 15th-century Italian term *umanista*, meaning a teacher or scholar of Classical Greek and Latin literature and the ethical philosophy behind it.[786]

But in the mid-18th century, a different use of the term began to emerge. In 1765, the author of an anonymous article in a French Enlightenment periodical spoke of *"The general love of humanity ... a virtue hitherto quite nameless among us, and which we will venture to call 'humanism', for the time has come to create a word for such a beautiful and necessary thing".*[787]

Harlem Renaissance Humanism **(ca. 1920-1930):** Although brief, this period produced many of the greatest talents in African-American literature (particularly poetry). Instead of referencing Greece and Rome, Harlem Renaissance writers "rediscovered" a semi-mythical version of African Humanism, particularly as seen through the eyes of Senegal's negritude movement. Modern Humanism

Secular Humanism: The best-known modern humanism, secular humanism denies or devalues the existence of a deity, in order to focus attention firmly on the accomplishments of humanity. However, a criticism of the movement is that it focuses more on opposing religion than on supporting humanism.

Religious Humanism: Typically religious humanism is celebrating human achievement and potential, and concerns itself with human affairs, yet without denying the primacy of God. This category includes Christian Humanism, Jewish Humanism and Islamic Humanism, as well as humanist versions of other religions..

The fundamentals of modern Humanism are as follows:

1. Humanism is ethical. It affirms the worth, dignity and autonomy of the individual and the right of every human being to the greatest possible freedom compatible with the rights of others. Humanists have a duty of care to all of humanity including future generations. Humanists believe that morality is an intrinsic part of human nature based on understanding and a concern for others, needing no external sanction.

2. ***Humanism is rational.*** It seeks to use science creatively, not destructively. Humanists believe that the solutions to the world's problems lie in human thought and action rather than divine intervention. Humanism advocates the application of the methods of science and free inquiry to the problems of human welfare.

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[786] Nicholas Mann. *The Origins of Humanism*. Cambridge University Press.1996. p. 1-2.
[787] The review *Ephémérides du citoyen ou Bibliothèqueraisonée des sciencesmorales et politiques*. chapter 16, Dec, 17, 1765. p.247.

3. ***Humanism supports democracy and human rights.*** Humanism aims at the fullest possible development of every human being. It holds that democracy and human development are matters of right.

4. ***Humanism insists that personal liberty must be combined with social responsibility***. Humanism ventures to build a world on the idea of the free person responsible to society, and recognizes our dependence on and responsibility for the natural world.

5. ***Humanism is a response to the widespread demand for an alternative to dogmatic religion***. The world's major religions claim to be based on revelations fixed for all time, and many seek to impose their world-views on all of humanity. Humanism recognizes that reliable knowledge of the world and ourselves arises through a continuing process. of observation, evaluation and revision.

6. ***Humanism is a life stance*** aiming at the maximum possible fulfillment through the cultivation of ethical and creative living and offers an ethical and rational means of addressing the challenges of our times. Humanism can be a way of life for everyone everywhere. [788]

The humanism pleads for the emancipation of human nature, the respect for personal dignity and value, and seeking for the freedom of thoughts and citizen rights. The primary task of humanism today is to make men aware in the simplest terms of what it can mean to them and what it commits them to.[789] Humanism's victories of course, are never complete, and may never be as long as poverty, suffering, or injustice exists. We live in a period of rapid technological and social change in which we are constantly confronted by new ambiguities and new problems. We cannot simply draw upon the moral wisdom of past generations; we must be prepared for some revision of our traditional moral outlook... Dramatic new scientific and technological breakthroughs provide enormous opportunities for human betterment, but they also raise moral dilemmas concerning possible dangers and abuses. *"Conscience, the sense of right and wrong and the insistent call of one's better, more idealistic, more social-minded self, is a social product. Feelings of right and wrong that at first have their locus within the family gradually develop into a pattern for the tribe or city, then spread to the larger unit of the nation, and finally from the nation to humanity as a whole"*[790]. Humanism is not a religion or an ideology… is a way of life. By this we mean our propensity to acquire values, to create ideals, and to make choices – ethical and moral choices.

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[788] ***Amsterdam Declaration 2002***. **http://iheu.org/content/amsterdam-declaration-2002**

[789] Statement from the Declaration of the Humanist Congress in Amsterdam. August 26, 1952. http://www.humanistsofutah.org/what.html

[790] Lamont Corliss. *The Philosophy of Humanism, Eighth Edition*. Humanist Press: Amherst, New York.1997,pp. 252–253.

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CAUSES OF SPREAD OF LEGAL NIHILISM ANALYZED THROUGH POLITICAL-LEGAL AND SOCIAL REALITY IN MOLDOVA

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Summary

Nihilism had been here all the nineteenth century, next to us, within us, and it is a simple truth that the human mind can face better the most oppressive government, the most rigid restrictions, than the awful prospect of a lawless, frontier less world. Nihilism is a dangerous intoxicant and very few people can tolerate it in any quantity; it brings out the old raiding, oppressing, murderous instincts; the rage for revenge, for power, for absolute.

Key words*: Nihilism, legal reality, process of democratization, essence of a democratic, social consciousness*

Moldova is a sovereign, independent, unitary and indivisible state[791], which, at the moment, is in a period of transition from a socialist type of society to democratic rules and principles. Continuing the process of democratization in Moldova is possible only if, the law will become one of the most effective levers for regulating the activities of people and their social relations. We're talking about a new quality of Moldovan society where the rule of law is realized, it is linked to the work of all government bodies, including the high level. This is the essence of a democratic state in which every citizen and legal person is protected by the law in force, which in turn regulates its use by state authorities.

Legal reality is a particular area of social life, caused by law, and its impact on social relations, and consists of the ideal (idealism) and the material (materialism).The area of the ideal is determined by the consciousness, and the area of the material by the social practices. As applied to the legal reality, the idealism and materialism appear in the sense of justice, legislation, implementation of the law and legal culture. The listed legal phenomena are interdependent at the level of regularities, so changes in some events inevitably bring corresponding changes in other phenomena from legal reality[792].

[791] Constitutia Republicii Moldova, adoptată la 29 iulie 1994, publicata in Monitorul Oficial al Republicii Moldova nr.1 din 18.08.1994.

[792] Матузов Н. И. Правовой нигилизм и правовой идеализм как две стороны одной медали // Правоведение, 1994, N°2

The social consciousness as a phenomenon of social reality has different forms: political, moral, national, aesthetic, religious, and legal consciousness. One of the factors having a negative influence on the formation of advanced legal consciousness is the presence of such a manifestation in the society as legal nihilism. As a phenomenon of legal reality, legal nihilism is rooted in the period of totalitarian rule, but it has been investigated more seriously only recently. Legal nihilism represents a skeptical and negative attitude towards law, disbelief in its potential to solve social problems according with social justice. It spread from the sphere of everyday relationships of people to the highest legislative bodies of the state. Legal nihilism is an obstacle on the way of building a state of law, because we are talking about unbelief in the law and disrespect for him[793].

The reasons for the spread of legal nihilism are quite varied[794]:

1. Historical roots

a) Which are a natural consequence of autocracy - mass of people are deprived of their rights and freedoms by a system of repressive legislation and imperfect justice**.**

b) The legal system, which was dominated by the administrative-command methods, secret and semi-secret laws and regulations, had a declarative role more than a normative one. All this contributed to a serious decrease of law's value in society.

c) Quantitative and qualitative adjustment of the past legal systems to the transition period, the crisis of law and the imperfection of all its mechanisms, the long duration of reforms implementation leaded to a profound moral and social disorder.

2. The content of the laws themselves[795].

The state as the spokesman of public interest cannot be in conflict with private interests. Direct consequences of this phenomenon are laws that wear in general a conservative nature, with no direct impact upon people. Therefore laws do not always correspond to the specific interests of the individual, the more falsely understood. In some cases, by virtue of those reason or another legislative bodies cannot adequately express the interests of society and state in matters of law. Consequently there are errors in the legislation, which aggravate the situation. If the existing laws are far from the interests of citizens, it is not surprising that people are not directly interested in their implementation. It is hard to expect the realization of a law that threats to violate the rights of citizens.

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[793] РаминОсман оглы, Курсовая работапо теме:"Основы правосознания", Краснодар, 2010.http://www.bestreferat.ru/referat-154675.html

[794] http://revolution.allbest.ru/law/00177833.html

[795]Теория государства и права: Учебник / Под ред. В.К. Бабаева.— М.: «Юристъ», 2005, 592 с.

3. Plays a negative role and the simple ignorance of law. From this point of view, we cannot deny the actuality of I.A. Ilin's words:"People who are ignorant towards their country, have an extra-legal life ... they are satisfied with unsustainable rudimentary knowledge of law. Knowing the law, respecting the law it is imperative for human's dignity. People ... need to know that law is an important part of the legal life. So it is very absurd and dangerous when the population of a country has no access to knowledge about law. Man as a spiritual being, cannot live without rules, right and law.

The role of tradition in regard to the law, especially when these traditions are passed from generation to generation is quite difficult to overcome. It is about understanding law's value and the inadmissibility of its neglect. Considering the defects of the laws themselves, it has become customary to oppose the requirement to comply with the law (s) to the requirements of justice. In our society the realities of today have already created a view, we may even say an axiom that the righteousness, justice is above the law. The laws themselves must be evaluated from the perspective of justice, and if the enforcement authority is acting against the law, but its actions are true and correct from the social point of view, no one would condemn them. The idea of law as a supreme value in itself has not yet become part of the legal consciousness of our citizens. And in Moldova taking account of all the political, economic, legal, and social premises, it is hard to imagine that it will soon become a reality[796].

4. The practice of law's application contributes in a large extent to the social expansion of legal nihilism. We cannot say that there are situations in life that seem to shift public opinion on the condescending attitude to break the law[797].Such cases as: salaries retention, the extremely bad quality of medical services, the lack of funding small business, the unemployment rate and the low educational process are enough to determine the rise of legal nihilism. In this case, the worse are the living conditions of people the less they trust the law and are willing to obey it.

5. Very many people are destabilized and amazed by the helplessness and impotence of law towards the high level of criminality that often shakes our society. With the apparent impotence of law, the view that the power is above the justice keeps extending. It is well known among the entrepreneurs that in the case of a serious conflict with the debtors more efficient are the private detective services than law's enforcements which lead to a new round of legal nihilism. Law as an institution is not trusted when one considers that only the rich and powerful can find the truth in court[798].

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[796]Ильин И.А. Общее учение о праве и государстве. О сущности правосознания. М., 1994. С. 165-166.
[797] G.J. Berman" Tradiţia vestică a dreptului: epoca formării". M, 1998, p.48.
[798] http://www.moldovenii.md/md/section/529

The development of a theoretical framework of legal nihilism is supported by the ideas promoted by some jurists in the local doctrines regarding the natural law and the "evident" opposition between law and right. The argument that not all laws serve the greater good was used by adherents of this doctrine in the attempt of making a theory that would justify the non-compliance with those laws that have no significant social meaning. The high humanistic pathos of the concept of law and the rights being in opposition actually turns into legal nihilism. The matter is that, in accordance with this concept, someone has to take over the function of deciding whether the law is an ideal law (or more precisely serves to the ideals of the law).But the attempt of deciding to who can be given this right, caused more problems than effective solutions.

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THE INTERNATIONAL CONFERENCE
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CONSIDERATIONS REGARDING THE CATEGORY OF LEGAL PUNISHMENT

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Summary

In this thesis, researches have been steered towards the systemic analysis of the punishment phenomenon as a structural element of legal responsibility, a periodic and necessary element that manifested itself in all societies and times, attention being focused on the theoretical aspect of this phenomenon or the study of the punishment phenomenon cannot be carried out without considering the theories and scientific currents that approached punishment in close connection to human nature, society and law.

The innovative feature of this thesis is determined both by its goal and object that covers multiple aspects, and also through the untraditional research methodology. In this paper, punishment is analysed as a structural element of legal responsibility, as its final result. A systemic analysis of the essence and contents of punishment is carried out, as well as the genesis and evolution of this phenomenon along the history of the political/juridical thinking of our country and from abroad. Based on the analysis of a wide range of legal, conceptual and empirical sources, the author has created a legal theoretic pattern of punishment, adjusted to the practice of legal responsibility in the modern state.

Key words: *legal responsibility, legal sanction, legal punishment, legal reward.*

The law is an ensemble of rules of behavior in the social relations with mandatory characteristic – imposed if necessary – for all members of the organized society.

In order that the positive law can create a true legal order, it needs to be effective. Effectiveness is absolutely necessary in order to transform moral order into legal order. This effectiveness of the law must, first of all, originate from a certain seduction of the rule, but, although the vast majority of individuals let themselves be dominated by a certain spirit of justice, of fairness, implementing legal provisions because this voluntary orientation towards the law seems to fulfill their nature and there are always unruly spirits who would disregard the rules of law in the absence of legal sanctions.

Although the system of sanctions is approximate and incomplete, still, it ensures a certain broad effectiveness of the global legal system. Taking into account the sanctions as a whole, thus, we can distinguish, beyond the particular

aims of each singular sanction the general purpose of ensuring the effectiveness of the legal order[799].

Therefore, any legal sanction tends, in the final analysis, to ensure the effectiveness of the legal order. Even when applied in a particular case, the sanction targets, first of all, the general interest. The particular violation of the law is nothing but the opportunity to apply a sanction. Of course, the nature of violation determins the nature and gravity of the sanction but, by applying it, the authority has objectives which exceed by far the individual case considerations. It is about, first of all, ensuring, by sanction, a certain social discipline which generally guarantees respect for the legal order. Thus, behind the legal system, there is a second, highly developed system, a system of guarantees which we call sanctions. Everybody knows it is there, ready to be set in motion against those who dare infringe the legal order.

Of course, the system of sanctions entails weaknesses and deficiencies, but generally it is enough for a certain social discipline. The sanctions make the law not a mere morally mandatory order, but a socially effective order. This function of sanctions is particularly clear in case of all sanctions which cannot have the goal to repair the damage caused and especially in the case of criminal sanctions. Wronged persons have no benefits from them. Their function is purely social, it involves guarranteeing order and peace by the fact that it compels all members of society to have a respectful attitude and differentiate between legal provisions.

Of course, sanctions are not a defining element of the legality but it is certain that they are its complement, a complement which ensures the effectiveness of order, so long as the acceptance of the rule is not unanimous. They are not the law but they are a means to protect the law[800].

The finality of the law is connected to the social order, greater good and social progress. It has been said, not by chance, that the law must bring about happiness for most people and avoid suffering and pain[801] as much as possible.

Nevertheless, the actual process of law enforcement, of law implementation cannot be separated from the notion of sanction and responsibility because sanction and legal responsibility are, were and shall remain genuine instruments of effective law implementation[802]. The existence of law itself and regulation of rudimentary forms of social relations is protected by this legal phenomenon. Thus, the sanction for breaching those norms has existed since the norm was actually initiated.

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[799] http//www.stiucum.com/drept/dreptcivil/teoriageneralaasanctiunilor…/ (visited on March 01, 2013).
[800] Ibidem.
[801] L. Barac. Responsibility and Legal Sanction. Bucharest: Lumina Lex Publishing, 1997, p. 23.
[802] L. Barac. Quoted work, p. 213.

Through its complexity, the sanction is a phenomenon which has preoccupied the most enlightened minds of all times, which resulted in the various scientific surveys. For example, many of those who have studied the subject of law, such as Plato, Aristotle, Socrates, Cicero, T. Hobbes, G. Lock, etc., many times, if not directly, then indirectly have also approached the issue of sanction in law. They do not analyze the law without also referring to eventual consequences to the breach of its provisions. Based on these considerations we specify that it is convenient to nominate the question of legal sanction as an issue which has preoccupied these thinkers.

In the positive law, notions such as sanction or punishment are most frequently used as synonyms. Still, when identifying types of sanctions specific to various branches of law, there is a distinction between sanction and punishment, the latter being considered a specific sanction of the criminal law. Within the criminal law, however, there is a distinction between punishment and other criminal sanctions.

Thus, we find that the range of sanctions is much wider than the range of punishments, the latter being included in the sanctions. The differences are connected both to the range of discussed concepts and the different legal regime which the two notions are subject to[803].

Although there are doctrinary arguments against the monopoly of criminal doctrine in the concept of punishment and in favor of using the concept of legal punishment in the theory of law and branches of law other than the concept of criminal law, the question remains under discussion[804].

The argument that the present is justified or motivated by the past is widely recognized. At first, we shall proceed in the same manner by summerizing some moments connected to the historical origin and evolution of the category legal sanction and the theoretical subject concerning this phenomenon in order to reach our planned objective.

The law, as social institution, originates in the ancient world. The necessity to regulate social relations was generated by the emergence of the first human communities and their interaction. The necessity to protect the initiated order from various infringements also originates in that time. Therefore, most norms which existed then were prohibitive in nature for the purpose of protection. In the evolution of society and social primary norms actual methods of social management emerged, which served as transfer from the norms of the primitive society to law. Such intermediary phenomenon was the so-called „taboo system",

[803] L. Barac. Quoted works, p. 219.
[804] N. Parosanu. Punishment – Structural Element in the Legal Responsibility System. Doctoral thesis. Chisinau, 2010, p. 125.

as well as the law, in many cases specific to military democracy as a special stage in the emergence of the state[805].

During his investigation into the historic aspect of the legal punishment, refering to A. Anisimov, the author R. Haciaturov specified that the „taboo system" regulated almost all aspects in the life of the primitive man, both in personal and community terms and in itself represented a specific version of sanctions for breaching the norm[806].

The lenghty practice of this community had brought about the emergence of „taboos", corresponding to the so-called system of clan totemism (totem – is the Algonquin dialect of Native Americans for: relative of the brother or the sister. Initial meaning of taboo: isolated, separated). At first, totemism was an expression of the natural division of labor between communities, contributing to the circulation of food stock and the regulation of relatios between the sexes (members of clans belonging to the same totem could not marry each other). According to totemic faiths, members of the same clans or sibships considered themselves related directly to their totem (plant, animal)[807].

For example, the German scientist R. Schleiser indicated the following list of sexual taboos, in the order of their strictness:

- Forbidding the incest between brother and sister (both in reality and in myth, its trespassing is very seldom);
- Incest with the mother (is considered unnatural and unimaginable and no such cases are known);
- Sexual intercourse with the daughter (not too severely punished, considered reprehensible, there are many cases known);
- Sexual intercourse with the mother's sister's daughter (rarely encountered, very reprehensible and always kept secret, severely punished if discovered);
- Sexual intercourse with the wife's sister (not considered incest, yet such relation, even if it takes place as polygamy or with the sister of the late wife triggers strong revulsion, antipathy and disgust);
- Sexual intercourse with the mother-in-law or the brother's wife (condemnable, but not considered incest)[808]. The resemblance between these prohibitive rules and the subsequent criminal norms is amazing.

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[805] Д. Балтаг, Н. Парошану. Актуальные аспекты проблематики правового наказания в общей теории права. In:
Закон и жизнь, №4, 2010. с.7-21.
[806] Р. Л. Хачатуров, П. Г. Ягутян. Юридическая ответственность. Тольяти, 1995. с.31.
[807] T. Herseni. Sociology. Bucharest, 1992, p. 355.
[808] D. Baltag, A. Gutu. General Theory of Law. Chisinau, 2020, p. 87.

Such research confirms the fact that the social rules are essential to any form of social organization: they are necessarily determined by the social evolution and form a first challenge, a requirement of any order.

So far, we have established the fact that it is essential for each community to regulate behavior criteria. If the sanctions applied at the time had a legal or non-legal character, that remains to demonstrate.

We consider that in the primitive society such sanctions are of social, traditional, moral and religious nature, since in this stage historical development there was no special body to enforce them from the outside. In case of breach of taboos established in the norms, the sanctions were applied by the whole community. Their enforcing power was the result of the usefulness of those prohibitive rules being reflected in the individual consciesness[809].

From then on we can say that the law originated in „sanctions" and, at its naissance represented a sum of prohibitive sanctioning rules, which aimed mainly to create the sensation of fear. This is also refered to by the fact that in the oldest law sources of the Ancient Orient states and subsequently of all the world, the number of imperative and sanctioning legal provisions prevailed on the binding legal provisions, which also endured in the Feudal period. For example, of more than 400 articles from the „Salic Law" , only 65 are not sanctions and of the 48 articles from the „Russian Truth", only two are not punishments[810].

In this respect, the author R. Haciaturov specified: „In those times, the `criminal law` and `criminal punishment` assumed the role of general law in a sense, stimulating the process of emergence and consolidation of the state"[811]. However, we would like to specify that regarding that time, the term „criminal" is not most accurately chosen. When the law emerged, a long time after that there was no distinction between criminal sanctions and other types of sanctions. There was a single system of severe legal sanctions applicable to all those who broke the law. In current terminology that would mean to apply the severeest punishments for any breach of the law, regardless of the nature of the breached norm.

This is extremely important from the law theory standpoint, because it demonstrates unity of sanctions in its beginning. As specialists specify, the ancient world did not know a separation of this kind and any breach entailed here a repressive sanction that is any breach may be examined as criminal. For example, P. Sorochin considered that the absence of distinction between the criminal and civil sanction in early times was fairly known[812].

Only subsequent to a lenghty evolution the unity of legal sanction disappears and this evolution is studied also from a theoretical standpoint.

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[809] N. Popa. General Theory of Law. Bucharest, 1992, p. 35.
[810] Р. Л. Хачатуров, П. Г. Ягутян. Op. Cit., с. 35.
[811] Ibidem, с. 36.
[812] П. Сорокин. Преступление и кара, подвиг и награда. С.Пб: РХГИ, 1999. с. 292.

Consequently, only the criminal constraints enjoy the right to be called „punishments" and the others are no longer called that by virtue of their degree of severity which is smaller compared to that specific to criminal actions.

As we can see, the actual process of law enforcement cannot be separated from the idea of sanction, punishment and liability because liability and sanction are, were and will be genuine law enforcement instruments.

Among others, the Russian scientist A. Gigilenko, criminologist, professor at the University of Saint Petersburg, author of the paper „Sanction. Its Concept and Distinction from Other Actions To Protect the Rule of Law"[813], also directed his attention to this fact. It is important to us that in this paper, the author examined the phenomenon of legal sanction from a general-theoretic position, but not from the positions of law branches.

Regarding the evolution and later on the distinction between sanctions, A. Gigilenko especially specified that this distinction emerged only at the end of the XVIIIth century, the first being the disciplinary sanction as a result of disciplinary offences. This term of disciplinary offence appeared in the ecclesiastic jurisdiction for the nomination of „specific categories" of „special educational actions", applicable to „the clergy for insignificant illicit actions". In that time, this particular notion, although used by the researchers of cannonical law, was unknown to legal scholars[814].

Further on, the author specified that in those times, one of the clergy, Vize, noticed that the confessor priests are dealt specific disciplinary sanctions (*Disziplinärstrafen*) to which he attributes „prison", „temporary suspension" (*Suspension vom Amte*) as well as „dismissal" (*Amtsenthebung*). The author further states that this is not treated by any legal scholar of those times who would have been preoccupied by the analysis of breaches in office[815].

In 1764, the German legal scholar Bemer, when studying the small offences of his servants, which he called (*excessus*), he sets them in counterbalance to crimes, specifying that in the cannonical law, the distinction between these notions also consisted in the fact that „punishments" are applied for crimes and certain limitations (*cesurae*) for small offences (*excessus*). In time, the severity of those limitations (*cesurae*) has increased to actual punishments, but they were not called criminal sanctions in order to avoid the impression that the clergy perform criminal justice[816].

As we can see here, there are the emergence of the theoretical division of sanctions into criminal and disciplinary. Most importantly, during that period, the

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[813] А. А. Жижиленко. Наказание. Его понятие и отличие от других средств правоохраны. С.Пб., 1914.
[814] А. А. Жижиленко. Op. Cit., c. 583.
[815] Ibidem.
[816] Ibidem, c. 584.

theoreticians and lawmakers avoided to use the term punishment (as conviction, condemnation, torture, trouble and ordeal), as opposed to disciplinary constraints (*cesurae*) or of other nature. This had many motives as premises. Sometimes the disciplinary sanctions were severe enough (imprisonment), which made fairly difficult to differentiate them from the criminal sanctions. However, for lack of theoretical-scientific arguments about criminal and the other sanctions, the only way to differentiate them was to use distinct terminology. This path is followed today as well and the punishments are the only category of sanctions applicable to offences in the criminal law. In the other branches, it has a different terminology, although there are also, as we have previously mentioned, oppinions which consider this as an obstacle in the process of theoretical and practical development of sanctions[817].

Returning to the history of the theoretical studies of sanction, we specify that in the XIXth century there is an ongoing defining of criminal of the „non-criminal" sanctions, but still by using different terms. For example, the same author, A.A. Gigilenko, makes a reference to the German legal scholar Binding who stated that the criminal law is the right to compensation for the offence. For this reasons, the criminal sanction (the punishment) is different from the disciplinary sanction which is not punishment in legal sense, the criminal punishment is applied for commiting the criminal act and with regards to disciplinary sanctions, that is applied not for the commited act itself but for a certain undisputed „disorder" and „neglijence" with the activity of the person in a position of responsibility, such as registrar, attorney and notary. His conclusion is that this is the reason why we should talk about „disciplinary action", not of „disciplinary sanction"[818]

The same author, A.A. Gigilenko, pointed out the precarity of defining the sanctions only from terminological point of view. In the paper which we previously nominated, the author is substantiating the necessity of unity and, at the same time, defining of all types of legal sanctions and from the standpoint of the correlativity between the sanction as legal category and criminal, civil and disciplinary sanctions as legal institutions specific to legal branches. Therefore, in the category of legal punishments he includes not only the criminal, but also disciplinary, administrative, civil and procedural punishments. He does not see any obstacle in grouping them under a single term „legal punishment", on the contrary, he supports the theoretical utility of such position.

This brief historical summary was necessary in order to argue the early unity of the legal sanctions and their reflection within a single theoretical abstraction. Similarly, we have also followed the evolution of the examined

[817] N. Parosanu, quoted work, p. 74.
[818] А. А. Жижиленко. Quoted work, c.602.

phenomenon and some theoretical studies dedicated to it. Finally, we may draw the following conclusion: the historical process of scientific study of the phenomenon „legal sanction" began with a single thesis about this phenomenon, from which various visions developed, materializing in multiple abstractions which presented the phenomenon as a sum of component parts. This process has purposely eclipsed the unity of legal sanction which represents an inevitable stage of the studying of the consequences of breaching legal norms.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

SUBJECTIVE LAW AND ABUSE OF PROCESS

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Summary

The general theory of law represents an unitary and essential overview on the law constants which study its concepts, categories, principles and basic notions.

The theory of law which approaches the regularities of the complex juridical phenomenon, may not ignore the structural analysis of such phenomenon and its particular modalities of expression afterwards rediscovered in new constructions.

This article represents the referrence considerations of the authors in respect of theories, subjects and evolution of the abuse of process concept.

Key-words*: subjective rights, abuse of process, subjective theory of the abuse of process, objective theory of the abuse of process.*

One of the most difficult subjects the law students are coping with is the law implementation and enforcement issue. Law implementation is a process. Such process means the existence of a behaviour tailored to the spirit and the letter of the law. When the behaviour fails to comply with such restrictions and when legal norms are ignored and disregarded, there are two new categories to consider – the *abuse of process* and the *fraud to the law,* as connected issues, indissoluby tied to the relationship between the spirit and the letter of the law and, meanwhile, so relevant for the general theory of law.

It is to be established if the legal entity may do anything with its subjective rights, considering the law to which is subjected upon the moment of the free determination of its behavioural option. Such option may not exclussively result on a whim, but of the letter of the law. The letter of the law limits us to the strict literal interpretation of the law and legal norm contents. The respective behaviour may not comply with the requirement set forth at article 55 of the Constitution of the Republic of Moldavia „Exercise of rights and liberties". „Any person who exercises his/her constitutional rights and liberties in good faith, without violating the rights and liberties of other persons". In this respect, juridical norms steer, influence and determine the behaviour of legal entities. Most of the time, legal entities tend to adhere to legal norms and values promoted by the society and to observe them, other times such norms are violated or neglected[1].

In case of abuse of process, the rights and liberties of legal entities granted by legal norms, are exercised in bad faith and fail to reach the goal considered by the lawmaker, thus, the spirit of the law being violated. The abuse of process is also when the „letter of the law" is breached and the legitime rights and interests of any legal entity are prejudiced or when it is illegally applied and, thus, adverse consequences for anyone protected by the lawmaker arisen.

The actuality of this subject also consists of the generalisation tendency of the abuse of process, entailed by law unsteadiness and re-interpretation of „good faith" notion through the conduct of legal entities, the abuse of process being a constant presence in the most of our legal life scopes. There are virtuous or primitive approaches, depending on the actual holder of the subjective right. Currently, we notice in our society a general trend of abuse of process, as from the rulers to the ruled. The moral sense of the participant in a legal relationship, irrespectively of its position, is not considered anymore as a virtue, except for some restricted and exclusivist milieux, and the express claiming for particular values often appear to be a sign of inadaptation by which the direct interest of the subjective rights of holder is methodically abused thus, justifying any conduct whatsoever while the „guilty" person has no conscience problems, acting as the majority do. Therefore, the generalized abuse is neutralizing the individual guiltness"[3].

Taking into account the idea that „logic triggers the scientific conclusion according to which no state has a monopoly on the real law and, worldwide, the positive law also contains and generates the non-law, that can be estimated only by actual recipients"[4], we consider the the abuse of process may be not only the result of the exercise in bad faith of the subjective rights, but sometimes a kind of protest of their legal holders against the modality in which it has been accepted. However much the legal norms are unjust, they should be strictly observed and more abused they are, higher the injustice degree is, as example, the excessive tax burden generates abuses from the part of the tax payers[5].

The importance of approaching the abuse of process by the perspective of the general theory of law is given both by an overview on the abuse of process and the highlighting of special and particular elements of the abuse of process in various domains. If, up to now, special studies intended to a specific category of abuse of process were elaborated, this paper focuses on a new approach of the concept analysis, followed by a generalization, a synthesis of such legal phenomenon.

Thus, the adepts of the subjective theory allege that such theory pertains to the exclusive domain of the ownership right, emerging under the French jurisprudence at the end of the XIXth century. The others, as adepts of the objective theory to which we rally, too, support the fact that the theory of abuse of process is not limited to real rights only, being also possible in the law of obligations,

corporate law or procedural law (both criminal and penal) and, as a consequence, they hold that the „the abuse of process originates from the Romans"[6].

Roman lawyers were often coping with the fact that the holder of subjective rights used to exercise the right granted by the law to the detriment of other people. As an example, the landowner, by erecting a house on the land, shadows a part of the neighbour's garden or hinders the access of the same on his/her territory, its borders or waters. Such circumstances entailed situations in which the landowner, by exercising his/her right of possession, use and disposition, prejudices the interests of other persons. Nevertheless, in such cases, Roman jurists denied the possibility of a abuse of process (*nollus videtur dolo facere, qui suo iure utitur* – No one is considered to act with guilt who uses his own right).

The question „could we exercise our rights in order to commit wrong (especially, having in view the well-known thesis of Ulpian that „*lex est ars boni et aequi*")" is, currently, a controversial issue.

The Latin word „abut" does not referred to an abuse, but to the right to consume a thing, as per the Ulpian's Pandects[1], and a current dictionary explains the Latin word „*abusus*" as the „total use of a thing"[2]. Roman jurisconsults did not preoccupy to elaborate a sophisticated theory, but to offer practical solutions for particular cases. In case of abuse of process, the arguments were the same, as evidenced by a lot of Latin adages codified and gathered in various collections. Here are some adages: „*quo suo jure utitur, nimenem laedit*"[819] (a person who exercises his or her legal rights harms no one) and „*sie utero tuo ut alienum non laedus*" (a person may exercise freedom of action as regards his or her property). „*Feci sed jure feci*"(a maxim according to which the rights could be exercised in an egoist manner, irrespective of the intended goal and prejudices brought, as they are exercised as per the laws) is a principle applied in the Roman law with great reservations only, meanwhile the principle „*malitus non est indulgendum*" (there is no indulgence for villainies)[820] being widely agreed.

The Roman law also knew the two abuse of process-related notions: the fraud to the law and the principle of good faith; as Paolo said: „*contra legem facit, quid id facit, quod lex prohibet; in fraudem vero, qui salvis verbis legis sentimentiam eius circumvenit*" (speaking of the spirit of the law to the detriment of its formal, literal meaning). Also, the good faith (*bona fides*) was distinct of fairness and the domain of bona fide agreements was also protected by the „*exceptio doli*" (good faith exception). Cicero defined the good faith as a double notion: *veritas* (sincerity expressed in words) şi *constantia* (fidelity in undertakings), also disclosing, for the first time, its psychologic background by the

[819] Gaius. Digesta justiniani. Book 1. Title 17.Apud U. Elsner. Op. Cit. p. 15.
[820] H. Palade Constantin. Abuse of process. In: Romanian Pandects, no. 11, 2010. pg. 75.

following adage: „*simper autem în fide quid senseris, non quid diheris cogitandum*"[821] (the real good faith relies on intention, not on words).

We have to specify that the outcome of this maxim is kept in the Civil Code of the Reublic of Moldavia, article 725, paragraph (2) „The contract is to be construed depending on the common will of the parties, without limitation to the literal meaning of the utilised words".

The common law in the Middle Age did not turn off the solutions consacrated by the Roman jurisconsults, by approaching the abuse from case to case. The judicial practice, initially considering „minor happenings", put the bases of the theory about the abuse of process. For example, the Parliament in Aix, on the 1st of February, 1557, punished the owner of a wool combing machine who used to sing for the sole purpose to innoportunate a lawyer in the neighbourhoods.

Another example is a Decree of the Court in Colmar, passed on the 2nd of May 1885 (the elevation of a chimney for the purpose to shadow the neighbour's property), in the contents of which it is noticed the necessity to restrict the subjective rights up to a „serious and legitime interest" for which the rights have been recognized and subordinated to the principles of morality, fairness and good faith[12].

Also, its enforcement extended from the real estate rights to the procedural ones. A Decree of the French Court dated 1365 compelled the appealing party to pay compensation for voluntarily delaying the regular procedures[822]. However, the recent French doctrine[5] denies the importance of the jurisprudence and sustains that it is the real builder of such institution.

The Civil Code of Austria (Prussia in 1794) launches, for the first time, in a codified law, the expression „abuse of process" as a general principle, enforceable to all subjective rights. The absence of the intention to harm, as part of the abuse of process, is noticed here, in comparison with the Roman law and the common law. The Civil Code in Montenegro, even from 1888, is sanctioning the exercise of a right only for the purpose to brought someone a prejudice[5], and recognizes the abuse existence only in the lack of intention and in consideration of its outcome.

The idea of the abuse of process does not appear in the French Civil Code in 1804, but, on the occasion of a case file on administrative acts, the State Council proceeded to the recognition of the „power misappropriation" concept, subsequently applied by the laws. Neither in the Austrian Civil Code in 1911, this institution does not appear anymore and article 1305 even stipulates a provision which could suggest the inconsistency with the concept of abuse: „who uses his or

[821] Ibidem.
[822] H. Palade Constantin. Op. Cit. p. 76.

her right within the limits of the law, is not liable for any damage whatsoever entailed by such abuse".

Such Codes, elaborated under the influence of the natural law school, considered that the rights are general, universal and genuine and have the appearance of the so-called „ human inborn rights" (individual liberty and equal rights – ownership right is among such rights), that cannot be controlled by any court whatsoever[5].

The Soviet doctrine approaches the same issue in the same negativism. Thus, for example, some jurists theoreticiens as S. N. Bratusi and M. V. Samoilov argued that the legal notion of „abuse of process" is meaningless. In defending their idea, they invoked the famous French jurist, M. Planiol. Planiol considered that the theory of abuse of process itself is illogical. He sustained that as the „right ceases where the abuse starts", we cannot talk about abuse of process, thus „one and the same act may not be, at the same time, consistent and inconsistent with the law"[5].

According to the author N.S. Malein, the idea of abuse of process was not justified and had no clear and convincing explanation in the modern literature. Referring to a monograph by the author V.P. Gribanov, published in 1972, about the limitations of reaching the civil subjective rights, by abuse of process, N.S. Malein understands such cases when the holder of a subjective right acts within the limits of those possibilities which, thus, consist in realization forms outside the legal limits of the right. Then, either the subject acts "within the right" which belongs to him and in this case he does not abuse his right or he acts "outside the limits set by law", thus by breaking the law he does not abuse his right but commits a crime, which entails legal responsibility. In both cases, the author concludes, there is no idea and rule for abuse of process.

Under the pressure and social necessities or interests of the "Great Capital", both in Democrat-Burgeoise and Socialist-Totalitarian regimes, the absolute doctrine of rights was gradually replaced with the doctrine of their relativity. Going through jurisprudence and then through the prism of doctrine, the idea of abuse of process brings the social function of right in the spotlight of legal life, as well as the position and role of its construer.

The famous aphorism of Planiol "*le droit cesse ou l'abus commence*" was opposed by another "*ou le droit commence l'abus cesse*", which is closer to the truth. The partisans of the negativity theory were probably mistaking the concepts of objective law (the ensemble of legal norms) with subjective law (determined prerogative, belonging to a subject). Thus, once this confusion is removed, there cannot be any objective abuse of process, however, we can speak of subjective abuse of process or, more accurately put, about the abusive exercise of process.

In conclusion, we specify that the generic subjective rights entered (sanctioned or created) in the law in force are possibilities destined for virtual

subjects, while in their exercising there are actual legal possibilities, capitalized in action by actual capable subjects, individuals or legal entities, citizens, taxpayers, state authorities, associations and organizations. Here we may infer that the exercising of a subjective right, regardless of its nature, is necessarily provided by its abstract and generic existence in the objective law. Only exceeding the internal limits of a defined subjective right, by its misappropriation from its social and economic purpose is an abuse of process and entails the legal responsibility of the holder.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"

REGIONALIZATION, CURRENT NATIONAL CONCERN; THEORETICAL AND PRACTICAL APPROACHES

PH.D. TUDOR PENDIUC
MAYOR OF PITESTI

"A central power, however enlightened and academic would be
can not cover all the details of a people's life."
"About Democracy in America" Alexis de Tocqueville"

Summary

A major concern of the Romanian authorities and citizens in general is overcoming the crisis in which we find ourselves.

One way to overcome the current problems, but also for ensuring a balanced development of the country is regionalization, in fact a new administrative reorganization of Romania.

Vast, complex, lengthy and highly sensitive process, regionalization benefit from a legal framework that shows the steps and ways of action required of such an approach.

This paper examines different aspects, theoretical and practical, arising from the related legislation regionalization process and from our current realities.

Keywords: reform, reorganization, administration, regionalization, objectives.

Improving the quality of life should be the primary objective, the permanent concern of any government at any level would be.

At the current stage of Romania's evolution and development, regionalization - actually a new administrative reorganization of the country is considered one of the main ways of current action, especially for overcoming many difficulties which we are facing with.

Any action taken in this regard, must fit in the current European context, and must respect the guidelines but especially the European Community directives.

One of the main documents that Romania's actions and measures must be reported to is " Territorial Agenda of the EU 2020 - towards a smart, sustainable and favorable to inclusion Europe, composed of diverse regions", which provides:

- In accordance with The Treaty on the Functioning of the EU (Art. 174 and 175), all Union policies and activities should contribute to economic, social and

territorial cohesion. Therefore, the responsible factors for elaborating and implementating sectoral cohesion should take into account the principles and objectives of Territorial Agenda.

- The objective of AT2020 is to provide strategic guidance for territorial development, promoting the integration of territorial dimension in different policies at all levels of government, and to ensure the implementation of the Europe 2020 Strategy in accordance with the principles of territorial cohesion.
- We consider that the EU objectives defined in the Europe 2020 Strategy for a smart, sustainable and favorable to inclusion growth can be achieved only if the territorial dimension of the strategy is taken into account, as the development opportunities vary from one region to another.
- We consider that the territorial approach in elaborating policies contributes to territorial cohesion. Relying on the principles of horizontal coordination, elaboration of policies based on empirical data and the development of integrated functional areas, such an approach applies the subsidiarity principle through multilevel governance.

In this European framework enter the objectives of Governance Program 2013-2016, from chapter "Development and Management":

- "Administrative-territorial Reorganization by creating the institutional framework for the administrative-territorial regions."
- "The functioning of public administration, emphasizing the increase of local autonomy by really activating the decentralization process, respecting the subsidiarity principle."

Establishment of administrative-territorial regions and decentralization contribute to:

a) reducing the existing regional imbalance by:
- stimulating a balanced development
- an accelerated recovery of economic and social delays of less developed areas
- prevention of new imbalances

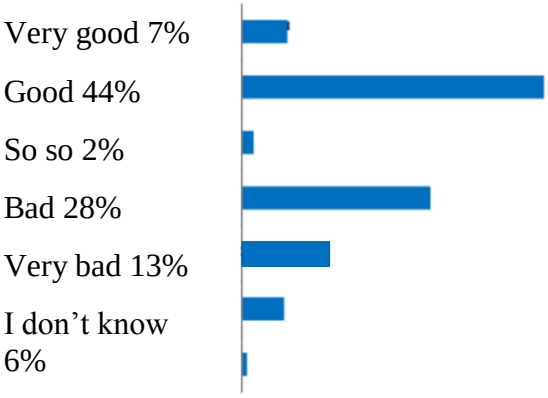
b) correlation of government sectorial policies at regional level by:
- stimulating initiatives
- capitalization of local and regional resources
- cultural development and territorial cohesion

In this way I consider interesting and welcome the **sociological study, "Regionalization - expectations, fears and illusions"** realized by IRES, in February 2013.

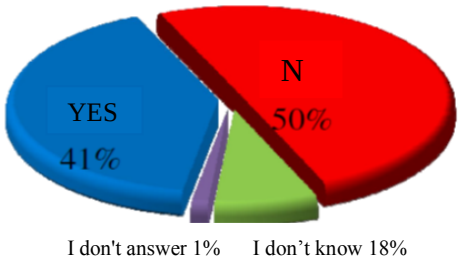
How do Romanian citizens receive the Regionalization?

Sociological study "Regionalization - expectations, fears and illusions" IRES, Feb 2013

The opinion of population about the Regionalization



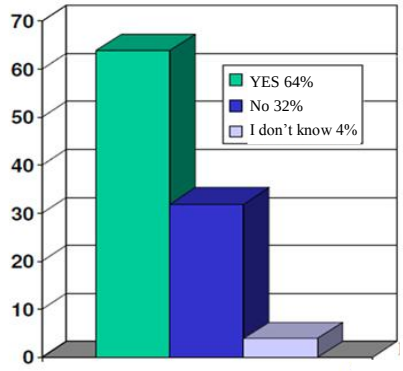
Federation of Romania could be a risk of regionalization?



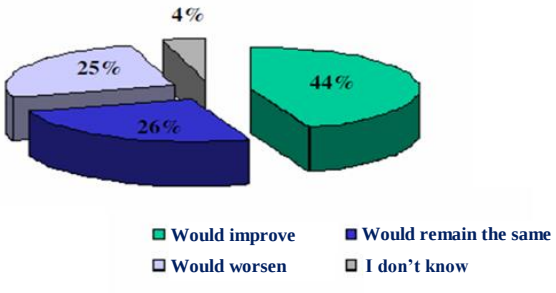
How do Romanian citizens receive the Regionalization?

Sociological study "Regionalization - expectations, fears and illusions" IRES, Feb 2013

Does represent the Regionalization a risk for developing differentiated development?



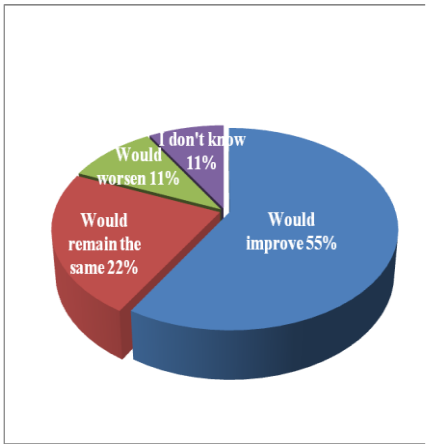
How will offer the jobs evolve in your community?



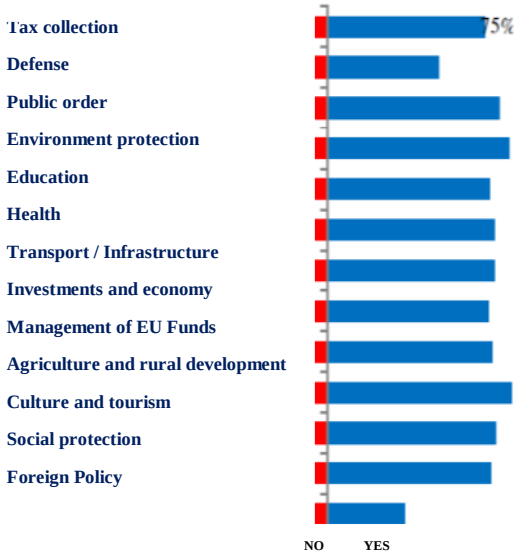
How do the Romanian citizens receive the Regionalization?

Sociological study "Regionalization - expectations, fears and illusions" IRES. Feb 2013

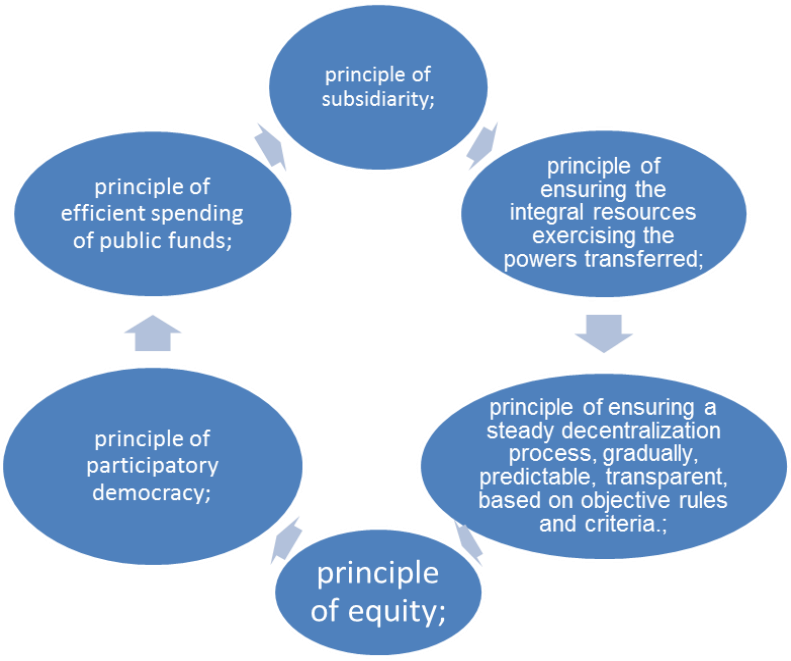
How will the process of attracting European fund change through regionalization in your community?



Do you think that the fallowing Government should be delegated regions?



One of the most important actions intended to contribute to achieving the both objectives of this chapter "Development and Administration" was the approval, on 19 of February 2013, of the Memorandum with the topic: "Adopting the necessary measures to start the process of regionalization - decentralization in Romania", establishment the strategic objectives, the principles of decentralization process, institutional framework and the calendar of necessary activities for implementing the established measures.



II. Strategic objectives of the Process of regionalization – decentralization

The 2013-2017 Government Program offers, in chapter "Development and Management", the objectives relating to **competences powers to be exercised by future regions**, respectively:

1. **Regional level:**
   - economic development of region;
   - European management funds at regional level;
   - managing and modernization of regional infrastructure;
   - managing the health infrastructure and medical assistance at regional level;
   - promoting the sights of regional interest;
   - planning the regional level;
   - development the technical school education, professional and higher education at regional level;
   - development of regional issues for development of agriculture;
   - managing the social protection programs at regional level;
   - protection of environment at regional level;
   - emergency situations management at regional level by creating a regional intervention system;

- promoting the performance sports at regional level;
- cultural development at regional level.

2. County level:

Decentralized public services from counties will become interest **institutions of county / local coordination / subordination of local authorities.**

The whole reorganization of administrative-territorial process involves the crossing of **three administrative processes**, which are correlated and closely interrelated as follows:

- The process of revising the Constitution;
- The process of developing the regulatory framework necessary for the organization and functioning of regions;
- The process of developing the regulatory framework necessary for decentralization of regions competencies, counties, municipalities, cities and villages.

III. Organizational and institutional framework that will manage the development process of regionalization.

In order to start the process of drafting the legal framework necessary for the organization and functioning of regions was the *Advisory Council for Regionalization* which was organized and functionating on the following expertise groups:

- ✓ Academic Working Group;
- ✓ Working group of lawmakers and local elected;
- ✓ Civil society working group, composed of representatives from employers, trade unions and non-governmental organizations.

To start the process of drafting the regulatory framework needed to establish the skills of all administrative levels it was established the *Regionalization and Decentralization for Interministerial Technical Committee.*

Maybe the most sensitive and complex issue in this process is the establishment of regions. For this it is necessary to following the **next steps:**

- analyzing the results and prospects of current developing regions;
- the impact study of regionalization taking into account the economic, administrative, sociological, cultural, historical component, local traditions, etc.;
- establishment the criteria for a new administrative "map";
- elaboration the new administrative map;
- elaboration of regional strategies in line with the national development strategy of the country and the European Strategy;
- establish the prioritizing of regional development with project definition "master";

- developing the criteria for establishing the regional centers;
- establish the regional centers and the new administrative structures.

The success of **administrative-territorial reorganization action** depends on many factors and many elements such as:

- ❖ Prevailing the sound **economic arguments** and officially confirmed;
- ❖ Avoid as much as possible the **compromises and concessions**;
- ❖ Establish a **growth strategies** that will bring the current weaker counties in economic domain, at best level and not reverse;
- ❖ Capitalization the current **economic image** and the best representation of each county in the current region;
- ❖ Taking into account the existing **economic potential** in each county;
- ❖ Preventing the **multiplier effect of jobs** result from economic profile of each county;
- ❖ Taking into account the point of view for the **business environment**;
- ❖ Giving up the **local patriotism** unsupported by the facts;
- ❖ **Making realizing other geographical groupings to the current even by changing the current number of regions based on common interests and projects.**

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4. Sociological study "Regionalization - expectations, fears and illusions" accomplished by IRES, in February 2013 and presented by Mr. Constantin Stroe in the meeting regarding the process of regionalization - decentralization organized by A.O.A and the Arges Chamber of Commerce and Industry.

ANNULMENT OF THE ARBITRAL AWARD AS PROVIDED IN THE NEW CODE OF CIVIL PROCEDURE

Professor S. Cercel, PhD
Professor Şt. Scurtu, PhD

Abstract: In accordance with the former Code of Civil Procedure, the only way to annul the arbitral award was an action for annulment. The present Code of Civil Procedure has established the same view, choosing to simplify the legal regime of the arbitral award annulment. However, as compared to the former code, the code that came into force on 15 February 2013 brings some changes and innovations with regard to the reasons that can justify an action for annulment of an arbitral award. It establishes a jurisdiction differing from the one in the former code, the action for annulment coming within the jurisdiction of the court of appeal in the judicial district of which the arbitration took place. The judgment admitting the action for annulment is subject to the last appeal, with the possibility of exercising the appeal for annulment and the review.

Preliminary issues. Different national legal systems do not provide identical regulatory frameworks for the regime of the annulment of an arbitral award. Legislatures have opted either for several ways or for a single way of annulling an arbitral award[823].

Moreover, the view of the legislature concerning the legal nature of arbitration (jurisdictional, contractarian or mixed) is determined in the regulation of the ways of annulling arbitral awards. Therefore, if arbitration is considered jurisdictional in nature, the rules of common procedural law are followed for the judicial review of the arbitral award, if its legal nature is seen as mainly contractual, the annulment of the arbitral award is performed by means specific to contracts, and if the double legal nature of arbitration is accepted, the annulment of the arbitral award is achieved both by common appeal procedures and by means specific to contracts[824].

[823] On several solutions found in various national legislations concerning the annulment of the arbitral award, see I. Leş, Tratat de drept procesual civil, ediţia 5, cu referiri la Proiectul Codului de procedură civilă, Editura C. H. Beck, 2010, footnote 3, p. 905.
[824] With regard to the three views on the legal nature of arbitration and the consequences of choosing one of the qualifications proposed by the doctrine, see O. Căpăţînă, Litigiul arbitral de comerţ exterior, Editura Academiei R.S.R., 1978, p. 19 sqq.

The 1865 Romanian Code of Civil Procedure, based on the dualist view on the legal nature of arbitration, adopted the following solutions: an arbitral award could be annulled not only by an action for annulment (a way of annulment specific to contracts), on one of the five grounds expressly and strictly provided by law, but also by means of all ordinary and extraordinary appeal procedures specific to judgments[825].

Following the reform achieved by Law 59/1993[826], the Romanian legislature renounced the solution of regulating several appeal procedures against an arbitral award, choosing the solution of annulling it only by the action for annulment, regardless of the organisation form of arbitration (occasional or institutional); it also limited the grounds on which an arbitral award can be annulled through binding norms, maintaining judicial review on the arbitral award, but within narrow limits, strictly determined by law[827]. One of the limits of judicial review were the grounds restrictively enumerated by the legislature for the annulment of the arbitral award, all the nine grounds enumerated under art. 364 of the Code of Civil Procedure aiming at the non-legality of the award, the court not being allowed to investigate other judgment errors invoked by the parties, such as those referring to evidence evaluation or the interpretation of some legal

[825] Between 1953 and 1989, the regulations contained in the Code of Civil Procedure in the matter of arbitration were not applicable to institutional arbitration, but to occasional arbitration which, although allowed by the legislature, was not used in practice, institutional arbitration having its own rules, even in the matter of arbitral award annulment. Thus, in the arbitration organized by the Arbitration Commission in Bucharest, in accordance with the regulations of this commission, in force until 1990, the decisions of the commission were final and were not subject to the last appeal regulated in the Code of Civil Procedure, since the dispositions in the Regulations of the Arbitration Commission in Bucharest could not be completed by those of common procedural law. The arbitral award made by the A.C.B. was subject to review by way of re-examination, within the competence of the Arbitration Commission, and if the re-examination request was admissible, the arbitral award was annulled and the dispute was subject to arbitration again (for further details, see O. Căpăţână, op. cit., p. 124).

[826] Law 59/1993 for the amendment of the Code of Civil Procedure, Family Code, Law on administrative dispute no. 29/1990 and Law 94/1992 on the organisation and functioning of the Court of Accounts was published in the Official Gazette no. 177 of 26 July 1993.

[827] With regard to the legal regime of the action for annulment of the arbitral award established by the former Code of Civil Procedure, after it was amended by Law 59/1993, see Șt. Scurtu, „Cronica arbitrajului", „Hotărâre arbitrală. Exercitarea controlului judecătoresc din perspectiva art. 364 C. pr. civ.. Limite (High Court of Cassation and Justice, commercial section, decision no. 3311 of 14 October 2010)", in Pandectele Române no. 5/2011, p. 243 sqq.

dispositions[828]. The other limit of the judgment were the grounds invoked in the action for annulment, the court having the possibility of analyzing, as a rule, the grounds it has been invested with. But "the nullities concerning public order may be raised by the party or the judge in any stage of the trial" (art. 108 par.1 of the 1865 Code of Civil Procedure) [829].

The legislature's renouncement to the appeal procedures within common procedural law was necessary, since they are incompatible with the arbitral procedure characterized by celerity and confidentiality, whereas the exercise of common appeal procedures has a dilatory effect with regard to the settlement of disputes, and the confidentiality rule of the arbitral procedure is replaced by the principle of public sessions and the requirement of delivering the judgment in a public session.

As a matter of fact, the modern view on arbitration tends to render it autonomous of courts, by limiting the interference of state courts in the arbitral dispute.

The New Code of Civil Procedure[830]. Having come into force on 15 February 2013[831], the new Code of Civil Procedure took over from the previous Code of Civil Procedure, as amended by Law 59/1993, the legal regime of the arbitral award annulment, establishing a single appeal procedure against the arbitral

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[828] As for the conditions under which one could invoke one of the nine grounds for the non-legality of an arbitral award, under the former Code of Civil Procedure, see I. Băcanu, Controlul judecătoresc asupra hotărârii arbitrale, Editura Lumina Lex, Bucureşti, 2005, p.117; I. Deleanu, in I. Deleanu, S. Deleanu, Arbitrajul intern şi internaţional, Editura Rosetti, 2005, p. 304.

[829] Similarly, see I. Băcanu, op. cit., p.117 and I. Deleanu, op. cit., p. 304. When "an arbitral award violates public order, mores or binding provisions of law" (art. 364, letter i of the 1865 Code of Civil Procedure), "the court may act ex officio, together with the other reasons provided by the party" (I. Deleanu, op. cit., p. 304). A contrary opinion is held by V. Roş, who considers that "none of the grounds on the basis of which one may request the annulment of an arbitral award by an action for annulment can be invoked and debated by the court ex officio … so that the court may use this prerogative, the reasons must concern public order, and the prerogative must be provided by law", as in the case of the last appeal – art. 306 par. 2 of the 1865 Code of Civil Procedure (V. Roş, Arbitrajul comercial internaţional, Regia Autonomă „Monitorul Oficial", Bucureşti, 2000, pp. 493-494).

[830] The references in this paper to different articles, without any normative specification, are made to the new Code of Civil Procedure.

[831] The new Code of Civil Procedure was adopted by Law no. 134/2010 on the Code of Civil Procedure (Official Gazette no. 485 of 15 July 2010) and subsequently amended by Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Code of Civil Procedure (Official Gazette no. 365 of 30 May 2012). The new Code of Civil Procedure was republished, on the basis of art. 80 of Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Code of Civil Procedure, in the Official Gazette no. 545 of 3 August 2012.

award – the action for annulment (pursuant to art. 608 of the Code of Civil Procedure, "An arbitral award may be annulled only by an action for annulment")[832].

The action for annulment of an arbitral award has a sui generis character, not being assimilated by the action for annulment of a contract or by the judicial appeal procedures, since it contains both annulment grounds specific to contracts, and annulment grounds specific to judgments[833]. On the other hand, some grounds (provided by letters a, b, c and e) are specific to arbitration, and the other (provided by letters d, f, g, h) are similar to those provided in the matter of appeal procedures specific to court judgments[834].

The Romanian legislature was inspired by the UNCITRAL Model Law, which consecrates the action for annulment as the only means for the annulment of an arbitral award. In accordance with the UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, the appeal procedure exercised before a tribunal against an arbitral award can only take the form of an action for annulment – "application for setting aside" (art. 34, par. 1).

Similarly, the Romanian legislature took over the solutions of the Model Law concerning the completion and correction of arbitral awards, regulating the possibility of completing an arbitral award and correcting the errors in its text by a corrective interlocutory judgment, even with regard to the possibility for the arbitral court to clarify the arbitral award, in case "one needs clarifications concerning the meaning, scope or application of the disposal of the judgment or it contains contrary dispositions" (art. 604 of the Code of Civil Procedure) [835]. In the previous code as well, although the legislature had not established by a legal norm the possibility of interpreting the disposal of an arbitral award, the juridical literature was dominated by the opinion favouring the admissibility of such a request[836].

Finally, before starting a brief analysis of the grounds underlying the annulment of an arbitral award, we have to specify, as already done by the

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[832] As shown in the specialized literature, by making reference to the practice of the supreme court in the matter, the establishment of another appeal procedure by the regulation of a permanent arbitration institution is void, since the legal norms regarding appeal procedures are binding, and the law prohibits any derogation of public order concern (I. Deleanu, op. cit., p. 285).

[833] V. M. Ciobanu Tratat teoretic şi practice de procedură civilă, vol. II, Editura „Naţional", Bucureşti, 1997, p. 613; similarly I. Băcanu, op. cit., p. 17. With regard to the legal nature of the action for annulment, see I. Băcanu, op. cit., p. 18 sqq.; I. Deleanu, op. cit., p. 286 sqq.

[834] R. B. Bobei, op. cit., p. 175.

[835] For further details on the previous code, see V. Roş, op. cit., p. 441.

[836] With regard to this issue, see I. Deleanu, op. cit., pp. 271-272.

doctrine, that art. 608 of the Code of Civil Procedure must also be interpreted in relation to the view established by art. 9 of the Geneva Convention (1961), since, through the effect of ratifying this convention, as well as of signing the New York Convention (1958), "these international documents have become components of the Romanian legal system" [837].

Pursuant to art. 608 (1) of the Code of Civil Procedure, an arbitral award may be annulled by an action for annulment on one of the following grounds:

a) the dispute was not subject to settlement by way of arbitration;
b) the arbitral court settled the dispute without any prior arbitral convention or on the basis of a null or inoperative convention;
c) the arbitral court was not constituted in conformity with the arbitral convention;
d) the party was absent at the time of the debates and the summons procedure was not legally performed;
e) the award was made after the end of the arbitration term as provided under art. 567, although at least one party declared to raise caducity, and the parties did not agree to continue the judgment, in accordance with art. 568 par. (1) and (2);
f) the arbitral court decided on some issues that were not requested or gave more that it was requested;
g) the arbitral award does not contain the disposal and the grounds, it does not indicate date and place of judgment or it is not signed by arbitrators;
h) the arbitral award violates public order, mores or binding legal provisions;
i) if, after the arbitral award is made, the Constitutional Court ruled on the exception raised in that case, declaring as unconstitutional the law, ordinance or disposition of a law or ordinance making the object of that exception or other provisions of the challenged act which, necessarily and obviously, cannot be dissociated from the provisions mentioned in the application.

By observing the grounds justifying an action for annulment, regulated by the new Code of Civil Procedure, we can see that most of the grounds provided in the 1865 Code of Civil Procedure were literally taken over in the new code. Yet, the new legislature renounced some of the grounds provided by the former legislation, considering that the nonconformities of the arbitral award may be remedied after it has been made; thus, the fact that "the disposal of the arbitral award contains provisions which cannot be fulfilled" (reason provided in art. 364

[837] R. B. Bobei, Arbitrajul intern şi internaţional, Texte. Comentarii. Mentalităţi, Editura C. H. Beck, 2013, pp. 175-176.

letter h of the 1865 Code of Civil Procedure) or the fact that the arbitral court "did not dispose of a certain requested issue" (reason provided in art. 364 letter f, second hypothesis of the 1865 Code of Civil Procedure) does not constitute any grounds on which the action for annulment can rely. In exchange, the legislature provided other procedural means in order to remedy such errors or omissions of an arbitral award, namely the procedure of clarifying and completing the disposal of the arbitral award by the arbitral court (art. 604 of the Code of Civil Procedure). Actually, the former Code of Civil Procedure, in case the arbitral court "did not dispose of a certain requested issue", the party had a right to opt, in the sense that he could use the procedure of completing the arbitral award (under the terms provided in art. 362 of the 1865 Code of Civil Procedure) or of having it annulled by the action for annulment (on the grounds of art. 364 letter f of the 1865 Code of Civil Procedure).

In a similar way, some of the grounds for the annulment of the arbitral award may be invoked only by observing a supplementary condition established by the legislature, namely that nonconformities should have been invoked before the arbitral court, under the terms of art. 592 (1) of the Code of Civil Procedure, according to which "Any exception regarding the existence and validity of the arbitral convention, the appointment of the arbitral court, the limits of the duties of arbitrators and the performance of procedure until the first hearing to which the party was legally summoned shall not be raised, under the sanction of losing this right, later than this hearing, unless otherwise provided."

Finally, "the nonconformity of procedural acts shall be covered if it was not invoked by the person interested at the hearing when it was caused or, if he was absent at that hearing, at the first hearing when he was present or legally summoned after the occurrence of the nonconformity and before the end of the first instance trial". Therefore, the nonconformity regarding the procedural acts may be invoked as a cause of the action for annulment of an arbitral award only if it was first invoked in the course of the arbitral award procedure, with the observance of the conditions provided in art. 592 par. 3 of the Code of Civil Procedure. In this sense, the law does not allow any interpretation (pursuant to art. 608 (2). "It is not possible to invoke as grounds for the annulment of an arbitral award the nonconformities which were not raised in accordance with art. 592 par. (1) and (3) or which can be remedied following the procedure provided under art. 604").

One of the legislature's innovations in respect of the grounds for the action for annulment of an arbitral award is the regulation of the reason in art. 608 (1) letter i) "if, after the arbitral award is made, the Constitutional Court ruled on the exception raised in that case, declaring as unconstitutional the law, ordinance or disposition of a law or ordinance making the object of that exception or other provisions of the challenged act which, necessarily and obviously, cannot be dissociated from the provisions mentioned in the application". The purpose of this

regulation is the fulfilment of the legality principle. In the case of judgments delivered by courts, it is provided as a reason for reviewing the judgment (art. 509 (1) point11). It is a solution preferred to the measure of suspending the litigation by the (arbitral or law) court before which an exception of unconstitutionality was raised.

In order to prove the grounds for the annulment of an arbitral award, only evidence in writing is admissible as new evidence, but if the action for annulment of an arbitral award was admitted, the court may admit new evidence if it is necessary to the judgment on the merits of the case.

The renouncement to the action for annulment cannot be carried out by the arbitral convention, but such a renouncement can be made after the arbitral award has been made (art. 609). The parties to the arbitral convention cannot limit or extend the number of grounds for the action for annulment, since they are expressly and strictly provided by law[838].

The action for annulment comes within the jurisdiction of the court of appeal in the judicial district of which the arbitration took place (art. 610).

The period within which the action for annulment may be brought in court is one month from the date of communicating the arbitral award. It must be brought in the competent court of appeal[839]. The legislature regulates three hypotheses for the moment from which the term for bringing the action for annulment in court starts: it usually starts on the date of communicating the arbitral award; if a request was formulated in accordance with art. 604, i.e. clarification, completion or correction of award, the term starts on the date of communicating the award or, accordingly, the interlocutory judgment issued on the request; finally, when the annulment is requested on the basis of the admissible unconstitutionality exception (a reason provided in art. 608 par. 1 letter i), the term is 3 months and starts on the

[838] R. B. Bobei, op. cit. p. 201.

[839] The former Code of Civil Procedure does not indicate the court where the action for annulment had to be brought (the arbitration court or the judicial review court). Judicial practice established the opinion, also shared by doctrine, that this action must be brought in the judicial review court. The supreme court, in a decision on a case, motivated its opinion as follows: "From the formulation of the above-mentioned legal texts, it results that the action for annulment is an action which must be directly brought in the court immediately superior to the court provided in art. 342 of the Code of Civil Procedure, and this court is the Court of Appeal in Bucharest. Otherwise, the legislature would have expressly stipulated, as with the appeal and last appeal, that the action must be brought in the arbitral court issuing it. On the other hand, it is obvious that the arbitral court is not a court in the sense of the provisions in the Code of Civil Procedure and, consequently, it cannot hold that the action must be brought in the arbitral court, on the single basis that the action for annulment was qualified as an appeal procedure" (The High Court of Cassation and Justice, commercial section, decision no. 156 of 20 January 2004, cited from I. Băcanu, op. cit. p. 114).

date of publishing the decision of the Constitutional Court in the Official Gazette of Romania, Part I, as in the case of the judgment review, when the review is requested on the basis of the admissible unconstitutionality exception (art. 511 par. 3). In case the action for annulment of the arbitral award invokes several grounds for which the moment - from which the term for bringing the action for annulment in court starts – is different, each of them must be raised within the time period stipulated by law.

The suspension of the enforcement of an arbitral award against which an action for annulment was brought in court may be disposed of by the competent court of appeal, at the request of either party. The law does not provide any situation in which the use of such an action for annulment should legally suspend the enforcement of an arbitral award. The suspension procedure of the enforcement of an arbitral award follows the rules provided by law for the suspension of the award in the case of the last appeal (art. 484). Therefore, one must annex to the request for suspension a certified copy of the action for annulment and the proof of depositing the bail provided under art. 718, and in case the request is made before the case is referred to court, one must also annex a certified copy of the disposal of the arbitral award whose suspension is requested. The claim is decided on in the council office, and the parties must be summoned. The hearing is so established that no more than 10 days will pass from the date of receiving the suspension request, and the judges will deliver a decision within 48 hours after the trial, by a motivated interlocutory judgment, which is final. On a solid basis, the court competent to decide on the suspension request may reconsider the suspension granted. It is important to note that in the case of the request for the suspension of the enforcement of an arbitral award, the law did not provide the obligation for either party to be represented by a lawyer or legal counsellor during the trial, as provided in the case of a request for the suspension of a judgment by the appeal court.

The object of the action for annulment is the national arbitral award, i.e. the arbitral award which settles the dispute between the parties, based on the recognition of the party/parties, "the arbitral award made in the case of renouncing the claimed right, the arbitral award recognizing the agreement of the parties, the arbitral award which – without deciding on the merits of the case, puts an end to the dispute" [840].

Moreover, pursuant to art. 594, the object of the action for annulment may be represented by interlocutory judgments of the arbitral court taking the following measures: a) the course of arbitration was suspended, in accordance with art. 412 and 413; b) precautionary or provisional measures were taken, in accordance with art. 585; c) the request for referral to the Constitutional Court on the

[840] R. B. Bobei, op. cit. pp. 199-200.

constitutionality of a legal disposition was rejected as inadmissible. By deciding on the action for annulment of such interlocutory judgments of the arbitral court, the court of appeal may, accordingly, maintain, alter or annul the measures disposed by the arbitral court through the interlocutory judgment. The judgment of the appeal court is final (art. 594 par. 6).

The action for annulment is decided on by the court of appeal, the panel provided by law for the first instance trial[841]. Consequently, the panel will consist of a single judge (in accordance with art. 54 of Law 304/2004 on judicial organisation).

The defence is mandatory. The failure to submit a defence within the term stipulated by law entails the defendant's loss of the right to propose evidence and raise exceptions, besides those concerning public order, unless otherwise provided by law. The other common legal rules concerning defence, as well as those regarding the purpose and content of the defence, the communication of the defence, are also applicable.

The judicial review court issues a judgment in case of a rejection, as well as in case of the admission of the action for annulment.

If the action for annulment is rejected, the judgment takes place in a single stage, the decision not being subject to appeal.

If the action for annulment is admissible, the arbitration award is annulled regardless of the reason for which the action was admissible. The measure the court will take after the arbitration award has been annulled differs depending on the reason for annulment.

Thus, in the cases provided in art. 608 par. (1) letter a (the dispute could not be settled by way of arbitration), b (the arbitral court decided on the case without any prior arbitral convention or on the basis of a null or inoperative convention) and e (the award was made after the end of the arbitration term as

[841] The 1865 Code of Civil Procedure provided in art. 365 par. 1 that the court immediately superior to the court which, in the absence of the arbitral convention, would have been competent to issue a judgment on the merits of the case, as a first instance court, was competent to issue a judgment, as a first instance court, on the action for annulment. The new Code of Civil Procedure initially stipulated that the action for annulment is decided on in the panel provided by law for the last appeal, specifying that the judgment is final. As a consequence of the critical comments in the juridical doctrine (I. Deleanu, Consideraţii generale şi unele observaţii cu privire la Proiectul Codului de procedură civilă, Revista Română de Drept Privat no. 6/2012, p. 48; C. I. Florescu, Arbitrajul comercial. Convenţia arbitrală şi tribunalul arbitral, conform noului Cod civil, Editura Universul Juridic, 2011, p. 454), the legislature reconsidered this disposition by Law 76/2012 and, at present, the court of appeal will deliver a judgment on the action for annulment in the panel provided by law for the first instance trial, and the decisions of the court of appeal admitting the action for annulment are subject to the last appeal.

provided under art. 567, although at least one party declared to invoke caducity, and the parties did not agree to continue the trial, in accordance with art. 568), it will refer the case to the competent court, as provided by law; in all other cases, the judgment of the court depends on the option of the disputing parties: if at least one person expressly requires the referral of the case to the arbitral court for re-trial, the court will take this measure; in the absence of such a request, if the trial is pending, the court of appeal will deliver a judgment on the merits of the case, within the limits of the arbitral convention. If, in order to decide on the merits of the case, new evidence is necessary, the court will issue a judgment after administering it. In the latter case, the court will first issue a judgment regarding the annulment and, after administering the evidence, the judgment on the merits of the case. As a rule, the judicial review court has the competence to issue a judgment on the merits of the case, using the material and procedural norms applicable in the case. The exception is the case when the parties expressly agreed that the dispute would be settled by the arbitral court in equity, situation in which the court of appeal will decide in equity, similarly to an arbitral court.

The doctrine emphasized the idea that, in the case of an action for annulment, there are two trial stages, which must be clearly delimitated: the stage of analyzing the grounds for annulment, when the object of the trial is the arbitral award, and the stage of deciding again on the dispute on the merits of the case, when the object of the trial is the arbitral action. "Therefore, as a rule, there will be two judgments, one for annulment and the other for settling the dispute on the merits of the case" [842].

The decisions of the court of appeal, issued in accordance with art. 613 par. 3, are subject to the last appeal.

In the specialized literature, it has been held that, unlike art. 366 par. 2 of the 1865 Code of Civil Procedure (according to which "the court judgment on the action for annulment is subject to the last appeal only"), art. 613 par. 4 of the new Code of Civil Procedure provides that "the decisions of the court of appeal issued in accordance with par. (3) are subject to the last appeal"; the consequence of eliminating the adverb "only", existing in the former code, is that, besides the last appeal, one may start the appeal for annulment and the review against the decisions of the court of appeal issued in accordance with par. (3) [843].

[842] I. Băcanu, op.cit., p. 116; similarly, see R. B. Bobei, op. cit, p. 208.
[843] Noul Cod de procedură civilă. Comentariu pe articole, vol.II, art. 527-1133, collective work, coordinator G. Boroi, Editura Hamangiu, 2013, p. 79.

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