UNIVERSITY OF PITESTI
FACULTY OF ECONOMIC SCIENCES AND LAW

Journal
LEGAL AND ADMINISTRATIVE STUDIES
STUDII JURIDICE ŞI ADMINISTRATIVE

Year XVI, No. 2 (17) – 2017

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

Publishing House C.H. BECK
Bucharest 2017

Journal
LEGAL AND ADMINISTRATIVE STUDIES
e-ISSN: 2344-6900
ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017

Type of journal: scientific/academic
First appearance: 2002
Publication frequency: two numbers per year
Edition: English

The Name of Issuing Institution
UNIVERSITY OF PITEŞTI
Faculty of Economic Sciences and Law
Editorial address: Avenue Republicii no. 71, Piteşti, code 110014, county Argeş
Tel/fax: +400348.453.400
E-mail: jlas@upit.ro
Web-site: www.jlas.upit.ro

Publishing House
C.H. BECK SRL
Address: Str. Serg. Nuţu, no. 2, Sector 5, Bucharest
Tel.: 021/410.08.47
Fax: 021/410.08.48
E-mail: redactie@beck.ro
Web-site: www.beck.ro

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e-ISSN: 2344-6900, ISSN-L: 1583-0772
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BRIEF CONSIDERATIONS ABOUT THE INFORMED CONSENT OF THE PATIENT

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Abstract:

One of the greatest legislative novelties inserted by the Civil Code, which has entered into force on the 1st of October 2011, is represented by the regulation of the personality rights. Among these rights, the right to life and health, the right to physical and psychical integrity and the right to self-provision are emphasized by their special importance. Inevitably, these rights are correlated with the possibility of performing certain medical interventions upon the human body, invasive or non-invasive, performed for therapeutic purposes or scientific research.

As a guarantee of the compliance with the above mentioned rights, the legislator has stated the need to have the prior consent of the patient for each intervention to which he shall be subjected. In the same time, it has been established the obligation for the medic to inform the patient regarding the essential aspects of the procedure to which the latter shall be subjected to, including regarding the risks. Therefore, the patient's consent shall not only be prior, but also informed.

The obligation to inform the patient is stated both as a general one, correlated with the right to information of every patient, as well as a special obligation, for medical interventions requiring a special regulation, such as the case of blood donations or organs, tissues or human cells harvesting for transplantation.

Being established as an obligation for the medic, the non-compliance with the obligation to inform may be sanctioned with the civil liability for malpractice.

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Key words: *personality rights, right to life and health, right to physical and psychical integrity, right to self-preservation, medical intervention, informed consent, civil liability.*

INTRODUCTION

The personality rights are characterized by the fact that are acquired by each human being, independent of their actions or inactions, as effect of their simple existence. Because these rights are inherent to the human being, the personality rights are also called *the primal rights of the human being*[1].

Also known in the Western legal space in the middle of the 19th century[2], the notion of personality rights has entered the Romanian legal doctrine after 1989. Nevertheless, though it did not enjoyed a coherent regulation, a series of legal provisions has been dedicated to certain rights, subsequently qualified as personality rights. We are taking into consideration Art 54 of the Decree No 31/1954 on the natural and legal persons[3], degree stating the legal protection of the non-patrimonial personal rights, category in which are included the personality rights, the provisions of the Criminal Code incriminating the offence against life, body integrity or health, as well as a series of normative acts adopted in the medical area, to which this paper shall refer.

The first complete regulation of the personality rights in our law has been operated by the new Civil Code[4], which has entered into force on the 1st of October 2011. This normative act states the following personality rights: the right to life and health, the right to physical and

[1] Gérard Cornu, *Droit civil. Introductions. Les personnes. Les biens*, 12th Edition (Montcrestien: LGDJ, 2005), 238.

[2] For the genesis of the theory of the personality rights, Frédéric Zenati-Castaing and Thierry Revet, *Manuel de droit des personnes* (Paris: Presses Universitaires de France, 2006), 210-13.

[3] Normative act repealed by the entrance into force of the new Civil Code.

[4] Law No 287/2009, republished in the Official Gazette No 505/15 July 2011.

psychical integrity, the right to dignity, the right to private life and personal imagine, to which are added the elements of identification of the natural person and the right to self-preservation.

The term of "personality rights" has been given because they are inherent to every human being and, according to the civil law, they are natural persons and because these rights are indispensable for their biological existence and personality, both psychological and social.

1. RIGHTS PROTECTING THE HUMAN BODY AND ITS BIOLOGICAL AND PSYCHICAL FUNCTIONS

The medical interventions of any type may collide with the personality rights protecting the human body and its biological and psychical functions. Among these rights we need to mention the right to life, the right to health, the right to physical and psychical integrity.

1.1. The right to life and health

Unfortunately, often times the words of the legislator are not crystal clear, and the regulations of certain areas suffer under the aspect of their systematization. There are no exceptions for the right to life and health, which are stated both by Art 61 Para 1 of the Civil Code: "*Life and health, physical and psychical integrity of every person shall be equally guaranteed and protected by the law*".

As it appears from the text of the cited law, three rights of personality are mentioned: the right to life, the right to health and the right to physical and psychical integrity. While the last of the rights mentioned by the legislator also enjoys a different and explicit statement, the right to life and health are just being mentioned. The content of these rights may very well be determined by relation to the other provisions of the Civil Code dedicated to the non-patrimonial personal rights protecting the human body and its physical and psychical functions, by the means of regulation of the conditions under which certain possible harmful interventions on the human body may be performed, as well as by relation to certain provisions of the special legislation.

From the examination of these legal provisions it results that in this area the following principles are applicable: the principle of inviolability of the human body, the principle of non-patrimonialism of the human body and the principle of the priority and interest of the human body[1].

The principle of inviolability of the human body is expressly stated by Art 64 Para 1 of the Civil Code and consists in forbidding any intervention that would harm the integrity of the human body, its biological or psychical functions. The consequences are that the human life is intangible (thus euthanasia being forbidden); every medical intervention should have a therapeutic purpose or, according to the law, scientific; the interventions upon the genetic features of a person are, usually, forbidden; also, shall be forbidden the harvesting of human tissues or organs for marketing purposes, for the industrial use of embryos, the usage of substitute mothers for procreation, as well as sterilization[2].

Art 64 Para 2, 2nd thesis of the Civil Code states several exceptions from the principle of inviolability of the human body for the cases and conditions limitative and expressly stated by the law, which we shall approach in the debate about the issue of the medical interventions.

The principle of non-patrimonialism of the human body, stated by Art 66 of the Civil Code prohibits its economic evaluation and the conclusion of the patrimonial legal acts having as object the human body or some of its components. Its basis is represented by the fact that the human body is the natural person itself, the biological support of its very own existence.

The non-patrimonialism is also extended upon the components of the human body (organs, tissues, cells) or its biological products (blood,

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[1] For a presentation of these principles, Eugen Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 4th Edition (Bucharest: C.H. Beck, 2016), 27-28.

[2] Aurel-Teodor Moldovan, *Tratat de drept medical* (Bucharest: All Beck, 2002), 24-25

breast milk, sperm). Even if they acquire the feature of things[1], they continue to preserve the "traces of their humanity"[2].

The principle of the priority and interest of the human body is expressly stated by Art 61 Para 2 of the Civil Code: "The interest and well-being of the human being must prevail before the single interest of society or science".

The eugenic practices, the interventions upon the genetic features, the examination of the genetic features, medical interventions or harvesting cells, tissues or human organs from living persons for their transplantation, stated by Art 62, 63, 65, 67 and 68 of the new Civil Code, may very well affect these values.

1.2. The right to physical and psychical integrity

The right to physical and psychical integrity of the person represents one of the forms for the principle of the inviolability of the human body. It is stated by Art 64, Para 2 of the Civil Code, according to which "Every person has the right to his physical and psychical integrity. The integrity of the human body shall not be prejudiced except for the cases expressly and limitative stated by the law".

The content of this right, as resulted from the quoted article, consists in the protection of the integrity of every human body and its components, but also of its psychic against all forms of aggressions, including those of medical nature[3].

The limits of this right are the cases for which the law permits such aggressions, including the medical interventions, performed with/ without the consent of the owner. Even for these cases there are two principles to be respected, operational also for the case of the right to life and health: the principle of non-patrimonialism of the human body and the principle of the priority and interest of the human body.

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[1] Ovidiu Ungureanu and Cornelia Munteanu, *Drept civil. Persoanele, în reglementarea noului Cod civil*, 2nd Edition (Bucharest: Hamangiu, 2013), 24.
[2] Cornu, *Droit civil. Introductions. Les personnes. Les biens*, 219.
[3] Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 30-31; Ungureanu and Munteanu, *Drept civil. Persoanele, în reglementarea noului Cod civil*, 21-31.

2. MEDICAL INTERVENTIONS

The legislator does not define the medical interventions, nor does it try to catalogue them. Its reluctance is justified by the complexity and diversity of the content of the phenomenon which would have defined it and by the fact that constant evolutions in the medical and biological sectors constantly change it.

In return, the legislator was preoccupied into stating in Art 67 of the Civil Code that "No person shall be subjected to experiments, tests, harvesting, treatments or other interventions for therapeutic or scientific purposes, except the cases and conditions expressly and limitative stated by the law" and to adopt regulations prohibiting certain medical interventions or establishing the conditions under which these are to be performed. Based on these regulations, we shall attempt a definition.

Thus, the medical intervention shall represent any form of experiment, test, harvest, treatment, procedure or a procedure similar to one of the above mentioned, invasive or non-invasive, performed for therapeutic or scientific purpose, affecting or which could affect the life, health, physical or psychical integrity of a human being.

Certain medical interventions, as the case of harvesting organs from the living donor, shall be permitted only for therapeutic purposes, not scientific.

Medical interventions shall be divided into two categories: medical interventions prohibited by the law and medical interventions stated by the law (legal and illegal medical interventions).

Thus, according to Art 68 Para 2 of the Civil Code: "It shall be prohibited the harvest of organs, tissues and human cells from minors, as well as from the persons alive, without discernment because of a mental handicap, a serious mental disorder or from another similar reason, except the cases stated by the law".

The special law which is mentioned is Title 5 – The harvest and transplant of organs, tissues or human cells for therapeutic purposes of the Law No 95/2016[1]. It allows the harvest of medullar or peripheral

[1] Republished in the Official Gazette, Part I, No 652/28 August 2015.

hematopoietic stem cells also from a minor who is a relative up to the 4th degree with the recipient (an exception from the interdiction stated by Art 68 Para 2 of the Civil Code), but prohibits the harvest of single or vital organs or tissues which could endanger the life of the donor.

Also, there are prohibited any eugenic practices tending the organization of persons (Art 62 Para 2 of the Civil Code); any medical interventions upon the genetic features having as purpose the alteration of the person's origin, except those referring to the prevention and treatment of genetic diseases (Art 63 Para 1 of the Civil Code); any intervention having as purpose the creation of a human being genetically identical with another living or dead human being, as well as the creation of human embryos for research (Art 63 Para 2 of the Civil Code)[1]; the usage of techniques for assisted human reproduction for the selection of the sex of the future child, except the cases aiming the avoidance of a serious hereditary disease related to the child's sex (Art 63 Para 3 of the Civil Code).

Regarding the allowed medical interventions, the rule is that they cannot be performed in the absence of the informed consent of the patient. For the cases mentioned by the law, such interventions may be performed without the consent of the patient.

3. THE RIGHT TO INFORMATION

3.1. Therapeutic medical interventions

The legislator has expressly stated the right of the patient to information in the Law No 46/2003[2], thus stating that the patient has the right to be informed regarding: available medical services, their means of use, the identity and professional status of the providers of health care services, his own health condition, possible medical interventions, potential risks for each procedure, the alternatives to the suggested

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[1] For the legal status of the human embryo resulted from the medically assisted procreation and in vitro, see Judith Rochfeld, *Les grandes notions du droit privé* (Paris: Presses Universitaires de France, 2011), 26-30.

[2] Law on the Patient's rights, published in the Official Gazette No 51/20 January 2003.

procedures, including information regarding the non-compliance with the treatment or with the medical recommendations, as well as regarding the diagnosis and prognosis. The hospitalized patient shall have the right to be informed upon the rules and customs to be respected during hospitalization.

In the same time, it is stated the possibility for the patient to decide whether he continues to be informed if the information provided by the doctor could cause sufferance, having the right to expressly ask not to be informed and to appoint another person to be informed in his place.

3.2. In the case of the blood donation or the donation of human blood components

The right to information is stated by the law also for the case of blood transfusion, blood donation or the donation of blood components. According to Law No 282/2005 on blood transfusion activity, blood and blood components donations, as well as the insurance of the medical quality and safety, for their therapeutic use[1], the National Blood Transfusion Institute and its local centres shall have the obligation to provide all necessary data for an informed decision of possible blood donors through informational-educational materials, easily understood by the audience.

According to Annex No 4, Let b) of the above mentioned law (Norms regarding the information to be given to donors, let a)-v)) the possible donor has the right to be informed concerning: the importance of the blood and the donation process; the protection and confidentiality of the personal data for the donor; the nature of the procedures involved either in the autologous or allogenic donation; the option of the donor to change his mind regarding the donation before going further or about the possibility to self-exclude at any moment from the course of the donation, without embarrassment or discomfort; the reasons for which is important for the donors to inform the transfusion center about any possible event subsequent to the transfusion which can catalogue the previous donation as improper for the transfusion therapy; the

[1] Republished in the Official Gazette No 188/17 March 2014.

responsibility of the transfusion center to inform the donor, using appropriate channels ensuring the confidentiality, if the results of the tests reveal an abnormality reflected on the health of the donor; the opportunity for the donors to ask questions in every moment; the fact that the blood donation in Romania is voluntary and free; the benefits and risks for health of blood or blood components donations both for the donor and recipient; the meaning of the wording "informed consent"; the conditions to be fulfilled by the possible donor for the donation of blood or blood components, namely to have a good physical and psychical health condition, proper personal hygiene and to present medical documents proving that he has passed the medical exams recommended by the doctor responsible for the selection of donors etc.

3.3. The harvest and transplant of organs, tissues and human cells for therapeutic purposes

For the harvest and transplant of organs, tissues or human cells shall be mandatory the information both of the donor and recipient[1] by the doctor, social assistant or other persons with specialized training over the possible risks and consequences from a physical, psychical, family or professional point of view, resulting after the harvesting.

The condition to inform the donor about the risks deriving from the harvesting has been stated by the law in order to insure an informed consent of the donor, which may reject, at any moment, the offer to harvest the tissue if he would consider that an unacceptable prejudice shall be endured.

In this meaning, the doctor shall have the obligation to really, concretely and intelligibly inform the donor, without minimalizing or exaggerating the prejudicial consequences, also the recipient regarding the risks and benefits of the proceedings, and when necessary, the family members, his legal representative, aiming the legitimate purpose of protecting the persons involved.

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[1] Ovidiu Ungureanu, "Noile dispoziţii legale privind prelevarea şi transplantul de organe, ţesuturi şi celule de origine umană în scop terapeutic", *Dreptul* no. 5 (2007): 19.

3.4. The participation in scientific experiments

Mainly, the scientific experiments on human beings are exclusively subordinated to the progress of medical science having as purpose the cure of different maladies. But, the dangers to which the human subjects are subjected to have generated the need for the adoption of certain legal regulations establishing the means and conditions under which such researches shall be conducted, especially that sometimes the experiments on human beings were conducted without them being informed about the dangers to which are exposed to and without their consent, being notorious the barbaric actions committed by the Nazi doctors[1] in the application of their research projects over the prisoners from the concentration camps of the Second World War.

One of the first documents with special importance for the recognition of the human rights in the area of bio-medical research having human subjects was the Nuremberg Code, stating 10 principles of this type of medical research, among which was the informed consent of the person. But, the legal regulation of the right to information was achieved by Art 7 of the International Covenant for the civil and political rights of 1966[2], being subsequently included in Art 5 and 16 of the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4th April 1997, known as the Oviedo Convention[3]. According to these provisions, the persons who are the object of a research have the right to know the nature, duration and purpose of the experiment, so that they will acquire enough knowledge to be aware of the risks to which they are exposed. Also, they have the right to be informed regarding the method and means of the research, regarding the

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[1] For a presentation of the medical trial at Nuremberg, when for the first time in history, the justice has been called to rule upon the compliance with the human rights in the bio-medical researches on human subjects, see also Lacrima-Rodica Boilă, "Cercetarea ştiinţifică pe subiecţi umani. Actualitatea Codului de la Nürenberg", *Romanian Criminal Law Magazine* no. 5 (2013): 42-46.

[2] Ratified by the Decree No 212/1974.

[3] Ratified by the Law No 17/2001 published in the Official Gazette, Part I, No 103/28 February 2001.

possible inconvenient and reasonable dangers, as well as regarding the effects of the experiment over their health.

From the above mentioned statements it also results the right of the person to withdraw at any moment. The information of the subject shall be correct, complete and intelligible, so that he will be able to take the decision fully aware of the situation.

At the level of the national legislation, Art 61 of the Civil Code states the principle of the inviolability of the human body, and as exception from this principle, Art 67 states the legal conditions for the medical interventions for a person. No person shall be subjected to experiments, tests, harvesting, treatments or other forms of therapeutic or scientific research, except the cases and conditions explicitly and limitative stated by the law.

Art 42 titled "Research on human beings" of the Code of Deontology of the Romanian College of Physicians reiterates the exceptional nature of the research on human beings and lists the conditions which must be cumulatively met for such scientific experiments[1], among which is the right of the person – subject of the research, to be informed about his rights and the legal guarantees for his protection. Beside the obligation to information, the doctor has the obligation to lay down all the diligence and to insist in the clarification of all circumstances, de jure and de facto, when he is involved in such activity.

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[1] According to Art 42 of the Code of Deontology of the Romanian College of Physicians, "*A medical research on a human being can only be made if the following conditions are cumulatively fulfilled: a) there is no alternative method for the research on human subjects, of a comparable effectiveness; b) the risks that the persons expose to are not out of proportion, as compared to the possible advantages of the research; c) the research project has been approved by the competent instance, after it has been the object of an independent examination on its scientific pertinence, including an evaluation of the importance of the research theme, as well as a multidisciplinary examination of its acceptability on the ethical plan; d) the person on whom the research is being done, has been informed about the rights and guarantees for his/her protection; e) there is the participants' consent, given expressly and in written. This consent can be freely withdrawn at any moment*".

4. THE PATIENT'S CONSENT

For the medical interventions with therapeutic purpose presenting a possible risk, after their explanation by the doctor, shall be requested the written consent of the patient. The legal age to express consent is 18. As exception, the minors may express their consent in the absence of their parents or legal representative, for emergency situations, when the parents or legal representative cannot be reached, and the minor has the discernment needed to understand his medical situation, as well as for medical situations related to the diagnosis and/or treatment for sexual/reproductive issues, at the express request of the minor aged over 16, as stated by Art 661 of the republished Law No 95/2006.

Guaranteeing the informed consent of the patient refers to the relevant information provided by the doctor in an easy language so that the patient may decide fully aware of the situation, involves the evaluation of the patient regarding the understanding of the information provided, offering, as it is possible, the freedom to choose between medical alternatives without coercion or manipulation[1].

As exception, the medical interventions may be performed without the consent of the patient or even against his will.

The cases for which the medical interventions may be performed in the absence of the patient's consent are stated by Art 662 of the Title 15 "Civil liability of the medical staff and the supplier for pharmaceutical and healthcare products and services" of the republished Law No 95/2006.

The above mentioned text states 2 cases: the first of the minor-patient, who does not have the necessary discernment to understand his medical situation and whose parents or legal representative cannot be reached, and the second of the major-patient, who in found in a medical situation preventing him from expressing the consent.

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[1] Angela Butnariu, Iustin Lupu and Mircea Buta, "Consimţământul informat în practica pediatrică şi în cercetarea vizând copilul", *Romanian Bioethics Magazine* VII, no. 7 (2009): 40-41.

For the first case, the medical nurse or midwife, if necessary, has the obligation to ask for the authorization for the medical act to the closest relative of the patient, which could be identified or the guardianship authority or they shall act without their consent for emergency situations, when the time elapsed until the consent could irreversibly endanger the patient's health and life.

For the second case, the consent shall be asked to the closest relative of the patient, which could be identified or the medical staff shall act without consent, when the time elapsed until the consent could irreversibly endanger the patient's health and life.

Also, in the category of violation of the human integrity, without consent, are included the measures ordered by the judge during trial, such as the medical hospitalization (during the procedure of placing under interdiction or as safety measure during the criminal trial), the obligation to medical treatment (during a medical trial), the performance of blood expertise (during the paternity trial) or the obligation stated by the law for the persons suspected of driving under the influence of alcohol or drugs to undergo the collection of biological samples.

The first two obligations (medical hospitalization and medical treatment) shall be ordered even against the will of the patient. The person cannot be coerced to fulfil the other medical interventions above mentioned, but his denial shall be interpreted as an admittance of the fact which had to be proven.

For the other cases, such as the participation in scientific experiments, for blood donations or harvesting and transplant of human organs, tissues or cells, given the impact of the subjects involved, the legislator details the conditions to be met by their consent.

From Art 19 of the Law of the patient's rights, it results the obligation of the consent of the person for his participation in the clinical medical training and in the scientific research. The consent shall originate from a person with full capacity of exercise, shall be express, after the correct information provided by the doctor, written and shall be freely withdrawn at any moment.

It is forbidden the experimentation on persons who are incapable of expressing their will[1]. As exception, shall be accepted the involvement in the research of such persons only if the following conditions shall be cumulatively met: shall be obtained the consent of the legal representative; the research is performed also for the patient's interest; the patient has no objections; the research cannot be performed with a compared efficiency on subjects capable of expressing their consent and has been received the approval of the court or of the authority responsible with the scientific project.

The same rules of the express, informed and free consent shall be applied for blood donations.

In the area of harvesting and transplant of human organs, tissues and cells the requirements for the consent of the donor/recipient are stated by Art 68 Para 1 of the Civil Code and Art 144 Let a) of the republished Law No 95/2006 on the Romanian healthcare reform. No harvesting shall be performed without the consent of the person concerned, and the donor shall have the possibility to revoke this consent at any time before the procedure.

The law prohibits the harvesting and transplant of human organs, tissues and cells from possible under aged donors, as well as from the persons without discernment, stating the rule according to which the harvesting is possible only from the persons with full capacity of exercise.

As exception, the harvesting of bone marrow (hematopoietic stem cells) can be performed also from an under aged person who is relative up to the 4th degree with the recipient, in compliance with the following conditions: the harvesting shall be made only with the consent of the minor who has reached the age of 10 and the written consent of his legal guardian (parents, guardian or trustee), according to the form approved by Minister's order. If the minor is under the age of 10, the harvesting shall be possible with the consent of his legal guardian. The written or

[1] Regarding the participation of children in medical scientific researches, Butnariu, Lupu and Buta, "Consimţământul informat în practica pediatrică şi în cercetarea vizând copilul", 38-46.

verbal consent of the minor aged at least 10 shall be expressed in front of the court's president, after the mandatory performance of a psycho-social investigation by the General Directorate of Social Assistance and Child Protection.

Synthetizing, from the above mentioned legal provisions, results the following conditions to be met by the consent given for the harvesting and transplant of human organs, tissues and cells[1]:

- The consent shall be free, namely shall not be altered by any of the vices of consent, being prohibited the harvesting or organs and/or tissues and/or cells if any physical or moral constraint shall be applied against the natural person, this case representing the violence as vice of consent;
- The consent shall be prior, being prohibited the its subsequent expression;
- The consent shall be express, without the possibility of deducing it from the behavior of the concerned person, nor determined under any circumstances by a third party, as in the common law;
- The consent shall be based on the information regarding possible risks and consequences in the physical, psychical, family and professional areas, resulted from the harvesting.

The doctor's obligation to inform the donor/recipient and/or his legal representative has the nature to remove the possible existence of the error or duress. This does not mean that, practically, they cannot exist being cases in which there is complicity or non-professionalism of the person obliged to inform the donor/recipient.

The expression of the consent shall be written, concluded in official form and having a default content stated by the Minister of Health's order. Specific to the harvest of organs, tissues or human cells is the revocable nature of the consent, without being necessary the compliance with a certain form, which represents an exception from the irrevocable feature of unilateral legal document.

As supplementary guarantee of the free, informed and altruistic feature of the consent, the harvest of organs, tissues or human cells from

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[1] Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 31-32.

a living donor shall be performed with the authorization of the commission for approvals of harvests from living donors, established by the hospital in which the transplant is being performed. The members of the commission shall sign the document containing the consent for harvesting, thus certifying that all the legal conditions have been fulfilled. In his turn, the recipient shall also sign this document. By signing the document, the recipient confirms that the harvesting is not the object of legal acts or facts for the purpose of receiving a material or other benefit. This is also the proof of compliance with another conditions stated by the law: the harvesting shall be performed only for a transplant whose beneficiary shall be a certain person. Signing that document also by the recipient does not transform the transplant of human organs, tissues or cells into a contract, the human body not being negotiable. As a conclusion, the consent for harvesting is a unilateral legal act, mainly free and official[1].

5. THE LIABILITY OF THE MEDICAL STAFF FOR VIOLATING THE PATIENT'S RIGHT TO INFORMATION AND FOR NON-COMPLIANCE WITH HIS CONSENT

Correlative with the right to medical information of the patients, Art 649 of the Law No 95/2006[2] and the Code of Deontology of the Romanian College of Physicians[3] states the obligation of the doctor to prior, complete and appropriate information of the person entitled to consent with the medical intervention. On the other side, according to Art 19 of the Code of Deontology, the doctor's obligation to information is not necessary for the cases in which the patient decides that he shall no longer be informed if the information presented could cause him sufferance.

The doctor's obligation has a professional feature and is based on the transparency of the medical decision and the good-will of the parties

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[1] Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 32.
[2] Published in the Official Gazette, Part I, No 372/28 April 2006.
[3] Published in the Official Gazette, Part I, No 981/7 December 2016.

with the purpose of achieving the aimed objective, namely the healing of the patient. Regarding its nature, it has been shown that it aims the activity of healthcare activity[1], the obligation to information being accessory to the main obligation for care and treatment. Given that the correct information of the patient is conditioned by the doctor's information concerning his health condition, any wrong or absent information could lead to a wrong diagnosis or treatment, this is why we are in the presence of a mutual obligation to information both of the doctor and patient.

The professional obligations of the doctor[2] for the patients represent the base of the medical malpractice. Specifically, it represents the starting point in the evaluation of the person's behaviour. Regarding the obligation to information, the doctrine[3] has stated that it is an obligation for result. Its violation could entail the objective doctor's liability, namely that of the risk in practicing his profession. In this meaning, Art 653 Para 3 of the Law No 95/2006 states that the medical staff shall be civil liable for the prejudices resulted from the non-compliance with the regulations referring to the informed consent of the patient.

Mainly, the lack of information of the patient cannot directly generate him a prejudice, because the violation of the physical integrity or the death of the patient is in a relation of causality with the administered treatment. But, it has been stated that it is possible the prejudice of the patient for missing the opportunity to avoid the harmful risk either by choosing the necessary medical care, or by the refusal to use a certain treatment or perform a dangerous intervention proposed by the doctor. The burden of proof for the fulfilling the obligation to information belongs to the doctor, who shall submit in this case the document signed by the patient, certifying that all information was

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[1] Lacrima-Rodica Boilă, *Răspunderea civilă delictuală subiectivă*, 2nd Edition (Bucharest: C.H. Beck, 2009), 385.

[2] Lacrima-Rodica Boilă, "Malpraxis. Propuneri legislative privind despăgubirea victimelor accidentelor medicale" Romanian Criminal Law Magazine, no. 5 (2012): 52.

[3] Boilă, *Răspunderea civilă delictuală subiectivă*, 392-93.

presented to him. Its written form offers the possibility to prove the conditions and content of the information.

If the harmful event occurs, in order to order the doctor to pay damages, the patient will prove the causality between the lack of information and the damaging consequences suffered. In the same time, the refusal of the patient to follow the treatment recommended by the doctor must be mentioned in writing, so that the refusal shall represent evidence in case of aggravation of his health condition and his prejudice due to his own action[1].

The entailment of the civil liability does not exclude the criminal liability, if the action which caused the prejudice represents an offence according to the law and/or the disciplinary liability of the doctor, if necessary. For instance, Art 40 Let b) of the Law No 282/2005 shall represent an offence the blood harvesting from a person without consent.

Not least, as stated by Art 37 of the Law No 46/2003 and by the Code of Deontology, violating the patient's right to medical information may entail the disciplinary liability of the doctor[2]. Depending on the seriousness of the action and the decision of the professional organs appointed by the law to investigate the possible deviations from ethical rules, the sanctioning system being based on sanctions from reprimand up to the exclusion from the professional organizations.

CONCLUSION(S)

The medical progress with all the benefits for humans and society comes with a series of problems from ethical to legal ones. In this context, the statement of the patient's informed consent has become a necessity, given the importance of the rights which could be prejudiced by the medical act or the scientific research, such as the right to life, the right to health and the right to physical and psychical integrity, the right

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[1] Boilă, *Răspunderea civilă delictuală subiectivă*, 386-88.

[2] Silviu Morar, Mihaela Cernuşcă-Miţariu, Horaţiu Dura, Adrian Cristian "Reflectarea drepturilor pacienților în noile coduri deontologice din domeniul medical", Acta Universitatis Lucian Blaga no. 1 (Sibiu): 34.

to self-preservation. By acknowledging the right to information of the patient, he becomes an active participant in the conclusion of the medical act. His consent generates important consequences for his life, health and body integrity. This is why the patient shall base the decision on a correct information provided by his doctor. Therefore, the obligation to inform the patient is an obligation for result, as already mentioned, whose violation could entail the civil liability of the doctor for objective reasons, which does not exclude the possibility of entailing the disciplinary or even criminal liability, according to the law.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 27-45

THE PILOT CASE OF REZMIVES AND THE MOST AWAITED REFORM OF THE ROMANIAN PENITENTIARY SYSTEM

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Abstract:

According to the European Court for Human Rights, many of the cases pending before the Court derive from a common dysfunction at the national level. In order to deal with the repetitive cases and to lighten its workload, the Court developed and implemented a new procedure to deal with the massive number of applications on similar issues arising from the non-conformity of the domestic law with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, called by the Court "systemic issues". Recently, the Court has decided to deal with the Romanian systemic problem of penitentiaries through the pilot-judgment procedure – the Rezmives and Others v. Romania case[4]*. We considered that it would be very interesting to analyse if Romania is the first Contracting State that has been convicted through a pilot case against the inadequate conditions of the penitentiaries and how the Romanian authorities will respond to the Court's recommended measures.*

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Keywords: *offences, penitentiaries, pilot-judgment procedure, Rezmives, structural, systemic.*

INTRODUCTION

On 3 September 2017, we are going to celebrate 64 years of application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the the "*Convention*"). This international treaty protecting human rights and fundamental freedoms in Europe was drafted in 1950 by the newly formed Council of Europe[1]. The Convention was inspired by the Universal Declaration of Human Rights executed within the United Nations, giving thus effect to certain of the rights stated in it. The beauty of the Convention is that even though it was drafted in 1950 and amended through sixteen different protocols, the Convention evolves by means of interpretation made by the judges of the Court. As it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in the light of present-day conditions"[2], fact that raises many challenges for its judges.

Additionally, it is remarkable that the Convention established an international judicial organ with jurisdiction to find against the Contracting States that do not fulfil their undertakings – the European Court for Human Rights (hereinafter the "*Court*"). Under the Convention two types of applications[3] are possible: (i) *individual applications* lodged by any person, group of individuals, company or NGO having a complaint about a violation of their rights under the Convention, and (ii)

[1] The Council of Europe was created on 5 May 1949; in present, it has 47 Member States (more complex than the European Union), including countries such Azerbaijan, the Russian Federation, Switzerland and Turkey.

[2] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25 April 1978, point 31.

[3] We emphasize that since the Court was established (in 1959), almost all applications have been lodged by individuals who have brought their cases directly to the Court, alleging one or more violations of the Convention.

inter-State applications brought by one State against another. Therefore, the Court cannot take up cases of its own motion.

Many times, the Court has been considered a victim of its own success due to the number of new applications lodged every year (over 50,000 – it is also worth mentioning that the Court receives every day around 1,500 letters[1]). This situation is determined by the growing recognition of the Court's work, the transparent procedures and the repercussions of the Court's judgments.

Unfortunately, because of this huge workload, the length of proceedings before the Court cannot be estimated and varies depending on the case, although the Court tries to deal with cases within three years from the moment the application was lodged. Certain applications are handled on a priority basis, being considered urgent (e.g. in cases where the applicant alleges that is facing an imminent threat of physical harm).

Many of the cases pending before the Court (around 95,000 cases) are considered to be "repetitive cases", because they derive from a common dysfunction at the national level. In order to deal with the workload, the Court developed and implemented a new procedure to deal with the massive number of applications on similar issues arising from the non-conformity of the domestic law with the provisions of the Convention, called by the Court "systemic issues". This procedure consists in examining one or more applications of this kind and, usually, postponing, "freezing", the other similar cases, against the respective Contracting State. This measure entails that, in this period, no procedural steps of any kind will be taken by the Court in these cases. Thus, when the Court delivers its judgment in the pilot case, it requests to the respective Government to bring the domestic legislation into line with the provisions of the Convention. It is interesting that the Court also indicates the general measures that the Government must take, providing also a time-limit for it, which is calculated from the date on which the judgment becomes final. After the expiry of this time-limit, the Court will then proceed to dispose of the other similar cases against the respective Contracting State. In certain cases, taking into consideration

[1] Please see http://www.echr.coe.int/Documents/Your_Application_ENG.pdf.

the amplitude of the changes to be done in the national legal system, the Court extended the time-limit given to the respective State[1].

The text of the Convention does not mention the "pilot judgment procedure", but in the rule 61, paragraph 1 of the Rules of the Court dated November 2016[2], it is mentioned that:

> *The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.*

According to this Rule, the Court is able to decide to apply the pilot-judgment procedure when the facts of an application reveal the existence, in a Contracting State, of a structural or systemic problem or some other similar dysfunctionality which determines or is able to determine other analogue applications.

It is noteworthy that, in case of adopting a pilot case, the Court informs several institutions of the Council of Europe: the Committee of Ministers, the Parliamentary Assembly, the Secretary General, and the Commissioner for Human Rights.

Please be aware that the first pilot case was delivered in 2004 in the case of *Broniowski v. Poland*[3], a case that concerned around 80,000 people, on the sensitive subject of compensatory properties to which the Polish citizens were supposed to receive for abandoning their properties beyond the Bug River and now in Ukrainian, Belarusian or Lithuanian territory.

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[1] For example, in the cases of *Maria Atanasiu and Others v. Romania* (applications nos. 30767/05 and 33800/06, judgment dated 12 October 2010) and *Greens and M.T. v. the United Kingdom* (applications nos. 60041/08 and 60054/08, judgement dated 23 November 2010).

[2] Available online at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[3] *Broniowski v. Poland* (application no. 31443/96, judgment of 22 June 2004).

Nowadays, Romania is under the pressure of a pilot case's time-limit for the violation of Article 3[1] of the Convention. In the judgment of *Rezmiveş and Others v. Romania* dated 25 April 2017, taken with unanimity, Romania was recognized by the Court as having a structural problem because of the conditions of detention in the penitentiaries or pre-trial arrest centres which are violating Article 3 of the Convention (prohibition of inhuman or degrading treatment)[2]. The claimants complained about the overcrowding in the cells (between 1,60-2,22 sqm personal space per claimant), insufficiency of the sanitary facilities, hygiene lack, low quality of food, presence of rats and insects in the cells[3]. The claimants argued that all these conditions, together with the absence of socio-cultural and educative programs or professional formation courses have constituted reasons for depression and feelings of humiliation. This is a general problem originating in a structural dysfunction specific to the Romanian prison system. The Court acknowledged that this state of affairs had persisted over the years[4], despite the fact it had been identified by the Court in 2012[5].

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[1] Article 3 of the Convention recognizes one of the fundamental values of a democratic society. Prohibition of torture and of inhuman or degrading treatments is a value that holds on civilization and respecting the human dignity. Unlike other articles of the Convention, Article 3 does not provide for restrictions or derogations, not even in case of public danger that is threatening the nation's life.

[2] Even the Court, in the *Rezmives* case, underlines that it has decided the violation of Article 3 in 150 judgments against Romania because of overcrowding and inappropriate conditions of detention (please see the *Rezmives* judgment, cited above, point 109). But this number has constantly increased, for instance in August 2016 the Court had 3,200 pending similar applications (no official figures for August 2017).

[3] Please note that the four claimants complained about the detention conditions in several penitentiaries (Gherla, Aiud, Oradea, Craiova, Târgu-Jiu, Pelendava, Rahova, Tulcea, Iaşi and Vaslui), as well as in the pre-trial arrest centre of Baia Mare.

[4] On 6 December 2007, a first judgment of the Court convicting Romania on this issue on the field of Article 3 was pronounced in the case *Bragadireanu v. Romania* (application no. 22088/04, judgement dated 6 December 2007). Between 2007-2012, other 93 judgments convicted Romania because the material detention conditions did not satisfy the European standard.

[5] *Iacov Stanciu v. Romania*, judgment of 24 July 2012. Having noticed the considerable number of applications against Romania on overcrowding and material detention

Even the Romanian authorities recognize this problem[1]. For example, the manager of the National Administration of Penitentiaries, Mr. Marius Vulpe, sustained that for respecting the Court's request that an inmate should have the right of a personal space of 4 sqm and for the Romanian State not to be anymore condemned by the Court for this reason, there should be released around 8,500 inmates or be built new penitentiaries. He also added that in Romania there are around 33,000 beds for inmates and 27,500 inmates in the Romanian prisons, but the problem is that the legal surface of four square meters[2] for each inmate is not observed. The existing surface of the Romanian penitentiaries could accommodate, in these circumstances, around 19,500 inmates.

It is interesting that after the analysis of the Court's case-law regarding this violation in Romania, it appears that there is no Romanian penitentiary without conviction on this issue in front of the Court[3]. The

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conditions, in 2012 the Court decided to address this issue to the Romanian authorities, according to Article 46 of the Convention, without using the pilot-judgment procedure. Please note that after the judgment of *Iacov Stanciu* of July 2012, the number of the cases in which the Court decided that Article 3 of the Convention has been violated because of overcrowding and of material detention conditions which were inadequate, has constantly increased (around 150 conviction judgments). Please see R. Pasoi, D. Mihai, *Hotararea pilot in cauza Rezmives si altii impotriva Romaniei in material conditiilor de detentie*, published online on 28 April 2017, at https://www.juridice.ro/507966/hotararea-pilot-cauza-rezmives-si-altii-impotriva-romaniei-materia-conditiilor-de-detentie.html.

[1] From the official website of the National Administration of Penitentiaries, the index of occupation for each of the Romanian penitentiaries varies, the maximal index being 174.93% for the Iasi Penitentiary – please see the Capacity of accommodation of unities at 15 August 2017 on http://anp.gov.ro/informatii/dinamica-efectivelor-2/.

[2] Although the European Committee for the Prevention of Torture recommends 4 sqm/inmate, the Court recently confirmed that 3 sqm of ground area for each inmate (including the space for the furniture, but excluding the one with the sanitary objects) in a room must remain the minimal standard relevant for evaluating the detention conditions under Article 3 (please see *Muršić v. Croatia*, application no. 7334/13, judgment dated 20 October 2017, points 110 and 114, *Rezmives* case, point 77).

[3] For example, Penitentiary Gherla (*Ciprian Vlăduț and Ioan Florin Pop v. Romania*, applications nos. 43490/07 and 43304/07, judgment dated 16 July 2015, points 59-63; *Apostu v. Romania*, application no. 22765/12, judgment dated 3 February 2015, point 83; *Tirean v. Romania*, application no. 47603/10, judgment dated 28 October 2014,

Court's case law on the material conditions for arrest in the pre-trial centres of the Romanian Police have also made the object of the Court's analysis[1], the Strasbourg judges already ascertained the overcrowding,

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points 37-46; *Axinte v. Romania*, application no. 24044/12, judgment dated 22 April 2014, points 49-50; *Leontiuc v. Romania*, application no. 44302/10, judgment dated 4 December 2012, points 56-62; and *Radu Pop v. Romania*, application no. 14337/04, judgment dated 17 July 2012, points 95 and 101), Penitentiary Aiud (*Tirean v. Romania*, cited above, points. 40-46; *Macovei v. Romania*, application no. 28255/08, judgment dated 19 November 2013, points 29-32; and *Gagiu v. Romania*, application no. 63258/00, judgment dated 24 February 2009, points 77-82), Penitentiary Oradea (*Ardelean v. Romania*, application no. 28766/04, judgment dated 30 October 2012, points 51-54; and *Hadade v. Romania*, application no. 11871/05, judgment dated 24 September 2013, points 73-78), Penitentiary Craiova (Axinte *v. Romania*, cited above, points 44-50; *Enache v. Romania*, application no. 10662/06, judgment dated 1 April 2014, points 56-62; and *Ciolan v. Romania*, application no. 24378/04, judgment dated 19 February 2013, points 39-46), Penitentiary Târgu-Jiu (*Bordenciu v. Romania*, application no. 36059/12, judgment dated 22 September 2015, points 22-33), Penitentiary Pelendava (please see the application no. 46833/14 of the group of applications *Matei and other 17 v. Romania*, no. 32435/13 etc., judgment dated 7 April 2016), Penitentiary Rahova (Apostu, above cited, point 83; *Iacov Stanciu*, above cited, points 171-179; *Flămânzeanu v. Romania*, application no. 56664/08, judgment dated 12 April 2011, points 89-100; and *Pavalache v. Romania*, application no. 38746/03, judgment dated 18 January 2011, points 87-101), Penitentiary Tulcea (*Bahna v. Romania*, application no. 75985/12, judgment dated 13 November 2014, points 43-53,), Penitentiary Iaşi [*Todireasa v. Romania* (no. 2), application no. 18616/13, judgment dated 21 April 2015, points 56-64; *Bahna*, above cited, points 43-53; *Axinte*, above cited, points 46-50; *Ticu v. Romania*, application no. 24575/10, judgment dated 1 October 2013, points 62-68; *Olariu v. Romania*, application no. 12845/08, judgment dated 17 September 2013, points 26-32; *Mazalu v. Romania*, application no. 24009/03, judgment dated 12 June 2012, points 42-54; *Petrea v. Romania*, application no. 4792/03, judgment dated 29 April 2008, points 43-50], and Penitentiary Vaslui [*Todireasa v. Romania* (no. 2), cited above, points 56-64, and *Bahna*, cited above, points 43-53].

[1] Please see, especially, *Gomoi v. Romania*, application no. 42720/10, judgment dated 22 March 2016, points 24-28; *Ghiroga v. Romania*, application no. 53168/12, judgment dated 16 May 2015, points 31-36; *Valerian Dragomir v. Romania*, application no. 51012/11, judgment dated 16 September 2014, points 47; *Mihăilescu v. Romania*, application no. 46546/12, judgment dated 1 July 2014, points 57; *Zamfirachi v. Romania*, application no. 70719/10, judgment dated 17 June 2014, point 66; *Voicu v. Romania*, application no. 22015/10, judgment dated 10 June 2014, point. 53; *Florin*

mediocre hygiene conditions, inadequate sanitary facilities and the very limited possibility of spending the time outdoors.

Coming back to the *Rezmives* case, after analysing the judgment, it is evident that the measures requested by the Court were that Romanian authorities have: (i) to introduce measures to reduce overcrowding and improve the material conditions of detention; and (ii) to introduce remedies[1].

As it is typical for a pilot-judgment procedure, for helping the authorities in changing this system, the Court decided to adjourn the examination of similar applications that had not yet been communicated to the Romanian Government for observations. In the meantime, the Court will be able to continue with the examination of the applications already communicated to the Romanian Government.

Since the judgment is not yet final[2], we must emphasize that within six months from the date on which the judgment will become final, the Romanian Government has to provide a precise timetable for the implementation of the general measures to be taken in order to find solutions for overcrowding and inadequate detention conditions in

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Andrei v. Romania, application no. 33228/05, judgment dated 15 April 2014, point 45; *Ciobanu v. Romania and Italy*, application no. 4509/08, judgment dated 9 July 2013, points 47-50; *Marin Vasilescu v. Romania*, application no. 62353/09, judgment dated 11 June 2013, points 33-37; *Artimenco*, cited above, point 35; and *Viorel Burzo v. Romania*, applications nos. 75109/01 and 12639/02, judgment dated 30 June 2009, points. 98-99).

[1] Please note that there should be instituted:

a) a *preventive remedy* – which should ensure that delegated judge for the execution of custodial sentences and the courts could put an end to situations breaching Article 3 of the Convention and award compensation, if the case; and

b) a specific *compensatory remedy* – which should ensure that appropriate compensation could be awarded for any violation of the Convention concerning inadequate living space and/or precarious material conditions.

[2] This judgment will become final in the circumstances set out in Article 44 paragraph 2 (final judgments) of the Convention. As a general rule, a judgment rendered by a Court's Chamber will become final in three months from its finding.

penitentiaries. This timetable shall be provided in cooperation with the Committee of Ministers of the Council of Europe.

It is interesting that Romania was not the first Contracting State to the Convention that was found as having a systematic problem with the prison system under Article 3 of the Convention. In this respect, we mention in a chronological order: Russia[1], Italy[2], Bulgaria[3], Hungary[4] and Belgium[5].

In *Ananyev and Others v. Russia,* the Court underlined that the structural problem consists in a dysfunction in the prison system at the root of a recurring structural problem of inadequate conditions of detention (e.g. the lack of personal space in the cells, the shortage of sleeping places for the inmates, the limited access to light and fresh air, and the non-existent privacy when using the sanitary facilities). In this pilot judgment procedure, the Court found that, against Russia, in more than 80 judgments, there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) and of Article 13 (right to an effective remedy) of the Convention.

In respect of the allegations of violations of Article 3 of the Convention, the Court requested the Russian Government, in co-operation with the Committee of Ministers of the Council of Europe, to provide within six months, from the date when the judgment became final, a binding timeframe for implementing preventive and compensatory measures.

As opposed to the practice of the pilot-judgment procedure, having in view the fundamental nature of the right not to be submitted to torture or to an inhuman or degradant treatment, the Court in this case

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[1] *Ananyev and Others v. Russia* (applications nos. 42525/07 and 60800/08, judgment dated 10 January 2012).

[2] *Torreggiani and Others v. Italy* (applications nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, judgment dated 8 January 2013).

[3] *Neshkov and Others v. Bulgaria* (application no. 7334/13, judgment dated 27 January 2015).

[4] *Varga and Others v. Hungary* (applications nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, judgment dated 10 March 2015).

[5] *W.D. v. Belgium* (application no. 73548/13, judgment dated 6 September 2016).

decided not to postpone the examination of similar applications pending before it (around 250 similar cases).

In the *Torreggiani* case, the Court observed that the structural nature of overcrowding in prisons derived from the 2010 Italian Prime Minister's declaration of a national state of emergency. This structural problem was consolidated by the fact that the Court had several hundred applications pending, raising the question if the conditions of detention of certain Italian prisons are compatible with the provisions of Article 3 of the Convention which prohibits the inhuman or degrading treatment. Having in view the rapid escalade of the pending applications, the Court elected the pilot-judgment procedure to deal with those cases.

The Court gave the Italian Government one-year time-limit to put in place an effective domestic remedy or even a combination of certain remedies in order to afford adequate and sufficient redress in cases of overcrowding in prisons, according to the principles of the Convention.

After this judgment, the Italian Government enacted several pieces of legislation to solve the structural problem evidenced by the Court – the overcrowding in the Italian prisons. Additionally, the authorities reformed the then existing law to allow the inmates to complain to a judge about the material conditions of detention, and if such persons would have been subjected to detention contrary to the Convention, then a compensatory remedy was introduced providing for damages to be paid to those persons.

It is interesting to analyse the subsequent case law against Italy, because in two inadmissibility decisions of 16 September 2014[1], the Court had the opportunity to analyse the new remedies conceived by the Italian authorities. In these decisions, the Court acknowledged that it had no evidence enabling it to consider that the remedies, put in place after the Court's pilot judgment procedure, did not offer, at least in principle, prospects of appropriate relief for the complaints submitted under Article 3 of the Convention. Unfortunately, the applicants' complaint concerning

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[1] *Stella and Others v. Italy* (applications nos. 49169/09, decision dated 16 September 2014) and *Rexhepi and Others v. Italy* (application no. 47180/10, decision dated 16 September 2014).

overcrowding in prisons had to be rejected for failure to exhaust the domestic remedies, reason for which the applications were considered inadmissible.

As previously mentioned, Bulgaria was also subject of a pilot-judgment procedure regarding the national prison system. Therefore, in the *Neshkov* case, the Court analysed the serious problems identified and the structural problem of the law concerning the remedies for the inmates challenging the prisons' conditions. After this analysis, the Court concluded that no effective preventive remedies were put in place, even though the legislation provided for a compensatory remedy. Thus, it was evidenced that in the cases of examining the detention conditions, the national courts usually did not consider the general prohibition against inhuman or degrading treatment under the Convention, but only the relevant statutory or regulatory provisions, proving that no effective preventive remedy was put in place.

Therefore, the Court requested the Bulgarian authorities that within 18 months-deadline, to put in place a combination of effective remedies for the poor detention conditions with both preventive and compensatory effects.

Having in mind the implications of the violation of the Convention, the Court continued to examine the similar cases, not deciding to adjourn them as in other pilot-judgment procedures.

In the *Varga* case, the Court ascertained that as in previous cases against Hungary when Article 3 of the Convention was breached in relation to the detention facilities, a structural problem existed, because there were no isolated incidents. The inmates complained mainly of a personal space lack, restrictions for shower facilities and outdoor activities, privacy lack when using the toilette facilities. Moreover, the structural problem was also confirmed by a number of 450 similar cases that were pending against Hungary on this issue. Even though a domestic remedy existed under the law, in practice this remedy was ineffective, although accessible.

Having in mind that the number of inmates detained on remand in the Hungarian prison facilities (in 2013 – around 5,000 inmates), the Court recommended that the Government should take in consideration

using more often the non-custodial punitive measures. The Court gave a 6 months deadline for putting in place an effective remedy or a combination of remedies (preventive and compensatory) in order to offer an effective redress for violations of the Convention in cases of overcrowding.

It is interesting how the Court proceeded in this case, because at the beginning, pending implementation of the relevant measures, the Court did not consider it necessary to adjourn any similar pending cases. On 8 November 2016, after 5 months from when the judgment became final, the Court examined the situation of the approximate 6,800 pending applications brought before it concerning the detention conditions in Hungary. After the analysis of the ensuing legislation that was adopted by the Hungarian Parliament on 25 October 2016, as well as to the examination by the Committee of Ministers of the related Action Plan, the Court considered that the new domestic remedies may be capable of redressing the complaints of the applicants in the cases pending before it. Thus, in this stage, the Court decided to suspend the examination of these applications until 31 August 2017 (communicated or not to the Hungarian Government). After 31 August 2017, the Court will notify the applicants in due course of the further procedure or any decision taken by the Court.

In the *W.D. v. Belgium* case, the Court noticed a structural deficiency specific to the psychiatric detention system in Belgium, after discovering that there were about forty cases pending before the Court in which different persons complained of the incompliance of the national legislation with the Convention (Article 3 and Article 5 paragraph 1 regarding the right to liberty and security and Article 5 paragraph 4 regarding the right to a speedy review of the lawfulness of detention. This structural problem concerned the continued detention in the national prisons, of the transgressors with mental health disorders, without receiving any appropriate medical treatment and without having access to remedies.

The Court requested Belgium to organise such psychiatric detention with the respect of the inmates' dignity, especially by encouraging the decrease of the number of transgressors with mental

disorders who were detained in such premises without receiving the appropriate medical treatment. Moreover, Belgium redefined the criteria for psychiatric detention, which represented a good starting point. In this respect, the Belgium legislator managed to provide in law the objective of providing appropriate therapeutic support to such inmates, with the scope of reintegrating back into the society.

Having in view the amplitude of the legal changes to be implemented into the Belgium legal system, the Court gave a two years' time-limit to remedy this situation and decided to adjourn the similar cases in this period.

What should Romania learn from these lessons? How to deal with the pressure of the time-limit? What are the measures that the Romanian Government should take with regard to the 27.000 inmates existing in the Romanian prisons?

The Court in the *Rezmives* case made certain recommendations[1] for the Romanian Government to solve the structural problem discovered:

1. *measures of administrative nature, for decreasing the overcrowding and for improving the material detention conditions*:
   1.1. *for the case of detention prior to conviction*: the Court underlined that the pre-trial arrest places of the Police departments have been previously analysed by the European Committee for the Prevention of Torture and by the Committee of Ministers, which reminded that these are places for detaining people on short period of time, thus considering them as being "structurally unfitted" to detaining persons for several days. Having this in mind, the Court recommended the Romanian authorities to make sure that the persons detained are transferred to a penitentiary at the end of the pre-trial arrest. Additionally, the Court encouraged the Romanian

[1] It is well known that the Court only suggests, with informative purpose only, the type of measures that can be adopted for ending a structural problem that has been found by the Court.

Government to analyse the possibility of using more often the alternative measures to preventive arrest;

1.2. *for the case of detention after the conviction*: the Court was interested to the legal reform the Government initiated, notably on: (i) using the criminal fine as an alternative to imprisonment; (ii) reducing the limits of penalties for certain offences; (iii) waiver of penalty enforcement and the postponement of penalty enforcement; (iv) positive effects of the probation system.

We consider that, even though the immediate results of this reform will not be significant at the beginning, on the level of overcrowding, in time, together with the diversification of the sanctions alternative to detention, they will make a difference on decreasing the number of detained persons.

Additionally, the Court emphasized that the setting up of new detention facilities will not be, in principle, sufficient to offer a sustainable solution for solving the problem. Another important thing would be the continuous allocation of funds for renovating the existing detention sites, taking in consideration the material conditions of the existing penitentiaries.

2. *measures of legislative nature - effective remedies*:

The Court recommended again, as it did in 2012 in the *Iacov Stanciu* judgment, that the Romanian State should create a *preventive remedy*, through which the judicial authorities would be able to end the situation contrary to Article 3 of the Convention and to give an indemnification when it considers the case.

Additionally, a specific *compensatory remedy* should be created through which an inmate who suffered because of an insufficient vital space and/or of precarious material conditions, would be indemnified accordingly. In this respect, the Court salutes the legislative initiative regarding the reduction of the penalties[1], which

[1] The Bill for amending and completing the Law no. 254/2013 regarding the execution of the penalties and of the custodial measures ordered by the court during the criminal

might be an adequate remedy for the damage suffered in care of precarious material conditions of detention with two conditions: (i) this should be awarded in an explicit manner for repairing the violation of Article 3 of the Convention; (2) its impact over the penalties quantum to be measurable.

As regards the administrative measures, please note that in the period of 2016-2017, the National Administration of Penitentiaries has done the following[1]:

- 679 new places have been set up through investment works and current repairs;
- 2,657 detention rooms have been submitted to current repair works;
- 200 places have been modernised in the Bacau penitentiary;
- several execution works are in progress with deadline in 2017:
  - setting up 40 new detention places and the modernisation of other 282 detention places at the Deva Penitentiary;
  - setting up 200 new detention places at the Giurgiu Penitentiary;
  - setting up 96 new detention places in the Gaesti Penitentiary;
- consolidation of the probation system:
  - according to the statistics, the effect of the new criminal policy is already obvious: at the end of 2015, around 28,000 persons were in detention and 42,000 persons on conditional release, while at the beginning of 2017,

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trial, initiated by the Justice Minister in November 2016 which provides that in order to grant conditional release, in the calculation of the punishment that can be considered as executed, according to the law, regardless of the execution regime of the penalty, the execution of the penalty in an inappropriate space.

[1] Please see the press release of the Ministry of Justice, http://www.just.ro/hotararea-pilot-pronuntata-de-cedo-privind-conditiile-de-detentie/. In the present, on 22 August 2017, according to the website of the National Administration of Penitentiaries, there are 26,588 persons deprived of liberty, and there is a shortage of 7,562 places of accommodation. But this situation gets better and better every day.

around 27,000 persons in detention and 56,000 persons on conditional release.

As regards the legislative measures, we underline that, in November 2016, the Ministry of Justice has initiated a bill for completing the Law no. 254/2013 regarding the execution of the penalties and of the custodial measures ordered by the court during the criminal trial, by adopting a compensatory mechanism of winning-days depending on the institution of conditional release. This mechanism is considered to be a general measure of relieving the penitentiaries, because it is conceived that in the account of the penalty to be considered as executed to include, no matter the type of penalty execution, as a compensatory method, the execution of the penalty by imprisonment in a space smaller than 3 sqm/inmate. In this case, for each period of 30 days executed in an inappropriate space, even if not consecutive, a further 3 days of the penalty shall be considered executed. This bill has been adopted in the Government meeting of 23 November 2016 and sent to the Senate on 9 December 2016. The bill is currently under debate in the Deputies Chamber (decisional chamber), where it was registered on 14 March 2017.

At the proposal of the Ministry of Justice, the Government has also adopted, on 31 January 2017, a bill regarding the pardon of certain penalties and measures of educational deprivation of liberty which was tacitly adopted by the Senate, after the deadline for debate and approval was met on 23 May 2017. The draft was sent for debate to the Chamber of Deputies, with a decision-making role in this case[1].

It is obvious that the Justice Laws have to be amended, as announced by the Justice Minister Tudorel Toader. Romania is willing to learn and apparently the authorities are taking and adapting several measures applied by Georgia in a similar case in 2012. Even the President of the Court, judge Guido Raimondi, has recommended to the Romanian authorities, to inspire from the legislative measures such as

[1] It is currently to the Commissions – please see online the status of the bill PL-x 219/06.06.2017
http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=16354.

those took by Italy, where the sanctions for the transgressors were reduced, and to some of them the sentence of domicile arrest were commuted to surveillance bracelets.

Second, building up new penitentiaries, modernising or extending the ones existing represent an important step to be taken. For instance, in several interviews, the Romanian Justice Minister confirmed that the Government is planning to build two new prisons, to modernise or to extend the ones already built and to analyse the possibility of transforming former military units in prisons[1].

Many of the cases pending before the Court (around 95,000 cases) are considered to be "repetitive cases", because they derive from a common dysfunction at the national level.

In a nutshell, the main objectives of the pilot judgment procedure can be described on three levels[2]: (i) for the Contracting States - to assist them in solving, at the national level, their structural or systemic problems; (ii) for the individuals – to offer them a possibility of speedier redress towards the violations of the Convention; (iii) for the Court – to manage its workload more efficiently and diligently, because this procedure reduces the number of similar cases that have to be solved by the judges.

We underline that, in our opinion, the pilot-judgment procedure represents a form of cooperation[3] between the Court and the respondent State. Its role is to offer general recommendations that would be capable of solving the respective systemic or structural problem, acceptable from the Court's perspective. However, the Court recognizes in its case-law that the Contracting State is free to choose the measures through which it will accomplish its obligation of conformation with the Court's decisions.

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[1] Please see https://www.news.ro/justitie/lider-de-sindicat-din-penitenciare-din-12-000-de-angajati-7-000-au-semnat-declaratii-de-refuz-al-orelor-suplimentare-se-va-asigura-doar-paza-detinutilor-19224033080020170809171348 39.

[2] Please see the press release of the Court no. 256/24.03.2011 available at http://hudoc.echr.coe.int/eng-press#{"itemid":["003-3481961-3922418"]}.

[3] Please see the press release of the Ministry of Foreign Affairs issued on 25.04.2017, available at https://www.mae.ro/node/41531.

One fundamental implication of this procedure is that the Court's assessment of the situation of the pilot-case trespasses the sole individual interests of certain applicants, requiring the Court to examine it from the perspective of the general measures required for solving the problem of other potentially affected persons[1]. Even there is a small number of similar applications pending before the Court, if the Court considers that it is a systemic or a structural problem, then the Court could use this procedure in terms of preventing the increase of such repetitive cases before the Court[2].

The Court affirmed on several occasions that the imprisonment usually implies for the inmates certain inconveniences, but for sure the sufferance and the humiliation to which are submitted should not overcome in any way what a certain form of legitimate treatment or penalty imply. The imprisonment does not mean that the inmate is deprived of the rights enshrined in the Convention, but the contrary – because the inmate needs increased protection due to its vulnerability and to the fact that he/she is fully in the care of the State.

In this respect, Article 3 of the Convention imposes a positive obligation on the authorities to ensure that any person deprived of liberty is held in conditions that are compatible with the respect of human dignity, that the means of execution of the penalty do not subject the person concerned to suffering or to an attempt of an intensity exceeding the unavoidable level of suffering inherent in detention; taking into account the practical requirements of the detention, the health and well-being of the person are adequately ensured[3].

In the Romanian case, the Court recognized and appreciated the efforts of the Romanian authorities to improve the situation of inmates from 2007 to 2017 (from the *Bragadireanu* case to the *Iacov Stanciu* case

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[1] Please see *Kuric˙and Others v. Slovenia* (application no. 26828/06, judgment dated 12 March 2014).
[2] *Ibidem*.
[3] Please see *Norbert Sikorski v. Poland* (application no. 17599/05, judgment dated 22 October 2009, points 130 and 131).

and now to the *Rezmives* case), but it decided that additional measures must be taken... and fast!

CONCLUSIONS

We look forward to discover the calendar that the Romanian Government will communicate to the Court at the expiry of the time-limit. Probably, after the expiry of this time-limit, the Court will assess the "global solutions" adopted by Romania and the compensation mechanism made available at national level. We only hope that after the analysis of the case, the Court will proceed like in the *Maria Atanasiu* case, proposing to strike out all similar pending cases once the required legislative changes had been introduced by the State in question, without prejudice to any decision to recommence the treatment of these cases in the event of any non-compliance by the respondent State. Additionally, we hope that the Court will also consider it appropriate to suspend the treatment of any applications not yet registered at the date of delivery of this judgment, as well as future applications.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 46-55

THE PROFESSIONALISATION OF POLITICS: SOME LEGAL CONSEQUENCES

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Abstract:

Today in every country we can see a great disappointment about politics and mostly about politicians. Searching good results of governance is a real provocation in many countries. But citizens need a better administration, a better economic policy and a rule of law society. Those purposes should be created by politicians. However, there is a "profession" named "politician"? Having a positive answer to this question, we must see a new question: what are the legal consequences of such a profession? Our text tries to make a brief answer to this situation.

Key words: *Citizens, politicians, professionalization, results, public service.*

INTRODUCTION

Today in every country we can see a great disappointment about politics and mostly about politicians. In every social poll, the parties and politicians are on the lowest positions, mainly in the last decade of researches.

For example, in the United Kingdom social polls point out the lowest level in history for members of parliament, but not only. We add

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here a special report on this problem, because is useful to watch the situation on the country that created in 1215 *Magna Charta Libertatum*:

"Politicians are now the group of professionals least likely to tell the truth, the public believes, while trust in captains of industry has fallen to an all-time low, found the survey by Ipsos MORI.

Only 13% of people trust politicians to tell the truth, down from 21%, while 82% think they do not tell the truth, up from 73% last year, the polling firm found in its latest Trust in Professions annual survey, conducted on behalf of the Royal College of Physicians. That 13% score is the worst MPs have recorded in the poll's 26-year history and means they are now the group people most mistrust, even more than last year's least-trusted personnel – journalists.

Government ministers fared little better. Just 16% .... believe they are truthful, down from 24%. "[1].

Despite the text is from 2009, the 2016 year has also bad results, as this text points out too: "Americans' trust in their political leaders and in the American people themselves to make political decisions continues to decline. The percentages trusting the American people (56%) and political leaders (42%) are down roughly 20 percentage points since 2004 and are currently at new lows in Gallup's trends"[2].

Romanian researches conclude in the same way: just 10% belive in politicians and parties[3].

Such a bad results should be investigate for causes and remedies, because politician's job is to rule the nation and communities and, of course, to offer solutions to all society's problems.

1. "When Tzŭ Kung asked what were the essentials of government, the Master replies: "Sufficient food, sufficient forces and the confidence of the people". (Confucius, c. 500 BC, p. 571)[1].

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[1]https://www.theguardian.com/politics/2009/sep/27/trust-politicians-all-time-low, accessed on 12.12.2017.
[2]http://news.gallup.com/poll/195716/americans-trust-political-leaders-public-new-lows.aspx, accessed on 12.12.2017.
[3]http://romanialibera.ro/politica/partide/sondaj--noua-din-zece-romani-au-incredere-putina-si-foarte-putina-in-partidele-politice-408442?c=q2561, accessed on 12.12.2017.

But trust is just a direct result of facts and words. Words are used to describe our ideas and plans; of course, they present our goals and working results too. However, there is a Latin proverb who point out the difference between words and facts: "*verba volant, scripta manent*". This expression is in fact the legal expression of necessity to prove an act or contract, but it can be understood in another way too.

What are words in politics and in our lives? For sure, to speak means to declare something. Declarations are made with a purpose – legal, economic, entertainment, etc. – and represent our discernment enforced in social relations. Everyone which are listening us create a new reality as a consequence of our words and answer in response, helping us to create a new reality. This ping-pong of words creates new thoughts in our minds and for future, new legal realities (because a successful negotiation can be followed by signing of a contract; a positive conversation between man and woman can be followed by marriage, etc.).

Words are expression of mind, because a person thinks (more or less) what he is speaking; but words must be accompanied by facts. On their PR, every company use the best words to describe its work and results, but a normal person is used with a special PR vocabulary and ask for real image of the firm. In this case, words are not enough, because equipments and employees of company speak themselves without any word: a clean and efficient equipments need no more human words about it; a poor and tired face of an employer speaks about salary and working conditions more precisely than a commercial of television.

2. Politicians are in the same situation, because they use words every day, but in the same time, they can convince electorate with a better PR instrument: the results achieved on their profession and on their administrative rule of public institutions. Those results – facts, in a simple word – destroy or launch their political career better and faster than any discourse on the TV cameras.

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[1]https://parliamentsandlegislatures.files.wordpress.com/2015/04/psa-paper-8.pdf, p.1, accessed on 16.07.2017

If we can describe one of the Internet effects on politics we can named it as "the speaking-politicians killer". Of course, this result is not totally and has not the same speed in every country, but with Internet is possible to find easier the real activity of your politician. In this paradigm of transparency and knowledge, the politicians start to hate Internet and also the transparency principle, because now it is possible to know and to compare. Much more, cooperation between Internet users made possible that secret of politicians are available to all people, despite their secret banking accounts made abroad. The year 2016 was signalled by the famous "Panama Papers" scandal, which has in the first weeks such consequences: "investigations are launched in several countries into the business activities of hundreds of individuals – not only fraudsters, drug lords and private individuals .... The banking regulator in New York orders thirteen banks – among them Deutsche Bank, ABN AMRO and Société Générale – to hand over all their data on business dealings with Mossack Fonseca. At the same time, several acting heads of government also come under pressure – in Iceland, Argentina, Malta, Pakistan and the United Kingdom"[1].

These revelations are good for citizens and for states, but not for politicians. In these years, the mask of politics start to fail and everyone is able to see its hideous face, based in to high percent on bribe, corruption, influence traffic and many other not moral practices. In those years, in every nation the trust over politicians strongly decreased and less people believe politicians. In this case, citizens stay home and mostly, the youngest generation, named Millenials.

About this generation, some American researches point out that: "The American National Election Study found that around 30 percent of the public tried to influence others how to vote in elections from 1952 until 1996; since 2000 this has averaged over 40 percent. The World Values Survey shows that protest activity has increased since 1981. And more Americans are active in new forms of political action such as political consumerism (buying or not buying a product for political

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[1] Bastian Obermayer, Frederik Obermaier, *The Panama papers. Breaking the story of how the rich and powerful hide their money* (London: Oneworld, 2016), 282.

reasons), and online activity. ... Millennials in 2016 are significantly less likely to vote or try to influence others vote than were the ’80s generation in the 1987 survey, or the first wave of postwar baby boomers in 1967. But millennials display about the same level of political interest as the youngest generation did in 1987, and millennials contact local government and work with others in the community at essentially the same rates as did youth in the earlier surveys. And today’s youth are likely to get involved in protests or other political confrontations. ... For instance, younger Americans in 1987 and again in 2014 are less politically engaged than young Americans were in 1967. Youth participation may have been exceptionally high in the 1960s, as many young people were protesting against the Vietnam War or with the civil rights movement. But the overall decline in youth activism in 1987 and 2014 comes primarily in voting turnout rather than other forms of activism“[1].

The same article continue with some conclusions about middle age voters: "Conversely, older Americans in the two later surveys are significantly more active than seniors were in 1967. .... On the one hand, better-educated, more affluent, and healthier seniors today remain socially and politically engaged into later life — more so than they were in 1967. On the other hand, a growing percentage of the young have delayed their careers, marriage and children, which delays their political involvement. But as we see with the ’80s generation, as they entered middle age in the 2014 survey, they become as politically active as the average Americans in the 1967 survey. In other words, the 1980s generation that was once considered apathetic is now, in middle age, more politically active than earlier generations were at the same stage of life. The same is likely to occur for millennials"[2].

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[1]Russell Dalton, *Why don’t millennials vote?,* Available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/22/why-dont-millennials-vote/?utm_term=.391e29fe989b, accessed on 14.12.2017. The author of the text is research professor at the Center for the Study of Democracy, University of California, Irvine.

[2] Ibidem.

3. In such a big changing style of politics, it appears two new questions for politicians: a) what must be changed in their practices b) professionalization of politics is a solution to solve this problem?

The main purpose of politicians, in a normal and coherent society is to serve the public good, the public interest, being dedicated to them and not following money rewards for their works on public ruling functions. Is true, on this topic we can observe the problem of complexity of public things, related to a normal paying for specific skills of solving problems. But this is not the main problems, because no one is forced to go into politics. Once they wanted to be politicians, it must respect the moral laws much stronger than the positive law.

Without this strict respect of moral laws, there is no trust of citizens in politics and politicians, because everyone knows that positive law is made by politicians – so, they have the power to change the rules – but the moral norms are a more complex process, with more substance in human daily life. Violating the moral law is accompanied in many cases by strong sanctions, who act on the legitimacy of criminals stronger than any state law and with much longer consequence.

Public confidence in the political system – and subsequently the political legitimacy of the government – is increased where the public service delivery system is effective, where the public officials are accessible to local citizens, and where government agencies and departments work together in well coordinated, complementary ways. This style of making politics is the expression of moral and economic efficiency, and in today's world citizens start to pressure the politicians and state institutions for effective results.

4. In a huge proportion, scientists and practitioners of politics would agree that meritocracy within politics is the most desirable thing. Everyone benefits when those who represent us are the best possible people for the job. This viewpoint is relatively uncontroversial. The

problem is that this is where the consensus ends; defining what makes someone the "best" politician attracts far more dissent[1].

This question is also accompanied by some constitutional norms.

For example, Romanian Constitution, in the article 121 paragraph (2) prescribes: "The local councils and the mayors cooperate as autonomous administrative authorities and manage public affairs in the communes and cities in accordance with the law[2]. But "manage" is not the best word to translate the Romanian text, because in original variant the verb "rezolva" means "to solve", not just an "operation of rule" (as is the verb *to manage*), but also a **positive result**!

Belgian Constitution in the article 165 paragraph (3) speaks: "Several federations of municipalities may cooperate or form associations with each other or with one or more metropolitan districts in accordance with the conditions and in the manner prescribed by the law to jointly regulate and manage those issues that fall within their competence. Their councils are not permitted to deliberate jointly"[3]. In French language the text is clearer: "Plusieurs fédérations de communes peuvent s'entendre ou s'associer entre elles ou avec une ou plusieurs agglomérations dans les conditions et selon le mode à déterminer par la loi pour régler et gérer en commun des objets qui relèvent de leur compétence. Il n'est pas permis à leurs conseils de délibérer en commun"[4]. The word "gerer" means "to manage and to solve". Again, a positive result!

5. The idea of positive results offered by politician's work is not everywhere present on legal texts, but it exists on the moral principles of politics. For sure, citizens go to vote asking for good results, not for bad ones.

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[1] Rainbow Murray, "What Makes a Good Politician? Reassessing the Criteria Used for Political Recruitment", *ECPR Joint Sessions*, Salamanca, (10-15 April 2014): 2.

[2] This translation, not very good, is presented on the Romanian Constitutional Court: https://www.ccr.ro/en/constitutia-romaniei-2003, accessed on 14.12.2017.

[3] https://www.constituteproject.org/constitution/Belgium_2014?lang=en, accessed on 14.12.2017.

[4] https://www.senate.be/doc/const_fr.html, accessed on 14.12.2017.

Good results can be achieved by every politician? Of course, the answer is negative. Sometimes opposition is strong, sometimes citizens act publicly against him, but in many cases is clear that politicians has less skills to fulfil the specific public service's tasks.

In this last case, we should note the necessity to educate politicians. But can we consider that his new education, made specific for political positions, are enough for a standard style of good results? No, of course not, but is creates a problem: following a special course for few years, we can consider that the result of those years of education is ... creating a new profession: "profession of being politician".

In this case, we should ask ourselves if only such school can give the exclusive right to be politician? The answer is negative, and of course, to completely limit by law the access in politics by such kind a school is not constitutional.

But, because politics and citizens needs good results, can we consider that such kind of schools as being necessary. The complexity of today's world and also the next years unfortunately claim for another vision on politics. Politics must be something professional, because the public good needs real positive results. As social research point out, the potential of protest and the citizen's interest on politics is higher and will be stronger; their (citizens) wish for good results becomes now stronger than ever, because they can compare with good results from other countries.

To do this, we need to evaluate and change our constitutions, and subsequent administrative legislation. Is not possible in a world with more than 7,6 billion people – mostly, the states constitutions was adopted when Earth population was less than 3 billion people and the social needs was smaller too – to have on power politicians without good skills of communities administration. The price for incompetence is too high and we cannot allow now; our planet has fewer resources every year, but more people who are asking for good results from politicians.

In this case, we can consider that politics can be a profession, with a special level of education. Is true, is becomes a bit elitist society, but no state can resist to ruler's incompetence, when resources are decreasing and new generation of voters becomes very selective in their wishes.

Because there is a law: state and legislation should adapt to its citizens, not vice verse.

CONCLUSIONS

An ideal representative would be someone capable of independent thought and wise decision-making, who was also able to consult with constituents and include their perspectives wherever possible. But can we find such people everywhere?

Numerous studies use educational levels as a proxy for quality, on the assumption that better educated politicians will be more intelligent, more knowledgeable, and therefore better placed to make good decisions and sound policies. The theoretical limitations of using education as a measure of quality are compounded by the fact that this variable is often used alongside income to estimate the competence of candidates.

But there is a question: can we live without education? Humanity achieved its best results only when educated people created good laws and good living equipments – Internet is a creation of good engineers, good planes benefit by good education too and the list is infinitely. If in economy and engineering high level of education shows such good results, why not extend this on politics?

For sure, the future will offer more arguments for such a change in political paradigm of politics. Is true, we must adapt our legislation to this, but public service and public good deserve some changes to obtain a better political class.

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LEGAL AND ADMINISTRATIVESTUDIES,www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2(17), Year XVI, 2017, pp. 56-64

INFLUENCE OF REFUGEE CRISIS ON THE EUROPEAN UNION

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Abstract

The magnitude of the migration phenomenon, despite measures to diminish the migratory flow, has brought the European Union to an unprecedented challenge in its history and against which, as it has been so far, is not prepared to defend itself effectively. It is even necessary to modify the regulation of the legal status of refugees at the level of the European Union, both in terms of granting refugee status and especially as regards the integration of refugees into society.

Keywords:*. refugee, European Union, social integration.*

INTRODUCTION

If among the reasons that have led to the crisis of migrants we mention the armed conflicts, violence, violations of human rights, climate phenomena, natural or ecological disasters, we will notice that these people lack the prospect of development and the opportunity to

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enjoy social and economic rights in both countries of origin and in receiving countries, as refugees or displaced persons.[1]

In the post-war period, an unprecedented migratory wave occurred in Europe due to the civil wars generated by the so-called Arabian Spring in Libya and Syria, which left unattended borders, corroborated with the decision of some European leaders to relax the policy of receiving extra-community immigrants, in order to solve the problem of labour shortages in the countries they lead.

From Libya, after 2005, both under President Muammar Gaddafi's regime and after his removal, in 2011, hundreds of thousands of African migrants managed to cross the Libyan territory, to reach the coast of the Mediterranean Sea and from there, on ships offered by traffickers and most often in precarious condition, which caused shipwrecksthat annuallykilledmany people trying to enter Italy.

Also in Syria, as the civil war as intensifies, where thejihadist group Islamist state conquered vast territories that it has united in a "caliphate" with those it controls in Iraq, the wave of refugees has taken on the proportions of an exodus, they fleeing in the neighbouring countries of Syria, namely Jordan, Lebanon and, most of them, in Turkey. Thus, amid the huge flow of refugees and dissatisfaction with the stagnation of negotiations for Turkey's EU accession, the Ankara government has not made any efforts to stop them from moving further to Europe.

As a consequence, this situation provoked profound disagreements between Western European governments and some eastern European governments as well as within the European Union, and to countries opposed to the distribution of refugees through a binding quota mechanism (among them Romania) this decision was imposed by ignoring a basic principle of the functioning of the European Union, namely the principle of consent, being prejudiced by the interests of the Member States.

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[1]For development, see C. F. Popescu, M.-I. Grigore-Rădulescu, *Public International Law. Introductory Notions* (Bucharest: Universul Juridic, 2015), 138-142.

The issue of large migratory flows[1] is correlated with the issue of refugee status regulation, as large population movements make it impossible to establish a demarcation line between economic migrants and political refugees.[2]

These vulnerable people arrive in the European Union to seek asylum. Asylum is a form of international protection for those who leave their country of origin and who cannot return from a fear that is well founded by persecution[3], so the European Union has the legal and moral obligation to protect them. Member States are responsible for examining asylum applications, and if they are not favourably resolved, national governments have the obligation to transfer migrants to their home countries or to another safe country they have crossed over.

Given this situation, there is a question of ensuring a balance between the safety of EU citizens and ensuring the fundamental rights of migrants.

Citizens' safety is related to state security[4], and state security has become a vital one under the "globalization" of the war on terrorism, which calls into question all the regulations on the special regime of human rights. Human rights are the predominant targets of terrorism, because their violation strongly affects public conscience.[5]

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[1]According to data released by the International Organization for Migration (IOM) on December 18, 2015, 956,456 migrants arrived in Europe across the Mediterranean Sea from the beginning of the year, almost five times more than in the same period last year. Most, respectively 806,919, landed in Greece, another 150,317 in Italy, 3,845 in Spain, 269 in Cyprus and 106 in Malta. Also in 2015, at least 3,700 died in shipwrecks. If those who land in Italy are usually from Sub-Saharan Africa, most of those arriving in Greece came from Syria, Iraq and Afghanistan, but also many migrants from countries such as Iran, Pakistan or Bangladesh.

[2]V.D. Zlătescu and I. Moroianu Zlătescu, *Refugees and Their Legal Status*, (Bucharest: IRDO, 1992).

[3]C.F. Popescu and M.-I. Grigore-Rădulescu, *Public International Law. Introductory Notions.* 2nd Edition, revised and added (Bucharest: Universul Juridic, 2017), 141.

[4]M. Milca, „Rule of Law, Human Rights, Citizens' Safety and Exceptional Status", *IRDO, Human Rights Magazine*, no. 2 (2016): 17.

[5] I. L. Chircă, „Terrorism, Serious Infringement of Human Rights", no 4 (2015): 29.

In the literature, emergedthe idea that it is necessary that the "safety demand" exceed the organizational status managed by the state and become a fundamental human right of humans and citizens.[1] In this respect, it is appreciated that citizens' safety does not exclude respect for fundamental rights, but imposing restrictions on rights can affect the dignity of the person. As an example, in the literature, it is stated that if the state enforces fewer fundamental rights, there will be fewer personal security safeguards susceptible to abuse of power, and if fewer safety conditions are offered, the exercise natural human rights will be affected.[2]

ANALYSIS ON THE MERITS

The phenomenon of active population aging is generalized at EU level, so some governments have considered migrant reception and professional training a solution to the problem of labour shortages, an argument also put forward at the level of the leadership of the European Commission, including by its chairman, Jean-Claude Juncker.

Given the large number of migrants and their orientation only to Europe's most developed countries, Germany has proposed to divide them across all EU countries through a binding quota mechanism, invoking the argument of European solidarity, an idea immediately agreed by the European Commission.

Several governments opposed this binding quota mechanism, so that at the European Council in June 2015 a compromise was reached on the redistribution of 40,000 refugees by voluntary quota, but as a result of Germany's pressure, their opposition was removed by imposing a qualified majority vote by the Justice and Home Affairs Council (JHA) on September 22, 2015.[3]

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[1]Milca,„*Rule of Law, Human Rights, Citizens' Safety and Exceptional Status*", 18.

[2]C. Mirabelli, „Libertà e sicurezza, la falsa alternativa" (www.oasiscenter.eu /it/articoli/2007/03/01/liberta-o-sicurezza-la-falsa-alternativa).

[3]Hungary, the Czech Republic, Slovakia and Romania voted against these quotas, and Finland abstained. We mention that, throughout the history of the European Union, sensitive initiatives concerning JHA have been adopted through consensus.

According to the decision, another 120,000 migrants from Syria, Iraq and Eritrea, whose rate of acceptance of asylum applications in the European Union is over 75%, will be redistributed through the states of the Union bloc in the next two years in the hotspot centres, created in Greece and Italy.

Beyond the Hungarian Government's opposition against binding quotas on the route used by migrants, Hungary has decided to block migrants' access to its territory by raising barbed wire fences at the borders with Serbia and Croatia, and has adopted legislation enforcing penalties for crossing illegal border, so that now any migrant who crosses the border is arrested and detained as a matter of urgency.

Irrespective of the alleged argument, whether they intend to stop the migratory flow or whether they want to control this flow, some states like Bulgaria, Hungary, Slovenia, Austria and Macedonia have raised fences at state borders.

However, Germany, Austria and the Nordic countries have begun to take measures to limit the flow of migrants, the most important of which concern the expulsion of those who have been refused asylum and the reduction of social aid for migrants. At the same time, Sweden and Austria have decided to tighten the conditions for family reunification.

In normalizing relations with the countries of origin and transit, which underpin the migration phenomenon, after long negotiations, at the end of November 2015, the European Union concluded with Turkey an agreement promising to take steps to stop migrants which transit through its territory, and the Union bloc has, instead, offered its initial economic aid of € 3 billion to Turkey refugees, especially Syrians, while also accepting to unblock the accession process of Turkey to the European Union and of the visa liberalization for Turkish citizens.

At the request of Germany, the European Commission also proposed a mechanism for the EU Member States to take refugees directly from Turkey, but only eight states[1] have shown their willingness to participate with certain limits.

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[1]Germany, Austria, the Netherlands, Belgium, Sweden, Finland, Greece and Luxembourg.

The European Union has taken steps alongside the UN to intensify negotiations to resolve the crisis in Libya and the leaders of the two rival parliaments in the country have agreed to sign an agreement to establish a national union government.

At the EU-Africa Summit held in Malta in November, the Union bloc promised African states an aid of € 1.8 billion in an attempt to persuade them to stop the influx of migrants, but the opinion of these states was in the sense that the European states support legal migration.

The aim of the measures adopted by the European Union aimed at an immediate effect to help the states deal with the waves of migrants, but also a long-lasting effect, to prevent forced displacements.

Subsequent to the European Migration agenda[1], a call for "*strategic reflection*" was launched to identify ways to maximize the impact of EU support for development and humanitarian support and address adequately the scale of multidimensional factors and the impact of forced displacements locally.

The European Commission has called on the European Union and its Member States by the Communication"*The role of the external action of the European Union in the current refugee crisis*"[2] in order to become involved in the long-term management of the causes of migration and displacementmentioning in this respect that beyond legal and physical protection, food and accommodation provision, it is necessary to ensure the forced displaced persons access to employment and services such as health care, education and housing..

Agenda 2030 for sustainable development considers forced displacement as a threat to progress, so refugees and displaced persons inside the country are vulnerable.

The World Humanitarian Summit, held under the auspices of the United Nations in May 2016, is the starting point for cooperation between the European Union and its Member States with other entities in the global sphere, with the aim of, inter alia, launching the Agenda for Humanity.

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[1]COM(2015) 240.
[2]JOIN (2015) 40.

In September 2016, at the UN General Assembly, a high-level meeting on refugees and migration took place which aimed at undertaking comprehensive, coherent and holistic actions on forced displacement, with the involvement of political, humanitarian and other development factors.

CONCLUSIONS

It is particularly important for the European Union in the years to come to integrate migrants so that they do not become a social problem or one that seriously affects the financial balance of the Member States. As a result, migrants accepting an asylum request must be able to find a job and no longer depend on state benefits.

In Germany, migrants must compulsorily learn German and accept German values, which calls into question the idea of multiculturalism, agreed by France, where, in the post-colonial period, about five million Muslim immigrants from the countries of Maghreb, who did not have the will to integrate into French society, many of them did not have an interest in working, contenting themselves with the social allowance, and grouped themselves at the suburbs of the major cities where they formed true enclaves. In addition to the economic burden they have created for the French state, these immigrants have become easily recruited by radical Islamists seeking new followers, an argument in support of this point of view from the terrorist attacks in Paris.

Of course, in the case of Germany and other Western European countries that have opened their borders for extra-community migrants, considering that they will cover the needs of the labour market, it remains to be seen whether they will be willing and able to integrate professionally in countries with a civilization and a culture of labour fundamentally different from their own countries. But there are also many migrants who show a strong determination to succeed or who have a qualification in a given field.

Problems also exist in Eastern European countries, both in their vocation to become multicultural societies and economically, and these countries do not have the need for migrant labour.

Launched at EU level, the concept of public safety promotes state access to devices that allow for complete control of computer data and interpersonal communication of citizens. Given that the number of terrorist attacks[1] in the EU Member States has increased, it is a question of whether the states will focus on actions that will increasingly invoke the matter of urgency underlying the state of safety and in time to become a form of government.[2].

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[1] M.-I. Grigore-Rădulescu, C.F Popescu, „Some Remarks on the Notion of Terrorism", *Romanian Penal Law Revue*, XXI Year, no. 2 (April-June 2014): 50-75.

[2] In this respect, see also Milca, „*Rule of Law, Human Rights, Citizens' Safety and Exceptional Status*", 22.

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e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 65-71

PRACTICAL REFLECTIONS ON CIVIL SANCTIONS

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Abstract:

We are nowadays witnessing a continuous development of the judicial practice, especially in what concerns contravention field. Therefore, the case law provided a great number of examples regarding the appropriate way of reviewing and applying the process of individualization of contraventions, in relation to the circumstances of every case.

It is well known that any legal sanction, including the civil sanction, is not an end in itself, but a means of regulating social relationships, of creating a responsibility spirit, the value of which cannot be conditioned by the partialism of the official examiner.

Notwithstanding, situations may still be encountered requiring a re-individualization of the civil sanction, as we will discuss in this article, namely the replacement of the fine with the warning, given that the petitioner has fulfilled his obligation concerning the payment of the bridge toll, but he fulfilled it with delay.

Key words: *(civil sanction individualization, fine, warning, partialism)*

INTRODUCTION

This article takes into account a short review of a practical situation where the civil sanction was applied although the legal obligations were fulfilled immediately after the commission of the contravention. In this case, the bridge toll was paid after the commission of the offense, but

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before the draw up of the record of findings and subsequent penalties. Given the low social danger of the offense and the fact that the legal obligations were fulfilled, we consider that it was required to re-individualize the applied sanction, meaning that the civil penalty should have been replaced by the warning, as the appeal court established by means of a final ruling.

By means of civil sentence no. 4235/05.04.2017[1], the complaint of violation filed by the petitioner was rejected as unsubstantiated, the contravention record remaining legal and valid. The petitioner was sanctioned with fine amounting to RON 130 for committing the offense provided for by art. 8 para. (1[1]) of Government Emergency Ordinance no. 15/2002 on the application of the toll for the use and crossing the national roads network of Romania[2].

Therefore, it was noted that on June 3rd, 2016, the petitioner used the bridges across the Danube without paying the tolls. The toll was paid on June 6th, 2016. The sanction of the fine was applied on October 12th, 2016, therefore by means of a record which was drawn up 4 months after these two events, namely the commission of the offense, respectively the payment of the respective toll.

The court of first instance made a rigid and erroneous interpretation of the legal provisions in force, namely it maintained the record challenged on grounds that the toll could be paid until 12:00 am of the day following the one of the bridge crossing. If the petitioner had not paid the amount of the respective fee, we could have admitted the thesis of the court of first instance, but the latter did not proceed with the verification of the way the applied sanction was individualized, by ignoring in full the personal arguments and circumstances of the case. The interpretation of the legislation was strictly literal, by omitting in full the spirit of the law.

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[1] pronounced by the Court of District 3 Bucharest.

[2]Published in Official Journal no. 143 of 25.02.2002, as further amended and supplemented.

The doctrine has repeatedly stated the need to interpret a legal regulation, this being „*justified by the fact that, in the application of the law, the enforcement body (the judge, the administrative body etc.) has to clarify, by using all the required precision, the wording of the legal rule, to determine its compatibility with a particular de facto situation (...) The enforcement body has always available a system of rules of general and impersonal nature, from which it has to select the one that applies in the specific case*[1]".

As it can be noted, the petitioner proved good-faith by paying the respective toll. It is true that he is guilty of the non-compliance with the legal provisions, but, notwithstanding, the fine applied on him does not achieve the preventive and educational purpose of the sanction and it is not proportional with the actual social danger of the contravention in question.

In what concerns the individualization of the sanction to be applied to the offender, this „*represents a legal procedure required for the compliance with the principle of individuality and personality of the applied sanction, principles which are specific to the criminal field, to which the contravention field is assimilated according to the case law of the European Court of Human Rights and of the Romanian courts*[2]".

Therefore, we should relate to the provisions of the common law in the field, namely Government Ordinance no. 2/2001 on the legal regime of contraventions[3], more precisely art. 21 para. (3): „*The sanction shall apply under the limits provided by the normative act and has to be in proportion with the social danger level of the committed offence, by taking into account the circumstances of the offence, the way and means*

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[1] Nicolae Popa, *Teoria generală a dreptului*, edition 5 (Bucharest: C.H. Beck, 2014), 203.

[2] Izabella Reka Radvanski, *Scurte consideraţii privind individualizarea sancţiunilor contravenţionale prevăzute de OG nr. 43/1997*, article published on August 21st, 2015, available on site https://www.juridice.ro/396263/scurte-consideratii-privind-individualizarea-sanctiunilor-contraventionale-prevazute-de-og-nr-431997.html, site accessed on 06.12.2017.

[3] The normative act was published in Official Journal no. 410 of 25.07.2001, as further amended and supplemented.

of committing the offence, the purpose, the consequences, as well as the personal circumstances of the offender and the other data of the record of findings and subsequent penalties".

Given the term between the commission of the contravention, respectively the payment of the related obligations and the time of the draw up of the record of findings and subsequent penalties is of 4 months (03/06.06.2016 – 12.10.2016), we consider that the official examiner should have sanctioned the petitioner by applying a warning. The fine would have been justified if the social relationships had not been settled, but the attitude of the petitioner after the commission of the contravention did not leave room for such an interpretation.

In order to reach the aforementioned conclusion, we only took into account the criteria referred to in art. 21 para. (3) of Government Ordinance no. 2/2001, and the case law of the European Court of Human Rights: „*cases Engel against the Netherlands, Lutz against Germany, Lauko against Slovakia and Kadubec against Slovakia (according to which) the contravention falls under the scope of the «prosecutions in criminal matters» the first paragraph of art. 6 of the European Court of Human Rights refers to*[1]".

Therefore, by reference to the actual and personal circumstances of the case, the fine applied by means of the record of findings and subsequent penalties and maintained in the settlement of the complaint of violation is unjustified.

The appeal of the petitioner against unsubstantiated civil sentence no. 4235/05.04.2017 was admitted[2], so that, in terms of the proportionality of the applied sanction, the court of appeal took into account the procedural attitude of the petitioner, who recognized and regretted the commission of the offence, thus being concluded that the preventive aim pursued by the law can also be ensured by applying a

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[1] Andrei Pap, *Drept contravențional. Culegere de hotărâri judecătorești 2007-2014. Vol. I. Reflectarea jurisprudenței C.E.D.O. în procedura contravențională națională,* (Bucharest: Hamangiu, 2015), 181.

[2] By civil ruling no. 6493/02.11.2017, pronounced by the Bucharest Tribunal, Division of the contentious administrative and fiscal.

milder sanction. Therefore, in connection with the actual social danger, it was concluded that the petitioner has the opportunity to become aware of his legal obligations by being applied the sanction of „*warning*".

Therefore, by applying a milder sanction, the petitioner was drawn the attention on the fact that he has to fully fulfill the law and not to violate any more the rules governing the movement of motor vehicles on national roads in the future, thus the scope of the civil sanction being achieved[1].

Furthermore, personal circumstances of the petitioner being also taken into account, who had a constant conduct of accepting the consequences of his deeds, thus being proved that he acknowledged that in the future he would avoid such conducts.

The offence of the petitioner of not paying the toll for crossing Cernavodă bridge under the deadline provided by the law, but with delay, does not indicate a lack of interest in the legal provisions, but can be deemed a consequence of a lack of attention or actionable negligence.

Given all the aforementioned, the decision of the tribunal to admit the petitioner's appeal was the right one, by changing the sentence appealed in terms of admitting the complaint of violation, by replacing the sanction of the fine with the sanction of the warning, in consideration of the fact that the merits applied inappropriately the law in terms of the individualization of the sanction.

CONCLUSION(S)

If the petitioner had wanted to avoid the payment of the bridge toll, the evidence certifying the performance of the payment would not have been available. Even if the payment was performed by exceeding the deadline for the payment of the bridge toll, the petitioner proved good faith in fulfilling this obligation, a ground for which this aspect should have been withheld and turned to good account by the court of first instance.

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[1] Mădălina-Elena Mihăilescu, *Sancțiunile contravenționale: aspecte de drept material în dreptul românesc și comparat* (Bucharest: Hamangiu, 2013),154.

Taking into account the preventive and educational purpose of the contraventions, the thesis of the court of first instance could not be accepted, as this would have meant to admit a mechanical application of the legislation, without taking into account the main elements which differentiates each and every case, namely: the proportionality of the sanction in connection with the actual social danger level of the contravention in question, the fulfillment of the legal obligations, the offender's attitude, as well as his personal circumstances.

In conclusion, neither the role of an appropriate interpretation of the legal regulations in connection with the specific of each and every case, nor the need to individualize every civil sanction depending on the way and means of committing them, the purpose and the consequence can be denied.

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e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2(17), Year XVI, 2017, pp. 72-82

TRADITIONAL RELIGIOUS PRACTICES AND THE ORIGINS OF THE SCIENCE OF ROMAN LAW

Andreea RÎPEANU[1]

Abstract:

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – sacra publica. The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced Codex Theodosianus.

Keywords: *traditional religious practices, Roman law, legal science, sacral law.*

INTRODUCTION

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were

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strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.[1]

The justification of punishment and mainly of capital execution is encountered, at least initially, in religion, in providing the victim to the God offended by fact and whose revenge could fall thus over the entire community.[2] Even the notion of *sanctio*, by which the punishment was determined for the breach of a law is obviously related to *sanctus*, *sacer* and *sacratio*. [3]

LAW AND RELIGION

For several centuries, the pontiffs have known the pomp days[4] and the solemn formulas that the parties in dispute were compelled to pronounce. The pomp days and formulas were revealed and displayed in forum by Gnaeus Flavius, the freedman of Appius Claudius Caeccus in 301 before Christ.[5] The pontiffs held the monopole of law, being the sole who knew and could provide explanations related to the trial. The first priest of the state was the king, until the foundation of republic.[6] The Romans didn't know later either the distinction existent today between state and church, aspects of religion, of sacred, rites and practices appearing in all aspects of Roman life, including in law and criminal law.

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of

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[1] Molcuț E., Oancea D., *Roman Law* (Bucharest: Publishing House, 1993), 60.
[2] Strachan-Davidson J. L., *Problems of the Roman criminal law* (Oxford: Clarendon Press, 1912), 1.
[3] Strachan-Davidson J. L. *Problems of the Roman criminal law*, 3.
[4] Days when trials were judged.
[5] Hanga Vl., *Borough of seven cholines* (Bucharest,1951), 185.
[6] Girard Fr., *Histoire de l'organization judiciare des Romains* (Paris: Arthur Rousseau, 1901), 13.

the cult financed by public resources – *sacra publica*.[1] The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced *Codex Theodosianus*.[2] The religions was present in all aspects of social life, it was not limited to temples and feasts.[3] There was however a clear difference between res sacrae and res publicae. In this respect, it was asserted in recent studies, that both religious practices of Romans, and the juridical ones, wouldn't be so different as previously thought, but much more dynamic, evidence of Roman specific conservationism. Therefore, the feasts with religious character were still organised in the town of Alba Longa, although it hadn't been for long time an important urban centre.[4]

For the lack of faith, it seems that there weren't juridical consequences, according to the former laws. There is however the possibility the state expressly demands a manifestation of faith, on certain occasions. In this respect, after the death of Cesar, when he was turned into a God (endowed with divine power), it was ordered to every citizen, under the death punishment, to celebrate the anniversary of birth of the dictator.[5] There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by

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[1] Rüpke Jörg, (coord.), *A companion to Roman religion* (Blackwell Publishing, 2007), 7.
[2] *Codex Theodosianus*, 16,10,4 decreed: in all places and all towns, the temples must be closed, and pursuant to a general warning, the possibility to sin to belong to bad ones; termination of sacrifices (if someone commits such an act to be victim of revenge); the property of the one executed to be claimed by the town; the governors from province to be punished in the same manner if they neglect the punishment of such acts.
[3] Jörg Rüpke (coord.) , *A companion to Roman religion*, 5.
[4] Plinius, *Naturalis Historia*, 3,69-70.
[5] Dion, 47,18.

Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.[1] Wanting to find out the desire of law in this respect, Romulus selected Palatine and Remus the choline of Aventin. The fatidic signs appeared firstly to Remus, in the form of six eagles. Romulus was shown twice more eagles.[2] However, both Remus and Romulus were acclaimed as kings by its own camp, *this being the reason of much trouble, turning into a bloody fight, in tumble, seriously injured by his brother, Remus fell breathless*.

The second legend, presented by Titus Livius, recounts us the fact that Remus jumped over the new walls built up by Romulus, but without any bad intention. However. Romulus, taking the gesture in serious, killed him saying: *all those who dare to jump over the walls built by me to die like this*.[3]

The nature of these myths is symbolic for subsequent development of Roman spirituality and moral. Pursuant to such bloody sacrifice, the first offered to divinity of Rome, the people will always keep in mind a memory not rather pleasant. More than 700 de years, pursuant to the foundation of Rome (753), Horaţiu will still consider it an originary sin, the consequences thereof being able to cause the perdition of Borough, determining its sons to murder each other.[4] Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known*

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[1] Livius Titus, *Ab urbe condita* (Bucharest: Minerva, 1976), 14.
[2] Livius Titus, vol.I, p.14 and Plutarh, *Romulus*, III-XI.
[3] The foundation of a borough entailed very struct rites: in order to be able to see the will of gods a good omen space is delimited on the sky; the space of borough, on its turn, was delimited by the ground plot ploughed, symbolicaly, to become inviolable, sacred.
[4] Grimal Pierre, *Roman civilisation* (Bucharest: Minerva, 1973), 16.

crimes as well: on the origin of the power of Tezeu is the suicide of Egeu.[1]

It was said that the legends of founding Rome would have on origin indo-European myths, mythological inheritance which, camouflaged in the oldest history of borough, represents by itself a religious creation susceptible to reveal us the structure specific to Roman religion.[2]

Initially, there was in Rome, as in other states of antic world, a confusion between law (*ius*) and religion (*fas*). Consequently, the priests were considered the maintainers and interpreters of divine will. The early legal practice was intensely maintained by pontiffs, from this college being elected as well the superior magistrates. The formula relied on a ritual practice involving accurate reproduction of some words deemed correct. The formulas were reserved to pontiffs, an elitist group of initiated people holding monopole over this knowledge. *Pontifices* were the only one able to draft testaments, contracts and who could provide evidence in trials. Under the direction of *pontifex maximus*, *comittia curiata* determines the sacred law and pontifical college, controlled state religion and ritual training. Starting with 3rd century before Christ, the place of pontiffs is taken by a class of legal advisors providing legal consultations in private law, including, both the field of contract, and that of crime.

In a society where guarding sacred goods of borough is deemed public duty and the recognition of sacrificers was an obligation, but which extended as well the application of domestic discipline over free citizen, when state religion was interested in doing this, the accomplishment of religious obligations was primitively rigoursly imposed, as well as sanctioned by criminal law. The one who, without being authorised in this respect, reveals the contents of the book of secret oracles, which may be consulted only based on a state order, risks capital punishment.[3] The guard of public sanctuaries was generally incumbent

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[1] Grimal Pierre, *Roman civilisation,* 16.
[2] Mircea Eliade, *History of faith and religious ideas* (Bucharest: Scientific, 1992), 106.
[3] Val. Max., 1,1,13.

upon magistrates. When, exceptionally, other individuals were appointed as well, who neglected their duties, a capital crime was committed.[1] There is no technical term to describe the sacrileges committed against Roman religion. The expression of Tertullian, *crimen laesae romanae religionis* is accurate, but it is not used frequently. At the same time, the notion of *sacrilegium* although frequently used, is not accurate, as it designates, at least on origin, the theft from a temple.

Although, the cult of other Gods, than those of Rome or those adopted by state is not deemed a delict, certain forms of foreign religion were morally and politically disapproved. Thus, during the Republic and Empire frequently were taken measures against the Egyptian cult, perceived as being too shocking for occidentals.[2] The repression consists in police measures, such as: it was forbidden public exercise of such practices; the altars and chapels were removed; the foreigners were applied measures of coercion etc.[3] According to Septimiu Sever, the king had, besides the duty to honour the gods of old rite that of disapproving and punishing any alienation from the old rite.[4] Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.[5]

The notion of *iniuria* (injustice) of private law was applied more for the state, than for gods. The profanation of a temple or the trouble of development of a religious act has as consequence a criminal action ended with a condemnation. It is ignored the possibility of the existence of particular legal disposals in this respect. Anyway, if such disposals existed, they targeted exclusively the offence of state. Roman criminal law did not include any disposals for the offence committed against a divinity by words or writs.

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly

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[1] Cicero, *Pro Rabirio*, 2,7.
[2] Cicero, *De legibus*, 2,8,19.
[3] Livius Titus, 4,30; 25,1,7,5.
[4] Dion, 25,36.
[5] *Digeste*, 48,19,30.

represented a crisis situation in the relation with gods.[1] Therefore, the accurate signification of miracles must be deciphered by priests. The magic power of divining the future belonged only to magistrates and military heads; it consisted in the interpretation of forecasts.

The domestic cult, remained unchanged for 12 centuries of Roman history, during the entire period of paganism was led by *pater familias*.[2] On its turn, the public cult was under the control of state. During the royalty period, the king held the first rank in sacerdotal hierarchy, being considered *rex sacrorum* (king of sacred).[3] It is known the fact that in the home of King three categories of writs were practiced, dedicated to Jupiter, Iunonei, Ianus, Marte and Ops Consina (goddess of agrarian abundance).

It was rightfully asserted[4], that rituals predominate not only in religious life of Romans, but also in politico-institutional life, marking deeply the entire mental of Roman people.

The cult of Dionis[5] was known in the entire Mediterranean world, including in Rome. Pursuant to the extension of Roman domination in Greece, the esoteric (secret) associations were spread in the entire peninsula, mainly in Campania.[6]

Consequently, in 186 before Christ was adopted a *Senatusconsult of Bacchanalibus* which had as scope the suppression of the cult of Dionis.[7] In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be

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[1] Eliade, *vol.II*, 107.
[2] Eliade, *vol. II*, 109.
[3] Eliade, *vol. II*, 111.
[4] Cizec Eugen, *History of Rome* (Bucharest: Paideia, 2002), 18.
[5] Dionis was in Greek mythology the god of vegetation, of pomiculture, of wine, of ecstasy and of fertility, called on Romans both Bacchus or Liber. In Rome Dionis appeared in the theatre shows and it was called in sacrifices.
[6] Eliade, *vol. II*, 226.
[7] Eliade, *vol. II*, 126, uses the phrase of *nocturne orgy mysteries*.

performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.[1] The certification of this law[2] is due to the discovery of an inscription in 1640 at Tiriolo. The Consul Spirus Postumius Albinus performed an investigation (*quaestio*) related to conspiracy (*coniuratio*) appeared related to practicing the cult of Dionis.

The supporters of the cult (around 7000) were accused of several crimes, among which: practicing ritual orgies, organisation of crimes for own enriching, forgery of documents etc. The text was analysed by several researchers, who emphasized the similarities with the persecution of Christians later on. There are some debates related to the nature of text and on the reasoning for which the practitioners of cult were punished. Thus, on the one hand, it is stated that, considering that religion was a state monopole, the particulars couldn't be allowed to organise such a cult and also, that it is manifested an opposition towards the influence of Greek culture, and on the other hand, it was asked the question whether in 186 before Christ existed indeed a criminal organisation using a bacchic cult to hide the activity. This cult was frequently associated[3] with orgy, crime and robbery or falsification.

When a conspiracy was discovered, the procedure consists in delegating a magistrate that leads an investigation, followed by the execution of leaders. It provides as well the neutrality of the group, as well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since

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[1] Walsh P.G., *Livy: His Historical Aims and Methods* (Londra: Cambridge University Press, 1967), 150 and 235.

[2] Pagan Victoria Emma, *Conspiracy Narratives in Roman History* (University of Texas Press, 2004), 51-53.

[3] According to Titus Livius there were bacchic rites not forbidden by state. However, the word *bacchic* represented mostly an insult, referring to immorality or sexual deviation.

conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.[1] The consul took them in custody to protect them and presented the case to Senate. Although some of the supporters of the cult committed suicide, the majority were caught, judged and executed or enchained;[2] the same for the leaders of the cult. On their turn, the altars were destroyed.

CONCLUSIONS

We believe that the asperity of punishments and the manner how this case was settled, must not be related to excessive intolerance of Romans opposite to religious cults, but rather to the prevention of a conspiracy. The severity and ampleness of investigation, carried out within five years prove the political nature of trial. The danger was determined by the existence of a potential complot against state and not by practicing a cult, since, as Ovidiu asserts, *Rome was the most dignified place of meeting of all gods*. The foreign cults were accepted and acknowledged at Rome by formal integration in official cults. Therefore, we must consider the social, political and military context after the second Punic war, when the security of state should be protected against any form of conspiracy.

Taking advantage of this situation, the senate used the legislation to control foreign influence, mainly that of Greek culture, control manifested several times, just to suppress the religious influences. In this respect, in 173 before Christ two epicurean philosophers were exiled; and in 155 before Christ the philosopher Carneades was exiled as well, on initiative of Cato cel Bătrân.

Despite all these, some bacchic practices survived in Rome, being tolerated by state to a certain extent.

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[1] Livius Titus, 39,19,5.

[2]Livius Titus does not recount what happened further on with thouse enchained, however it is easy to understand. To be mentioned that Rome had no prison in the sense that we provide to the notion.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 83-92

REFLECTIONS ON THE PRESUMPTION OF INNOCENCE IN THE LIGHT OF ART. 335 PARA. (2) OF THE CRIMINAL CODE

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Abstract:

Both the case law and the doctrine flourish when we take into account civil, respectively criminal cases, this is why we encounter a great number of legal issues, each of them with its specificity. Notwithstanding, what happens when the legal provisions violate constitutional principles, such as the presumption of innocence?

Therefore, in this article, we would like to draw the attention on the inadequacies that lead to exaggerated and unjustified restrictions in what concerns the liberty of a person to drive on public roads in case of committing the offence provided for by art. 335 para. (2) of the Criminal Code.

Key words: *(presumption of innocence, driving right, temporary traffic permit, criminal case)*

INTRODUCTION

This article approaches in both theoretical and practical terms, the matter regarding the breaching of the presumption of innocence in case of committing the offence referred to in art. 335 para. (2) of the Criminal

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Code. In this case, the legal provisions in force do not allow the release of a temporary traffic permit, thus an absolute interdiction being reached, until the criminal case is settled.

In accordance with the provisions of art. 335 para. (2) of the new Criminal Code[1], „ *driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, or whose license has been withdrawn or rescinded or who is not entitled to drive vehicles in Romania*" represents an offence.

The provisions of art. 335 of the Criminal Code find their correspondent in the provisions of art. 86 of Government Emergency Ordinance no. 195/2002 on public road driving, para. (2) by taking over, under a series of amendments on thesis I, old art. 86 para. (2) of Government Emergency Ordinance no. 195/2002[2].

The doctrine stated that the offences provided for by art. 335 of the Criminal Code are committed only with intention, which can be direct or indirect. The commission of the act with basic intent or without guilt does not represent an offence[3]. Therefore, after the commission of the offence, a criminal case is opened which will either be closed, if the incidence of one of the cases listed in art. 16 para. (1) of the Code of criminal procedure[4] is found, or the indictment will be issued and the courts of law will assess the lawfulness of the referral to the court and

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[1] Law no. 286/2009, published in Official Journal no. 510 of July 24th, 2009, as further amended and supplemented.

[2] Adina Vlăşceanu and Alina Barbu, *Noul Cod penal: comentat prin raportare la Codul penal anterior* (Bucharest: Hamangiu), 2014, 771.

[3] Vasile Dobrinoiu (coordinator), Ilie Pascu and Mihai Adrian Hotca and Ioan Chiş and Mirela Gorunescu and Costică Paul and Norel Neagu and Maxim Dobrinoiu and Mircea Constantin Sinescu, *Noul Cod penal comentat. Partea specială*, Vol. II, Edition II revised and supplemented (Bucharest: Universul Juridic, 2014), 718.

[4] Law no. 135/2010, published in Official Journal no. 486 of July 15th, 2010, as further amended and supplemented.

will analyze the file in what concerns the existence of the constitutive elements of the offence, respectively the form of guilt required by the law for the defendant.

By examining art. 111 para. (3) of G.E.O. no. 195/2002[1], we note that „*in the situations (...) referred to in (...)* ***art. 335 para. (2)****, (...) of the Criminal Code, the temporary traffic permit is released* ***without driving right***".

It is true that, following the corroboration of art. 111 para. (1) and para. (2), we might think that there is the possibility of releasing the temporary traffic permit ***with*** driving right, but the provisions of para. (3) do not leave room for interpretation from this point of view. Therefore, in connection with the commission of the offence provided for by art. 335 para. (2) of the Criminal Code, regardless of the accepted version, we conclude that the temporary traffic permit shall be released ***without*** driving right.

Notwithstanding, art. 111 para. (6) of G.E.O. no. 195/2002 provides that „*upon the request of the holder of the driving license retained under the terms of para. (1) letter b) or of para. (4), the prosecutor (...) or, during the trial, the court vested with the settlement of the case* ***can order the extension of the driving right****, by no more than 30 days*", until the final settlement of the case.

We note that art. 111 para. (6) does not distinguish between the facts for which the extension of the temporary traffic permit can be ordered, by making reference only to art. 111 para. (1) letter b), where we expressly find the offences committed under the terms of art. 335 para. (2) of the Criminal Code.

Since the temporary traffic permit is released without driving right, the prosecutor might consider that the document in question cannot benefit from the right of extension, on grounds that it would be illogical to extend the term of a document which do not grant from the very beginning the legal possibility of exercising the right to drive on public roads.

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[1] on the right of driving on public roads, republished in Official Journal no. 670 of August 3rd, 2006, as further amended and supplemented.

Such an interpretation will lead to the flagrant violation of the presumption of innocence, as the person in question will not be entitled to drive on public roads and cannot successfully initiate procedures whereby to be granted this right, until the final settlement of the case.

It is true that according to the legal provisions in force[1], the parties shall be entitled to benefit from the settlement of the cases, including criminal cases, within a reasonable term. The doctrine has shown on numerous occasions that this is absolutely required „*in order to achieve the purpose of the criminal trial of contributing to the defense of the rule of law, to the protection of individual, of the individual's rights and freedoms, as well as to the education of the citizens in the spirit of law enforcement*[2]".

Notwithstanding, two aspects are required to be taken into account, namely:

a) the term required for a criminal case to be settled, which can easily exceed one year, maybe more, depending on how busy the court is or how complicated the case is.

Therefore, according to a study performed on the judgment of ECHR against the Romanian state, „*judgment Vlad of November 26th, 2013 notes the violation of art. 6 (1) and outlines that, since there are other 500 cases with the same object and type of violation on the dockets of the Court, in what concerns the term of the criminal and civil procedures before the Romanian courts, there is a systematic issue requiring the adoption of additional regulations of the judiciary system*

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[1] Art. 21 para. (3) of the Constitution of Romania, republished; Art. 8 of the new Code of criminal procedure: „*The fair nature and the reasonable term of the criminal trial*".

[2] Grigore Gr. Theodoru, *Tratat de Drept procesual penal*, Edition no. 3, (Bucharest: Hamangiu, 2013), 54; Nicolae Volonciu and Andreea Simona Uzlău (coord.) and Raluca Moroșanu and Victor Văduva and Daniel Atasiei and Cristinel Ghigheci and Corina Voicu and Georgiana Tudor and Teodor-Viorel Gheorghe and Cătălin Mihai Ghirița and Teodor Manea, *Codul de procedură penală comentat*, edition no. 3 revised and supplemented (Bucharest: Hamangiu, 2017), 6.

in order to ensure the fulfillment of the right to a fair trial within a reasonable term[1]".

Therefore, we do not find ourselves in the situation where we can claim that we, as a state, fully comply with the right to a fair trial and the settlement of a case within a reasonable term. In order for them not to remain at the state of illusions, it is required to implement measures to put them forward.

b) the limited term of complementary contraventions[2]. Therefore, the maximum term of suspension of the driving right is of 90 days, which can be extended by 30 days in certain situations[3].

Therefore, the civil sanction for the commission of a sole offence shall not exceed 120 days of suspension of the driving right. For example, it is not excluded that the court reaches the conclusion that, in what concerns the case submitted for judgment, the acquittal of the defendant has to be pronounced or that the prosecutor founds that the closing of the file is required. In such a situation, we are witnessing an excessive and unjustified restriction of the right to drive on public roads.

Such a sanction cannot be considered as fulfilling the requirements of proportionality[4], or the presumption of innocence principle, since,

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[1] Marin Voicu, *România – 20 de ani de jurisdicție a CEDO – Privire statistică și de sinteză*, studiu publicat în data de 17.02.2017, available on site https://juridice.ro/essentials/893/romania-20-de-ani-de-jurisdictie-a-cedo-privire-statistica-si-de-sinteza, site accessed on 09.12.2017.

[2] Art. 96 para. (2) letter b) in conjunction with art. 103 (1) c) of G.E.O. no. 195/2002.

[3] For example, the failure of the offender to appear within 15 days as of the pronouncing of the ruling whereby the court rejected the objection filed against the record of findings and subsequent penalties, in order to deliver the driving license, according to art. 118 para. (4) and para. (5) of G.E.O. no. 195/2002.

[4] Art. 21 para. (3) of G.O. no. 2/2001 on the legal regime of contraventions, published in Official Journal no. 410 of July 25th, 2001, as further amended and supplemented, provides the following: „*The sanction shall apply within the limits provided by the normative act and must be proportionate to the level of social danger of the committed offence, by taking into account the circumstances of the offence, the way and means of committing the offence, the purpose, the consequences, as well as the personal circumstances of the offender and the other data of the record of findings and subsequent penalties*".

based on the legal provisions in force, the one who falls under the scope of them will be treated as having been finally convicted for the commission of the offence he/she is investigated for.

According to art. 97 para. (3) of G.E.O. no. 195/2002, „*the term during which the holder of the driving license is not entitled to drive a vehicle (...) shall be deemed a term of suspension of the exercise of the right to drive*". For example, let's imagine that the criminal case is closed or the defendant is acquitted after 2 year term. It is obvious that the restriction incurred is exaggerated.

The constitutional principle of the „*presumption of innocence*", is established by art. 23 para. (11) of the Constitution of Romania[1]: „*Any person shall be presumed innocent until found guilty by a final decision of the court*".

Furthermore, the presumption of innocence is also established in the new Code of criminal procedure in art. 4: „*(1) Any person shall be presumed innocent until found guilty by a final criminal decision. (2) Following the administration of the evidence adduced to the case, any doubt in the formation of the opinion of the judicial bodies is interpreted in favor of the suspect or defendant*".

The presumption of innocence principle is not regulated only on national level, reason for which any person accused of an offence is presumed innocent until his/her guilt has been established under a final conviction ruling, according to art. 6 second paragraph ECHR, art. 48 paragraph 1 of the Charter of Fundamental Rights of the European Union, but also art. 14 paragraph 2 of the International Covenant on Civil and Political Rights[2].

The presumption of innocence does not apply only to the person being sued and respectively who acquired the capacity of defendant as the doctrine provided: „*both the Constitution of Romania, and the Code*

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[1] Republished in Official Journal no. 767 of October 31st, 2003.

[2]Mihail Udroiu (coord.) and Amalia Andone-Bontaș and Georgina Bodoroncea and Marius Bulancea and Daniel Grădinaru and Claudia Jderu and Irina Kuglay and Cristinel Meceanu, and Lucreția Postelnicu and Isabelle Tocan and Andra Roxana Trandafir, *Codul de procedură penală: comentariu pe articole: art. 1-603* (Bucharest: C.H. Beck, 2015), 17.

of criminal procedure refer to the notion of «person», without making the presumption of innocence dependent on the existence of a criminal trial where the person has the capacity of suspect or defendant[1]".

Therefore, the presumption of innocence should have been complied with and the exercise of the right to drive vehicles should not have been prohibited almost in full throughout the term of the investigations, respectively of the judgment, as the more so as the personal circumstances of the case can prove that there is no such high social danger to justify an exaggerated restriction of the rights of an individual.

In case of the commission of the offence referred to in art. 335 para. (2) of the Criminal Code, the immediate consequence consists in a state of danger for the social relationships contemplated by the criminal protection[2]. We hereby indicate that there are final rulings pronounced by the courts of law whereby the petition of the plaintiff was admitted and the defendant (the County Police Inspectorate, as the issuer of the document) was bound to release a temporary traffic permit with right of driving on public roads and of extension by 30 days, under the terms of art. 111 para. (6) of G.E.O. no. 195/2002[3].

It is important to note that in the aforementioned case, the plaintiff was involved in a car accident which resulted in the death of three persons, and criminal prosecution was ordered against him for the commission of the offence of third degree murder and the driving right could be extended only until the initiation of the criminal proceedings.

On second appeal, the Court of Appeal of Cluj took into account that the release of the temporary traffic permit without driving right was

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[1] Udroiu, *Codul de procedură penală: comentariu pe articole: art. 1-603,* 17.

[2] Comment published in the paperwork of Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Paun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *Noul Cod penal comentat. Partea specială*, Edition III revised and supplemented (Bucharest: Universul Juridic, 2016), available on https://idrept.ro/, site accessed on 08.12.2017.

[3] Decision no. 1405/2008 pronounced on 11.06.2008 by the Court of Appeal of Cluj, which admitted the second appeal filed against civil sentence no. 557 of March 18th, 2008, pronounced by the Tribunal of Cluj, which it modified in full.

not substantiated in any way by the defendant, which, given its prior attitude, is contrary to the good administration principle, and, on the other hand, the claim according to which this is due to the fact that new elements have been found during the criminal prosecution cannot be accepted. This would have violated the principle of the presumption of innocence the plaintiff must benefit from[1].

In another case, the tribunal noted that the plaintiff was involved in a car accident and he is being investigated for third degree murder, but his presumption of innocence must be fulfilled and must be allowed to exercise his right of driving throughout the term of the investigations[2].

CONCLUSION(S)

Given all the aforementioned arguments, as well as the two final rulings above, we hereby conclude that the restriction of the right to drive on public roads is not justified if we took into account both de facto situation and the circumstances of the facts, respectively the lack of injured persons, material damages, respectively the lack of substantiated reasons to represent a danger for the safety of public traffic.

The full restriction of the right to drive on public roads until the settlement of the case violates unquestionably the presumption of innocence that any individual should benefit from.

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[1] *Ibidem.*

[2]Ruling no. 2330/CA/06.12.2007 pronounced by the Tribunal of Hunedoara – commercial division and division of the contentious administrative. The second appeal filed by the County Police Inspectorate was declared null by the Court of Appeal of Alba Iulia, by Decision no. 342/CA/2008.

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LEGAL AND ADMINISTRATIVESTUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 93-99

VICTIM OF THE AGGRESSION. THE PROCESS OF CRIMINAL INVESTIGATION OF THE RELATION BETWEEN VICTIM AND HIS OFFENDER

Carmina TOLBARU[1]

Abstract:

Criminal phenomenon is a complex one, by the degree of danger and the serious consequences it globally generates, and its study can only be completed in relation to both the offender, as well as to the victim and the offence to which it was subjected to. Nevertheless, a true analysis of the victim's behaviour must be in accordance with the society creating and developing it, but also with the criminal personality.

Key words: *victim, aggression, offender, criminal investigation, criminal context*

INTRODUCTION. THE IMPORTANCE OF VICTIM DURING THE CRIMINAL INVESTIGATION

The criminal phenomenon is extremely complex, thus the criminal investigation must be performed also by taking into consideration its victim.

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Thus, during the investigation must be captured the psychological impact felt by the victim as consequence of the aggression to which she is subjected to, such impact generating very intense feelings. Thus, in the context of the aggression generated by the offender against the victim, a thorough analysis is necessary from the perspective of the offender and of the victim's behaviour[1].

Knowing the victim's background is interesting also for the understanding of all circumstances related to his/her personality, but also for the "reasons" for which the perpetrator proceeded to his/her approach, have the nature to anticipate the means in which the latter one will act in the future, in agreement with settling the criminal cause and the prevention of other crimes[2].

Undoubtedly, a faithful analysis of the victim's behaviour can only be performed in agreement with the society which shapes and develops it, but also in relation to the criminal behaviour.

Thus, we are talking about a so-called trinomial offender-victim-society[3] whose complexity determines an analysis of all particularities of victimization, with an incursion in the study of the psychological, moral and social causes. Obviously, the couple offender-victim cannot be seen outside the society, its specificity being seen equally, under a double aspect, both in regards to the features of aggressiveness, as well as the ones of victimization. The role of society is essential from this perspective, having the task to insure the victim's protection through the means of defence offered, but also through the existing social recovery possibilities.

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[1]Tiberiu Bogdan and Ioan Sântea, *Analiza psihologică a victimei* (Bucharest: Ministry of Internal Affairs Publishing House, 1983), 41-45

[2]Emilian Stancu and Carmina-Elena Aleca, *Elemente de criminologie generală* (Bucharest: Prouniversitaria, 2013), 51

[3]Tudorel Butoi et al., *Victimologie* (Bucharest: Pinguin Book, 2004), 18

THE CORRELATION BETWEEN THE VICTIM-AGGRESSION-OFFENDER

During the criminal investigation, the victim must be seen from a multilateral perspective, but in relation to his offender and the offence to which was subjected. The *victim* of the aggression refers to the person who, directly or indirectly, suffers the physical, moral and material consequences of the offence[1]. As consequence, the *offender* represents the person who commits such offence, in the meaning of social danger behaviours, such behaviours being different from a society to another.Thus, the *aggression (offence)* represents a social attitude, consisting in an attack against the persons or assets, with the purpose of causing injuries or the death of the person, or the destroying, degrading or rendering goods unusable[2].

Also, the aggressiveness is seen as an essential normal component of personality, which can be held under the control of reason to a certain point, at which the individual feels he is prevented from satisfying his wishes and manifests by violent and destructive behaviour[3].

Therefore, the offence emerges as result of endogenous factors, related to the inner side of the individual and also exogenous ones, related to the environment, the passivity of victim being itself a factor that increase criminality rate[4].

Together with the offender's personality, the victim's behaviour and also their particularities represent an object of the criminal

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[1]Tiberiu Bogdan, *Comportamentul uman în procesul judiciar* (Ministry of Internal Affairs Publishing House, 1983), 93

[2]George Antoniu et al., *Dicționar juridic penal* (Bucharest: Scientific and Encyclopedic Publishing House, 1967)

[3]Irina Negoescu and Alina Orășteanu, "De la violență la crimă un singur pas", in *Investigarea criminalistică a infracțiunilor comise cu violență* (Bucharest: Romanian Criminalist Association, 2009), 165-169

[4]Valerian Cioclei, *Manual de criminologie*, ed. 6 (Bucharest: CH Beck, 2016), 23

investigation[1]. It must not annihilate the role of the victim in determining the deviant behaviour, thus registering a percent of the guilt in his/her burden[2]. Moreover, during the conflict victim-offender, whenever there may be a change of role between them, the original role being relevant in terms of retaining the attenuating or aggravating circumstances, and the final one for the criminal establishment of the aggressor and the victim[3]. Thus, the victims may be classified in the following categories[4]:

- Victims who had no previous relations with the offender, case in which the offence is imputable only to the offender;
- Victims having a provocative attitude, regardless if they were aware or not of the provocative action;
- Victims initiating the offence, subsequently participating in the aggressive action;
- Biologically weak victims, in the meaning of being unable to oppose the offence;
- Socially weak victims, in the meaning that they belong to an ethnical or religious minority;
- Political victims

Also, more often the individual's features are the ones transforming him into a victim of the offence, by identifying a multitude of criminal factors in this regard: adultery; negative habits of the victim (alcohol or drugs use); egocentrism; egoism or vanity; being anti-social and having a tendency towards isolation; emotions and impulsivity; sex and age; financial status and the living standards; intellectual, cultural and educational degrees; the victim's psychical condition etc.[5]

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[1]Marc Ouimet, *Les causes du crime: Examen des théories explicatives de la délinquance, du passage à l'acte et de la criminalité* (Quebec: Les Presses de l'Université Laval, 2015), 52-53

[2]Stancu and Aleca, *Elemente de criminologie generală*, 61

[3]Mihai-Adrian Hotca, *Protecţia vctimelor. Elemente de victimologie* (Bucharest: C.H. Beck, 2006) 84-85

[4]Stephen Schafer, *Victimology. The Victime and His Criminal* (Reston: Reston Publishing Company, 1977), 77

[5]Butoi et al., *Victimologie*, 91-92; Adrian Iacob et al., *Metodologia investigării infracţionalităţii* (Craiova: Sitech, 2008), 45

The mobile is the emotional psychic factor, always irrational, and usually unconscious, pushing the subject to act[1]. It must not be ignored from the analysis of the offender's personality[2].

THE WEIGHT OF THE PROVOCATIVE ACTION OF THE VICTIM IN THE CRIMINAL INVESTIGATION

Most cases of aggression are based on the existence of different relations between the offender and the victim (family relations, paramour relations, entourage, cultural or professional environment etc.) without always talking about the victim's instigation, for as long as it does not react in a manner against the law. The ascertainment of the existence of a instigation from the victim has weight in relation the incrimination of the offender, such instigation having multiple forms of manifestation: violence, insults, slander, threats etc., practically any manifestations with the nature to produce in the psyche of the aggressor a special resonance that would lead him to react accordingly.

The jurisprudence of the judicial organs has stated that in numerous cases the starting point in identifying the perpetrators has been the understanding of the relation between the victim – offender – contexts[3]. Thus, it shall be established that if the illicit activity is the result of an instigation, performed by the victim to the offender or if it is the existence of a particular antecedent conflictive state, independent of the attitude of the victim at the time of the aggression.

Given the circumstances under which a person becomes the victim of an offence, namely the existence of previous relations between the offender and the victim, relations which based the performance of the illicit activity, the reasons determining the victim to come into contact with the offender or the existence of a possible instigation from the victim, the investigative organs shall establish, for each separate case,

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[1]Valerian Cioclei, *Mobilul în conduit criminală* (Bucharest: All Beck, 1999), 295
[2]Marc Ancel, *La defence sociale nouvelle – une mouvement de politique criminelle humaniste* (Paris: Cujas, 1981), 209
[3]Butoi et al., *Victimologie*, 115

depending on the particular elements of the case, the conditions that favoured the commission of the offence, its nature, as well as other factors influencing the criminal liability of its author[1].

For certain criminal situations, it is extremely relevant the analysis of the victim's reaction to the criminal behavior, which may determine either a reduction or an increment of the victimization, depending on the specific possibility of the victim to reaction. Unfortunately, most of the times the victims remains passive in their attitude after committing the aggression, which encourages criminal behavior in the society.

CONCLUSIONS

The criminal plan is of extreme complex, the actual factual situations being decisive in committing a crime. The specific existent situation may provide to the perpetrator the most favourable conditions for committing an illicit action, by taking advantage of the received opportunity. Thus, by aiming the commission of an aggression the perpetrator may wait for the right moment to take action or he might even create it. An exclusive approach to the objective conditions of the factual situation cannot be made, since the lack of subjective conditions would eliminate the criminal nature of the action. Therefore, the most important subjective aspects lie in the purpose of the action related to the mental act of conduct.

Knowing the circumstances, factors and conditions of the aggression, analyzing the degree of the victim's vulnerability, and recording the resulting consequences, as a whole, retention of all aspects of the victim and the aggressor, all these victimology connotations are of paramount importance through the identification of the prevention measures and treatment and their efficient applicability.

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[1]Ouimet, *Les causes du crime: Examen des théories explicatives de la délinquance, du passage à l'acte et de la criminalité*, 19-22

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 100-105

THEORETICAL ASPECTS CONCERNING PUBLIC SERVICES IN THE CONTEMPORARY SOCIETY

Viorica POPESCU[1]

Abstract:

Considered as the engine of modern economies, public services represent a different area, characterized by great diversity and high dynamism, which puts its mark on the other economic areas, directly influencing the way of capitalizing the human and material resources.

In this context, public services have an important role because they are the ones determining the development and modernization of the communities, being managed by the administrative-territorial units. The public service is the mean in which the administration provides general services for citizens, as political power. The establishment of the public services belongs exclusively to the deliberative authorities, and the organization and functioning represents the feature of the executive authorities.

The current study aims a brief analysis of the theoretical aspects characterizing public services in contemporary society.

Key words: *public service, tertiary sector, economy, public administration, political power*

INTRODUCTION

The explosion of the services and the augmentation of their role in modern societies have determined the specialists to name the current

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phase as the "society of services" and to intensify their researches for a better knowledge of this sector.

Etymologically, the notion of service originates from the Latin "servitum" which had the meaning of "slave", reason for which was subsequently interpreted as "to be under somebody's service", "to provide a service" or "to lay down a service", which evoked the idea of "public utility" or "public service".

THE NOTION OF PUBLIC SERVICE

Regarding the definition of the notion of public service it must be emphasized the fact that its achievement has been very difficult by relation to the numerous and complex activities for providing services, but also by relation to the usual meanings of the term.

As example, we need to mention the following definitions being given by the foreign or Romanian literature:

- The service represents the result of a human activity characterized by intangibility, designed for sale using the market or distributed by programs or institutions specially established which give no room for a transfer of property[1];
- Services represent "occupations, functions, actions or benefits for someone's benefits" or "organisms or sub-divisions part of an administrative or economic ensemble"[2];
- The public service represents a creation of the state, county or commune placed at the disposal of the public with the purpose of satisfying, regularly and continuously, general needs, to whom the private initiative could provide only an incomplete and intermittent satisfaction[3];

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[1] R. K. Shelp, *Beyond Industrialisation Ascendency of the Global Services Economy* (New York: Praeger Publishers, 1981), 91

[2] Philip Kotler and Bernard Dubois, Marketing, Management, 7th edition (Paris: Public Union, 1992) 54

[3] Paul Negulescu, *Tratat de drept administrativ român* (Bucharest: Tipografiile Române Unite, 1925) 217-218

- The public service is the ensemble of the means (material and human) used by an administrative entity to fulfill its purpose or a certain part of it[1];
- The services represent a benefit performed for a third-party[2].

As far as we are concerned we agree to the definition given by Prof Antonie Iorgovan, according to which "the public service is the form of the administrative action by which a public person assumes the satisfaction of a general need"[3].

THE FEATURES OF PUBLIC SERVICES

From the above mentioned definitions we may conclude that the public services are activities with the following features:

- It mandatory involves the satisfaction of a general or public interest;
- Are performed by an authority of the public administration or private legal persons authorized by the public administration to provide certain activities of general interest;
- Are established by the law or based on the law;
- The activities are performed based on the public power;
- All citizens are equal in relation to the public service.

THE TYPOLOGY OF PUBLIC SERVICES

According to the classification of Jean Fourastié [4], the economy is divided into three areas of activity:
- the main sector including: agriculture, the extractive industry, hunting and fishing;

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[1] Th. C. Marinescu et al., *Drept administrativ, finanțe, statistică* (Bucharest: Biblioteca Enciclopedică Administrativă, 1995) 343
[2] Irina Baltă and Teodora Robu, Cerințe privind calitatea serviciilor publice (Bucharest: Open Society Institute, 1999) 17
[3] Antonie Iorgovan, Tratat de drept administrativ (Bucharest: All Beck, 2005) 65
[4] Jean Fourastié, Le grand espoir du XXème siècle (Paris: Gallimard, 1963), 57

- the second sector including: manufacturing industries
- the third sector including the public services among others.

This division of the economic areas is currently challenged as effect of the technical-scientific and informational development, not few authors stating the emergence of a new sector of economy, namely the fourth which would comprise health, culture, education and scientific research, namely a part of the area specific to central and local services.

Regarding the classification of services, the literature and the economic practice have stated numerous ones based on different criteria, all starting from the idea that currently the public services may be performed not only by state authorities, but also by private persons, under the control of the administration.

According to the means in which the state organizes the public services, these are divided into the following:

- Public services provided by the state holding monopoly (the civil status service, civil protection, the population records, driving license service, the passport service, collecting taxes and fees etc.);
- Non-monopoly public services which refer to services whose object may be performed by private persons (education, health, culture).

According to the degree of coverage, the public services are divided into:

- National public services;
- Local public services.

According to the means of establishment, the public services are divided into:

- Public services established by the state;
- Public services established by the administrative-territorial units (county, town or commune).

According to the means of financing of the public services, these are divided into:

- Public services entirely financed from the state budget;
- Public services generating own revenues.

From the perspective of the social importance, the public services are divided into:

- Vital public services (water supply, sewerage, district heating);
- Optional public services (park and amusement facilities, information centres).

CONCLUSIONS

Recognizing the importance of public services as basis for meeting the general need is an important step in the development of society.

Whether they are subsidized from the budget, or the supplying authorities are required to make their own revenues, public services must operate according to the principle of efficiency, the administration being bound to find the best relationship between the efforts (costs) made and the effects obtained namely the quantity and quality of the services rendered to citizens. Moreover, the provision of public services must be continuous in relation to the nature of the public interest, many public services not being interrupted without the risk of disturbing or endangering public life.

Ensuring the transparency towards citizens and constantly adjusting to the communitarian needs is not only a desideratum of the functioning of public services, but also a goal for them.

Through effective legislative measures, the state has the obligation to support both public authorities and private legal entities in their effort to provide top quality public services in the shortest possible time, thus satisfying the general need and interest.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 106-112

THE ANALYSIS OF THE NOTIONS OF "DIVERGENT JURISPRUDENCE" AND THE "UNITARY JURISPRUDENCE"

Iulia BOGHIRNEA[1]

Abstract:

One of the problems faced by the legal system (both the Romanian one, as well as the system of other European states) is the non-unitary application of the law for similar cases, the judges having sovereignty, in regard to the interpretation and application of the law to the current situation submitted to their judgment.

Key words: *divergent jurisprudence, unitary jurisprudence, administration of justice*

INTRODUCTION

The notion of "jurisprudence" is defined by almost all legal literature as being the ensemble of the judicial decisions issued in the application of the law[2], but as G. Buta mentioned[3] "*this meaning is*

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[2] Gerard Cornu, *Vocabulaire juridique* (Paris: PUF, 2014), 589.

[3]Gheorghe Buta, "Jurisprudenţa, o nouă veche provocare", *The Romanian journal of jurisprudence* no 1(2011): 13. For the same opinion regarding the definition of the jurisprudence, see also Sofia Popescu, *Teoria generală a dreptului* (Bucharest: Lumina Lex, 2000), 155.

useless in the unifying approach and this is why, it must be used a narrower meaning, according to which the jurisprudence represents the form in which a litigation is being trialed by a court, namely the solutions issued by the courts for similar cases previously settled, case in which the notion of judicial practice can be identified, totally or partially, with that of judicial precedent. It is not possible to examine the existence of a unitary jurisprudence in the general meaning, but only from the point of a concrete judicial practice on the same issue of law subject to judicial review".

THE NOTION OF "DIVERGENT JURISPRUDENCE"

The divergence of jurisprudence is characteristic only for those legal systems based on the law, the divergence assuming a difference of interpretation between different jurisdictions. We are free to use the term *divergence of jurisprudence* when the courts, spread throughout the territory, do not totally agree in the interpretation of the same text[1].

"*Il y a, pour toute de la République, une Cour de Cassation*" according to Art 111-1 of the French Code for Judicial Organization. The feature of uniqueness given to the High Court has as purpose a uniform application and interpretation of the law throughout the state, thus this institution has been established in 1780 in order to answer this desideratum, namely the fight against divergent jurisprudences, inserted by the Old Regime[2].

In Romania, both under its old name "Supreme Court of Justice", as well as under its new one, "High Court of Cassation and Justice", this public authority, having a constitutional status, has the feature that, nationally, it is not possible the establishment of another court of higher or equal level[3].

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[1] Frederic Zenati, *La jurisprudence* (Paris: Dalloz, 2003), 57-70.
[2] Guy Canivet, La Cour de Cassation et divergences de jurisprudence. *La divergence de jurisprudence* (Saint-Etienne: Publication de l'Université de Saint-Étienne, 2003), 157
[3] Nicolae Cochinescu, *Organizarea puterii judecătoreşti în România* (Bucharest: Lumina Lex, 2006), 138.

Also, the revised and republished Constitution has stated the uniqueness of the High Court, placing it on top of the hierarchy of the national judicial courts.

This is the argument for which Art 126 Para 3 of the Romanian Constitution, revised and republished, offered to it the role to interpret and insure the unitary application of the law by all the courts, with the public purpose of creating a national unitary judicial practice, "*the High Court of Cassation and Justice insures the unitary interpretation and application of the law by all the other courts, according to its competence*".

In the case *Păduraru v Romania*[1], the European Court of Human Rights, by stating that the "*divergences of jurisprudence represent, by their nature, the inherent consequence of each judicial system based on an ensemble of first courts having authority upon their territorial circumscription*", has considered that, in the absence of a mechanism insuring the coherence of the practice of the national jurisdictions, such deep divergences of jurisprudence, persisting over time and in relation to an area of high social interest, have the nature to create a permanent uncertainty and to diminish the public trust in the judicial system, which is one of the fundamental components of the state of law. In this context, the European Court of Human Rights has stated that "the role of a supreme jurisdiction was precisely the one to settle the contradictions of jurisprudence"[2].

In its Decision No 54/2014, the Constitutional Court has stated that "the deep divergences of jurisprudence are likely to create a general climate of judicial uncertainty and insecurity, aspect underlined by the European Court of Human Rights in its jurisprudence".

In the paper "*Le traitement des divergences de jurisprudence*", Hervé Croze[3] sees the divergence of jurisprudence as being "*a normal*

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[1] Decision of 1st of December 2005, Para 98.

[2] Decision of 28th October 1999, issued in the case *Zielinski, Pradal, Gonzales and Others v France*, Para 59.

[3] Hervé Croze, *Le tratement des divergences de jurisprudence. Les procedures de trataiment et prevention. La divergence de jurisprudence* (Saint-Etienne: Publication de l'Université de Saint-Étienne, 2003), 207-221.

symptom, a bit itchy, insuring the function of a complex and thin jurisdictional system. It ultimately contributes to the balance of the dynamics of the legal order and, undoubtedly, to the progress of the law" and Pierre Capoulade[1] considers the constant jurisprudence as being "*a brake of the effort of research, of the deepening and reflection, favoring a more successful adjustment of the judicial act with the social act*".

Frederic Zenati[2] thinks that the plurality of the courts makes the notion of "divergent jurisprudences" to be different than the "constant jurisprudence"[3], because the latter one is not necessarily the result of the absence of jurisprudential divergences, but of the convergence of the solutions on a similar case, namely a model for a constant solution.

THE NOTION OF "UNITARY JURISPRUDENCE"

In order to fulfill this constitutional role, of treatment of the divergent jurisprudence, by the High Court of Cassation and Justice, the legislator has used two procedures for the unification of the judicial practice, first of all using the "curative treatment", the procedure of the appeal in the interest of the law (1861) adding the "prevention treatment", to avoid the jurisprudential differences, using the procedure of the preliminary rulings (2010).

The Commission reports on progress in Romania under the Cooperation and Verification Mechanism of 28th January 2015[4] stated that "*The HCCJ has further developed its use of preliminary rulings and appeal in the interest of the law to unify jurisprudence. It has also*

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[1] Pierre Capoulade, *La jurisprudence constante de la Cour de Cassation. L'image doctrinale de la Cour de Cassation* (Paris: La Documentation française, 1994), 217-224.
[2] Zenati, *La jurisprudence*, 57-70.
[3] Philippe Jestaz, *La jurisprudence constante de la Cour de Cassation. L'image doctrinale de la Cour de Cassation*, (Paris: La Documentation française, 1994), 207-216
[4] European Commission, Brussels, 28.01.2015 COM (2015)35 final; the Mechanism for Cooperation and Verification has been established by the Commission Decision of 13th December 2006 with the purpose "of achieving certain thematic objectives in the area of the judicial reform and the fight against corruption". http://ec.europa.eu/cvm/docs/com_2015_35_ro.pdf accesed on 2 September 2015.

pursued measures to improve the dissemination of court judgments. Similar practical steps have been seen in the prosecution and in the judicial leadership more widely".

Also, on the 15th September 2015 the experts of the European Court have had a meeting with the representatives of the HCCJ, who "*have presented the evolutions registered in the application of the mechanisms for the unification of the jurisprudence, the application of the new Codes, as well as the progress registered at the level of the supreme court in the area of the Mechanism for Cooperation and Verification*"[1].

With the National Strategy for the Development of the Legal System 2015-2020, the Ministry of Justice aimed the improvement of the justice act, among other objectives, the unification of the judicial practice through the "strengthening of the role of the HCCJ as a court of unification of the judicial practice and authority of supreme control"[2].

The need for the unitary application of the law results from the principle of legality, referring to the adjustment between the behavior of different subjects of law and the legal norms[3].

As mentioned by G. Buta, only when the solutions of the courts are identical for similar cases subjected to trial, we are able to say that the judicial practice is unitary[4].

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[1] The Bureau for Information and Public Relations of the HCCJ, Press release regarding the meeting of the HCCJ's representatives and the European Commission experts, http://www.scj.ro/1292/4724/Comunicate-de-presa-2015/Comunicat-de-presa-referitor-la-intalnirea-reprezentantilor-Inaltei-Curti-de-Casatie-si-Justitie-cu-, accessed on the 21st September 2015.

[2] Among these other measures have been proposed for the achievement of this objective, namely: "*the professional training of magistrates regarding the national jurisprudence; the publication of the relevant decisions of the courts and the drafting and distribution of themed guidebooks in courts and prosecutor's offices, monitoring the judicial practice and emphasizing the non-unitary practice, for the settlement of the matters subjected to several interpretations*".

[3] Cochinescu, *Organizarea puterii judecătoreşti în România*, 150.

[4] Gheorghe Buta, "Jurisprudenţa, o nouă veche provocare", 13.

CONCLUSION

As a conclusion, the procedural instruments[1] based on the "judges' dialogue" between the national judge and the Court of Justice of the European Union, and on the other side between the national judge and the High Court, have been established with the purpose of insuring the coherence of interpretation and unitary application of the law, as well as the prevention of the divergences of jurisprudence at the communitarian level, namely at the national one.

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This paper is written during the sustainability stage of the project entitled ***"Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research",*** contract number POSDRU/159/1.5/S/140106. This project is co financed by European Social Fund through Sectorial Operational Program for Human Resources Development 2007-2013. **Investing in people!**

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 113-122

LIABILITY OF THE LEGAL PERSON - GENERAL ASPECTS

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Abstract:

The legal person, as a subject of civil law, conclude legal acts or commits legal facts, so that the liability is contractually or tortured.

Tort liability may be, as in the case of individuals, liable for damages caused by an own unlawful fact, for unlawful damages to other persons or for damage caused by things, animals or the ruin of the building.

Liability for damages as a result of the unjustified refusal of the authorities to issue an act is a form of autonomous liability governed by the law of administrative litigation.

The legal person, with the exception of the state, public authorities and public institutions, whose activity can not be subject to the private domain, respond also penal.

Key words: *Liability of the legal person*

Legal persons are subjects of civil law, participate in their own name in the civil circle, by concluding legal acts and by committing legal

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facts, which necessarily implies the commitment of their liability when necessary.

The general framework for the establishment, organization, functioning of the legal person is regulated in Book I, Title VI "About individuals" of the new Civil Code.

Legal entities are governed by public law and private law.

Legal entities under private law may freely form themselves in one of the forms provided by law.

Legal persons under public law are established by law, acts of central or local public authorities or other ways provided by law.

The legal person, as a subject of civil law, conclude legal acts or commits legal facts, so that respond contractually or tortured.

Tort liability can be, as in the case of individuals, liable for damages caused by an offense of its own, for unlawful damages to other persons or for damage caused by things, animals or the ruin of the edifice.

Tort civil liability for damages caused by the deed is governed by the provisions of article 1357-1371 in conjunction with the provisions of article 219 and article 221 Civil Code, provisions supplementing the provisions of special laws that apply to different categories of legal entities, namely Law no. 31/1990 on commercial companies, O.G. no. 26/2000 regarding associations and foundations, Law no. 215/2001 on local public administration, Law 90/2001 on the organization and functioning of the Government and ministries, etc.

Incuring civil liability for damages caused by the deed of the legal person presupposes the existence of the general conditions of the civil tort liability, namely the existence of patrimonial damage, the illicit fact by which a certain obligation is violated, bringing a touch to a subjective right, the causal relationship between the deed illicit and damage, author's culpability of the illicit deed.

In addition, the incuring of contractual civil liability presupposes the fulfillment of the same conditions listed above, plus the condition of the existence of a contract in which the unlawful deed consisting in the

non-performance of a contractual obligation and the condition that the debtor be delayed or to be right in the delay.

It is known that being itself a legal person is expressed through its organs, which, unlike the representatives, are intrinsic parts of it. When we speak of the bodies of the legal person, we do not have two self-governing legal entities: the legal person on the one hand and its organs on the other. We are in the face of a single entity - a legal person - that expresses through its organs[1].

According to the provisions of Article 219 of the Civil Code, licit or illicit deeds committed by the bodies of the legal person are binding on the legal person itself, but only if they are related to the duties or the functions entrusted to them.

The interpretation of the provisions of Article 219 of the Civil Code shows that the illegal acts committed by the organs of the legal person are binding on the legal person itself.

It should be noted that the provisions of the Civil Code refer generally to the deeds of the "organs" of the legal person, not to those of the "administrative organs" or to the facts of the "management and administration organs"[2], the law not referring to the deliberative organs of the person legal and auditors.

The provisions of Article 221 of the Civil Code also provide that, unless otherwise provided by law, legal persons governed by public law are bound by the lawful or unlawful acts of their organs under the same conditions as private legal entities.

Consequently, the unlawful and prejudicial acts committed by the management and administration bodies of legal persons in relation to the functions entrusted to them are the illicit deeds of the legal person.

Given that we are faced with responsibility for the deed of the legal person, what has been done through its organs, it is necessary for the incuring the liability that the victim to prove the fulfillment of the

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[1]Constantin Stătescu and Corneliu Bârsan, *Drept civil. Teoria generală a obligațiilor, ediția a IX-a revizuită și adăugită* (Bucharest: Hamangiu, 2008), 211

[2]Fl.A.Baias et al., *Noul Cod Civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012), 221

general conditions of the civil tort liability, namely: the damage caused, the deed illicit, the causal relationship between the damage caused and the unlawful deed and the guilt.

It was also expressed the opinion[1] that three general conditions must be proved: the damage, the illicit deed of the management or administration body, and the causal relationship between the deed and the damage. The condition of the proven guilt of the judicial body that committed the unlawful and prejudicial deed is not necessary. Liability of the legal person in the relations with the victim is objective, without guilt. The guilt can not be transposed by the natural person or natural persons who have committed the unlawful deed as the body or bodies of the legal person. Moreover, in the most common situations, the victim is not required to prove the identity of those persons. The basis of the liability without guilt of the legal person consists in the idea or the obligation of guarantee, in the sense that it is the duty of all legal persons to guarantee to others that their management and administration bodies, through their acts and deeds, will not cause unjust prejudices.

In addition to the general conditions of tort civil liability for its own deed, in the case of liability of legal persons it is necessary that the unlawful deed was committed by the governing or administrative bodies in connection with the duties or the functions entrusted to them.

As far as the offense committed by the person or persons having the status of an organ of the legal person has not been committed in the performance of the duties or attributions entrusted to him, the liability of the legal person for his own deed can not be committed; in this situation only the sole responsibility of the guilty person is committed under the terms of Article 1357-1371 Civil Code.

If the individual commits the illicit deed as servant and not as an organ of the legal person, the liability of the legal entity can be held accountable for the deed of another, responds to act as principal for the servant.

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[1]Liviu Pop and Ionuț-Florian Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile* (Bucharest: Universul Juridic, 2012), 460

Even if the legal person is responsible for his own deed in the case of the damage caused by the illicit fact of his own organ, he does not exclude the assumption of personal liability for the personal deed of the person or persons making up the management or administration organ of the legal person.

The imposition of liability of the legal person for the damage caused by the unlawful fact committed by its organs is a protection measure for the victim of the damage, which has the possibility either against the legal person or against the person or persons who act as a management or administration organ, or against everyone.

The victim of the damage will make the option considering the defendant's solvency: if the legal person is solvable, the action for damages will be brought against it; if the administrator is solvable, the action for damages will be brought against him; if the solvency of the two responsible persons is in doubt, the action will be brought against both.[1]

Pursuant to the provisions of article 219 paragraph 2) of the Civil Code, unlawful facts also attract the personal and joint liability of those who have committed them both to the legal person and to third parties.

At the same time, the provisions cited also regulate the possibility for the legal person to return, by way of action in regression, to persons who have committed the unlawful fact as a management or administrative organ.

Liability of the legal person may also be committed on the basis of liability for the deed of another under article 1373 of the Civil Code, respectively under the responsibility of the principal for the deed of the servant.

Commitment to the tort liability of the principal requires proof of the cumulative existence of conditions, some of the common law and others special.

The common law conditions of the principal's liability are the general conditions of civil liability, namely the existence of an illicit fact of the sevant, the unjust damage suffered, the causal relationship between

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[1] Baias, *Noul Cod Civil,* 221

the illicit fact of the servant and the prejudice, as well as the guiltyness of the servant.

Commitment of the liability of the principal for the act of the servant, in addition to the common law conditions of civil liability, presupposes the necessity and cumulative fulfillment of the special conditions, namely: the ratio between the perpetrator of the unlawful fact and prejudicial and the person called to answer as the principal for the damage caused to the victim and the illicit deed committed by the servant in connection with the duties or the functions entrusted to him by the principal.

According to the provisions of article 1373 paragraph 2 of the Civil Code, is principal the person who, by virtue of a contract or by virtue of the law, exercises the direction, supervision and control over the person who performs certain functions or tasks in his or her interest.

Thus, the relationship between the principal and the servant involves a report of subordinating of the servant to the principal, acting under the authority, supervision and control of the principal.

Usually, the ratio of servancy is born from a contract (for example employment contract), but can also arise from an extra-contractual fact (for example, the acceptance of functions by a person as a member of a cooperative organization or the fulfillment of a voluntary work, unpaid for an organization).

Servant is always a natural person, the principal may be, as the case, a natural or legal person.

With regard to the second special condition for the assumption liability of the principal for the fact of the servant, it is necessary for the latter to commit the unlawful and prejudicial fact acting in the interests of the principal or order of the principal in the interest of another, within the limits of the duties of his in compliance with the instructions and provisions which the principal gave him.

The principal shall also be liable for the damage caused by the damage when acting by departing from its function by exceeding his limits and even by abusive practice, provided that the deed is related to the duties or purpose of the functions entrusted to him.

The Principal will not respond if it proves that the victim knew or, as the case may be, could have known at the time of the harmful act that the servant acted without any connection with the duties or purpose of the duties entrusted to him.

Good faith is presumed by law to the benefit of all individuals and legal entities until the contrary.

Law no. 554/2004, the administrative litigation law, regulates the liability of the public authority in the case of the issuance of an administrative act or in the case of failure to legally solve a claim that damages a right or a legitimate interest of a person.

Public authority means any state organ or administrative-territorial units acting in public power to satisfy a legitimate public interest; are considered to be public authorities within the meaning of the present law private legal entities which, according to the law, have acquired public utility status or are authorized to provide a public service under a public power regime.

The legal doctrine has raised the question whether the liability of the public authority for the issuance of an act or the failure to resolve a request in due time is a civil liability tort or administrative patrimonial liability or of public law.

It has been argued that the liability governed by the law of administrative litigation, both in the old regulation and nowadays is a patrimonial liability of administrative law[1],although there is also the view that this kind of liability is a special tort liability.[2]

In the same vein is the Supreme Court jurisprudence: Liability for damages as a result of the unjustified refusal of the authorities to issue an act is a form of autonomous liability, governed by the law of administrative litigation, and is not considered in terms of civil tort

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[1]Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, ediția a 4-a (Bucharest: C.H. Beck, 2005), 299

[2]Pop et al., *Tratat elementar de drept civil,* 520

liability, but exclusively by the provisions of the administrative law, and the provisions of the Civil Code do not apply extensively.[1]

The Code of Criminal Procedure regulates the conditions of criminal liability of the legal person.

According to the provisions of art. 135 Criminal Code, the legal person, except the state and the public authorities, is criminally liable for the crimes committed in carrying out the object of activity or on behalf of the legal person.

A first condition that must be fulfilled for the liability of the legal person to be engaged is that the legal entity is not exempted from being accountable to the legislator.Thus the State, the public authorities (the Parliament, the President of Romania, the Government, the Public Authority, the Judicial Authority) are not criminally liable as they have no criminal legal capacity and are excluded from the sphere of legal persons criminal responsible, so they can not enter in conflict reports, as passive subjects of these relations.[2]

Public institutions are not criminally responsible for offenses committed in the exercise of an activity which is not subject to the private domain.

These institutions are legal entities that carry out activities excluded from the private initiative, which means that assessed activities can not be carried out either by natural persons or by legal persons of private law.

Legal entities under private law can be criminally responsible regardless of the type of activity they carry out.

Another condition imposed by the legislator for the criminal liability of the legal person is that the offense is committed in the realization of the object of activity or in the interest or on behalf of the legal person.

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[1]Viorel Terzea, *Noul cod civil adnotat cu doctrină și jurisprudență* (Bucharest: Universul Juridic, 2014), 307 - *CSJ, administrative litigation section, decision no. 1427/1999*

[2]Ilie Pascu and Vasile Dobrinoiu et al., *Noul Cod penal, ediția a 3-a revăzută și adăugită* (Bucharest: Universul Juridic, 2016), 722

CONCLUSIONS

In summary, the liability of the legal person may be contracted in the event that the legal entity is a part to a contract if it fails to fulfill its obligations under the contract.

The legal person also responds on delictual plan, the liability of which may take the form of liability for the own deed and the form of liability for the deed of another person (responsibility of the principal for the servant deed, liability for the ruin of the edifice).

Also, at the administrative plan, the legislator regulates the administrative-patrimonial responsibility of the public authority issuing an administrative act or does not legally settle an application and thereby causes damage to a person's right or legitimate interest.

Last but not least, the legal person, with the exception of the state, public authorities and public institutions, whose activity can not be subject to the private domain, is also responsible for criminal liability, the liability being assumed in the case when the offense is committed in the realization of the object of activity or in the interest or on behalf of the legal person.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (17), Year XVI, 2017, pp. 123-144

APPEAL TO EXECUTION - MEANS OF REMOVING PROCEDURAL IRREGULARITIES AND ILLEGALITIES ENFORCEMENT

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Abstract:

When discussing enforcement, we reveal the ineluctable an overall heterogeneous principles, rules, terms and conditions, defined and structured by a special technique that outlines the most important and uitl practical tool likely to lead to guaranteeing the rights of creditors recognized by the various titles enforceable in law. (Evelina Oprina)

From the beginning we have to mention that the institution submit a procedural analysis is the method which penalizes conduct, inaction and faulty way of the criminal enforcement proceedings.

Civil process is divided into two stages, the trial phase respectively enforcement.

The latter stage of the civil binds study execution appeal as execution institution through which we want to bring some clarification valid and also solid.

Concept enforcement activity in competition for achieving the forced execution titles - broad sense - a broad category of participants.

Parties, courts, prosecutor, law enforcement, third parties, etc. all of them having a role and strictly prescribed by law in the execution of writs of execution.

After the tumult of legislative - Law no.No 138/2015 and GEO. 1/2016 - went through foreclosure stage, switching power implementing executive orders by bailiffs directly without competition courts and many other such changes, the legislature returned - founded - the restoration of legal order execution normal procedural .

Clear is that it can not be accepted as another body, even in the sphere of the judiciary to order on some measures with a particularly important and irreversible

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effects, such as enforcement of securities that have the capacity to produce significant changes and essential subjects heritages report execution.

Under the new Code of Civil Procedure, enforcement should be the last resort to lender in order to get into the right won through court and appeal to execution, one of the most important and used institutions

Procedural debtor tries to fend times exectuare timed to release the title against him.

Therefore it remains to detail all these effects and legal consequences of the execution appeal for sanction, timing and verification of the legality of acts and forms of enforcement.

Key words: *appeal, enforcement, refusal unjustifiably enforceable, abolition, set aside the judgment*

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1. THE SEAT MATERIAL, CONCEPT, SUBJECT AND OBJECT EXECUTION APPEAL.

Headquarters is the material provisions of Book V of the Code of Civil Procedure, Chapter VI namely Articles 712 and following, and art. 61 of Law no.188 / 2000, republished, stating also that those interested or injured by the acts of enforcement, enforcement may be challenged under the Code of Civil Procedure.

Mid appeal to execution is mainly procedural, specially created for the enforcement procedure by which an interested person or injured by executing request the competent court dismantling illegal acts or measures of enforcement.

Appeal to the enforcement is therefore mainly a procedural instrument designed specifically for the enforcement procedure, a specific complaint this procedure, which is obtained, as we shall see in the subsequent developments, cancellation or removal of acts of

executaresau sometimes and annihilate the enforceability of an enforcement effect[1].

Appeal to execution is the general route available to parties interested third parties in enforcement proceedings as general procedural path which seeks the abolition of all enforcement activities started with infringement or ignorance of the law.

According to art. 712 paragraph (1) and (2) NCPC "against enforcement, the rulings given by the bailiff and against any act of execution may be filed for execution. It also may be filed with the performance and if the bailiff refused to carry out an execution or to perform an act of enforcement under the law. If not used the procedure laid down in art. 443, can appeal and if necessary clarifications concerning the meaning, scope or application of the writ of execution ".

Thus, the appeal can address both enforcement order itself, which includes the claim to be enforced, and any act of execution which was carried out in violation of Rule precept. So it is subject to appeal and refusal bailiff to take legal activity enforcement.

It explains such a situation, the situation where peten asks the court ordered the defendant - the office of bailiff - the enforcement of which was invested, identifying a debtor by issuing letters to institutions such information, the withholding of monies, securities and other intangible assets acquired or obtained traceable to the defendant-debtor, continue the execution if it considers that the debtor is insolvent and handling all the protocols and enforcement activities as required by law[2].

Compared to paragraph 2 of art. 712, which contains a special rule character to the provisions of art. 445, the latter simply refers to the impossibility of formulating an appeal or appeal for reason of completion, correction or clarification of the judgment. Not be affected by this rule as requirements related to the claim contained in the executory title, so the art show. 663 based on certainty, liquidity and

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[1]S. Zilberstein and VM Ciobanu,*Treaty Enforcement* (Bucharest: Lumina Lex, 2001), 251.

2 For details see Decision civil case no.816 of 27 March 2013, the Court pronounced Arges Civil Division.

chargeability. Claim meets all these requirements, but the judgment is hazy be either necessary to clarify certain points which the court treated them superficially times are too small clarified.

The legal nature of execution appeal was controveresată so that a cursory analysis of this institution as exécution we would be tempted to raise the rank of appeal, but it is the means procedural defense of the party concerned in final stage civil - enforcement. The parties dispute the subjects of execution we can derive from the interpretation of the provisions of par. (3) the art. 712 Code of Civil Procedure: "Also after the start of enforcement, those interested or aggrieved may, on track execution appeal and annulment concluding declared enforceable and the conclusion upholding a declaration of enforcement, if they were given without fulfilling the legal requirements."

So, if we observe the wording of the Code, we conclude that any person who is deemed interested or aggrieved party may appeal the decision to execution, if it considers that rights have been violated by the acts of enforcement. The appeal may be exercised primarily by pesoanele directly involved in report execution, ie debtor and creditor pursuer and pursued under execution by withholding and the third party withheld, which thus becomes part of the execution procedure[1].

Thus, it is considered third party according to art. 650 Code of Civil Procedure: "Every third person injured by an act of enforcement may require the abolition or, as appropriate, cessation of enforcement itself, only by execution appeal unless the law provides otherwise." The law provides third party two conditions to promote execution appeal, namely, to be injured due to foreclosure and give open mainly only way execution appeal. For instance, it is considered third husband to whom pursue their own property, for a debt of the other spouse so, the bank that owes its creditor a sum of money, which it owes to another legal relationship."

In fact, between respondent, as a financier, SC SRL, as a user, D. appellant, as guarantor, and called M., as guarantor, the contract of finance lease dated 17.12. 2008 that the financier was required to provide

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[1]A.Tabacu, *Civil Procedural Law* (Bucharest: Universul Juridic, 2013), 453.

for a fixed right to use an asset, whose owner is the user, against a periodical payment called leasing rate, and at the end of the lease funder have an obligation to respect the right user option already expressed in the contract, about buying the property, according to art. 1.1 of the contract. B. SA issued from address that has been identified appellant with an account, so that was issued by the bailiff address to set up garnishment from 13.01.2012, communicated to the appellant.

The obligation assumed by the appellant by the financial leasing contract dated 17.12.2008 represents the applicant's own debt, which is held to respond with their own property and not with the commons, not falling under any of the cases where husbands respond commons. Regarding the analysis of the conditions above events in the present case, the court finds, first, that the acts of enforcement on the withholding of execution file of beige. Were made illegally because they watched bank accounts the contestant who, although they were not supplied with available cash, were common property of the appellant and intervener in its own name, in the absence of evidence to the contrary presumption operating in condominium common property of spouses[1].”

The bailiff may become subject to the legal execution, since art. 712 par. (1) Code of Civil Procedure permit an appeal to execution in contradiction with the enforcement body if it refuses to carry out the enforcement or to fulfill an act of executing the law.

Likewise, art. 644 Code of Civil Procedure him and he lists the bailiff as the participant to enforcement.

The Public Prosecutor, the prosecutor can actively participate in an execution appeal procedure as long as the provisions of art. 658: "The Public Prosecutor supports the law, enforcement of judgments and other enforceable titles. In cases specifically provided by law, the Public Prosecutor may request the enforcement of judgments and other enforceable titles. " In conjunction with those contained in the general part of the Civil Procedure Code in art. 92: "The prosecutor can start any civil action wherever necessary to protect the rights and interests of

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[1]Civil Sentence no. 9769/2012 of 2 Bucharest District Court. http://portal.just.ro/300/Lists/Jurisprudenta/DispForm.aspx?ID=209

minors, people under interdiction and missing persons, and in other cases provided by law." Even ordered the norms devices to such behavior from the representative of the Public Ministry.

Texet to note is that both the Code of Civil Procedure gives the prosecutor an opportunity to act always in motion, regardless of the procedural position to acquire. The task of the prosecutor is bound ensure the respect of the rights and interests of the parties in relation to the law. We chose to let the creditor and debtor past, due to their role and their importance as the real holders of execution appeal.

Execution creditor may be challenged when one considers his rights infringed or violated them a vested interest in stemming the faulty enforcement of law recognized by an enforceable.

Such assumptions are:

- being rejected application for enforcement by the bailiff;
- drafting inadequate enforcement activities;
- unavailability of insufficient assets of the debtor for making the claim;
- set deadlines for fulfillment of procedural documents above the limit set by law.

The debtor may invoke appeal to execution in order cessation of enforcement, timing enforcement activities, or just to defend their interests with regard to enforcement, how fulfilling acts of execution times on himself executory title based on which is execution.

Appeal to execution is the main weapon that the debtor has at his disposal in enforcement, with real chances cease forms of execution. This is why the courts for enforcement are invested annually by tens of thousands of files bearing the main appeal to execution.

Object execution appeal available to us is dictated by art. 712 of Code of Civil Procedure.

Consequently one can easily notice that it may bear on the enforcement itself - appeal to the execution itself - or clarifying meaning, of the scope or application of the writ of execution, appeal against actions of the executor, the appeal against the refusal executor to carry out enforcement .

The most common form of appeal is the appeal to the actual execution, which themselves may contest the enforcement and execution of any act performed during forced pursuit.

Contestant may ask the court about the appeal or annul the whole procedure of execution or the unlawful act or acts met.

May also have the theme rulings given by the bailiff in breach of the substantive conditions and time limits established by law, superannuation acts of enforcement shortcomings regarding the claim is certain, liquid and payable of the claim lacked bailiff, invoking compensation laws, pursuing goods not belong debtor extinguish the payment obligation remaining after final judgment, reducing costs of execution, order tracking goods or tracking of goods which by law can not be traced.

Usually not subject to proper execution appeal cancellation of the writ of execution, unless the interested party has the opportunity to present proper execution appeal, asking the court until the writ of execution and cancellation forms of execution.[1]

On the way execution appeal may be required and cancellation conclusion upholding a declaration of enforcement, repostulating in question this time, the contradictory requirements of enforcement.[2]

It can invoke objection to enforcement, where writs of execution other than a court decision, and the reasons of fact or law concerning the merits of the enforcement order covered only if the law does not provide for a specific legal remedy for the abolition of.[3]

Appeal to the enforcement reported to the meaning, scope and implementation of the writ of execution is admissible only if the open track which is not used for art. 443 Code of Civil Procedure, because otherwise they would get in case of breach of *res judicata*. It is necessary enforcement order to be susceptible to interpretations that require

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[1] M. Dinu and R. Stanciu, *Enforcement in the new Code of Civil Procedure* (Bucharest: Hamangiu, 2015), 179

[2]Tabacu, *Civil Procedural Law*, 455.

[3] E. Huruba,T*he Treaty of Civil Procedural Law*, eds. Les I. et al, Vol. II (Bucharest: Universul Juridic, 2015), 707.

clarification from the magistrate judge since putting it into execution is difficult or impossible in terms of blur and/or restrictive interpretation or *a contrario*, very extile.

It is clear however that such an approach can not be added or deleted certain rights that were not listed in the title or, as the provisions of Code of Civil Procedure art. 443, requires only the interpretation of the wording of those provisions or phrases that can not be implemented.

Moreover, in resolving execution appeal court can not examine and retain new facts or circumstances occurring after the only judgment that run, and not those that have occurred before.[1]

Remember is the look of essence, that the appeal to execution grafted on these assumptions can not question the merits of.

The appeal against the refusal to perform an act bailiff enforcement or perform enforcement, which is formed by contesatorul is heading directly against the bailiff, who becomes intimate.

Refusal to perform bailiff enforcement or to perform any act of enforcement under the law, is the basis bailiff liability under art. 7 letter b) -i) of Law no. 188/2000 which allows the interested party to file a complaint within 5 days from the date on which he became acquaintance of this refusal, the court within whose jurisdiction it has its registered office bailiff.[2]

"Following the commencement of foreclosure proceedings against the debtor SC SA, in case no. 1XX / 2007, was organized public tender dated 21.04.2008. On this occasion, the executor has completed minutes no. 25/21.04.2008, under which it informed the representatives of creditor SC SRL that the auction may not start because you made a request for recusal - registered before the Court Mangalia no. 8XX / 254/2008.

Refusal to continue the execution was based on disp. art. 31 paragraph 3 Code of Civil Procedure previously. Also was recorded and the position of creditors, meaning that calls for support for tender, as was

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[1]Zilberstein and Ciobanu,*Treaty Enforcement*, 261.
[2]See this article. 56 para. (1) and (2) of Law no. 188/2000.

mentioned in publications for sale no. 15 / 18.03.2008, as there is no impediment or incident to enforcement.

There is no requirement or the right bailiff to cease fulfillment of acts of enforcement pending resolution of the request for exception.

Accordingly, the court finds unjustified nature of the bailiff's refusal to continue enforcement in case of execution. "[1]

Appeal to title other than the court decision, which is the expression of judicial practice repeatedly apeciat that are admissible complaints made against other securities eligible for executorialitate imposed by law.

Are enforceable titles other than judgments those expressly stated in the Code of Civil Procedure in articles 635 and following, the European enforcement order, orders and reports drawn up by bailiffs, documents authentic, in cases provided by law, writs of execution notary issued under provided by law, debt securities and other documents which the law recognizes the binding power - bills of exchange, promissory note and check - and other debt securities which are enforceable by law and fulfill all the conditions of the special law. Also by contesting enforcement may be required, according to Code of Civil Procedure, and division of the common property or condominium property, by this time division behaving and to the creditor, meaning that the court decision will be its opposable, although he will not attend distribution of lots.[2] In that case the creditor is special interest, timeliness sharing common property or joint property will make, to acquire exclusive ownership of such property.

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[1]Civil Sentence nr.11305 / 2008 Court of Constanta.
http://portal.just.ro/212/Lists/Jurisprudenta/DispForm.aspx?ID=1

[2] Tabacu, *Civil Procedural Law*, 459.

2. THE REQUEST FOR APPEAL TO EXECUTION-FORM CONDITIONS

The new Code of Civil Procedure regulatory conditions of the application form which confers a court with a litigation enforcement, contains short elements on the formal requirements.

That provision art. 716 par. (1) states that "The complaints are in compliance with the formal requirements envisaged for the lawsuit."

Either such indirect reference is made to the provisions of art. 194 in conjunction with art. 148 new Code of Civil Procedure. Clearly, according to art. 716 of the new Code of Civil Procedure, appeals are made with due observance of the rules laid down for the original application, appeal to execution was itself a writ of summons.

Not applicable nor the place to discuss the form of applications and components of applications for summons is necessary to mention, however brief explanation of paragraph 2 of art. 716 the new Code of Civil Procedure: "The complainant who does not live or is not located in the residence town court may, by even his request to choose their domicile or registered procedural in this locality, showing the person follows communications to be made."

3. THE JURISDICTION

Court to resolve these claims is different as it relates title challenge or an appeal is proper.

That is, the territorial jurisdiction of the court seised of the appeal does not change to the rules as they are dictated by art. 651 of the new Code of Civil Procedure: "The court of enforcement is the court in whose constituency is, the date of referral of the enforcer, residence or, where appropriate, place the debtor, unless otherwise provided by law."

Court to resolve these claims is different as it relates title challenge or an appeal is proper. Special rule against the law in matters of enforcement is the art. 714 Code of Civil Procedure, indicating that the court competent for execution appeal all court enforcement "If forced pursuit of the buildings, the levy of execution fruit and general revenues

of buildings, and if teaching foreclosure of real property, if the property is in the jurisdiction of another court of appeal than that is executing court, the appeal may be filed in the court of the place and situating the building." However, this alternative provides for powers code reported at different location of the property followed - real estate, fruit and general revenue of the buildings and teaching buildings - where the court is located execution.

Compared to appeal to execution it self among detailed above, appeal to execution clarification on the meaning, scope or application of enforcement order is lodged with the court whose decision is being executed - art. 714 par. (2) Code of Civil Procedure.

The second sentence of the same paragraph 2 states the situation in which enforcement order subject to appeal does not emanate from a court or tribunal so that whatever form execution appeal court jurisdiction belong enforcement. Jurisdiction referred art. 716 par. (2) is not an alternative, but granted the appellant the opportunity to choose their citation, no effects of a possible alternative jurisdiction.

However, given that the appeal does not contain the elements listed in art. 196 par. (1) Code of Civil Procedure, is void, but other elements cancellation penalty can not intervene, since the entry into force of Law no. 138/2014 changed art. 717 Code of Civil Procedure stating that the provisions of art. 200 NCPC are not applicable to execution appeal.

Consequently the court may not avoid execution appeal for failure to comply with the conditions in art. NCPC 195-198. Candlemas is mandatory, as ordered art. 717 Code of Civil Procedure, which is why we relate to the term common law formulation of defense provided by art. 201 par. (1) NCPC, 25 days under the same requirements and penalties claimed by art. 208 NCPC, namely forfeiture of the evidence and proposes to invoke exceptions, than those of public policy, unless the law provides otherwise.

The method of calculating the deadline for filing a defense is the common law provided for by art. 181-182 NCPC.

The request for appeal execution is subject to the same rules that apply postage lawsuit requests so that the application is calculated on the

value of goods whose prosecution disputed the value of the goods or pursued.

4. PROCEEDINGS

Pocedural the trial execution appeal is made according to national rules applicable common law for the judgment at first instance, according to art. 717 par. (1) NCPC. The norm is derogatory in a celerity of execution appeal in light of the situation need to establish appropriate law enforcement purposes herd.

So is art. 717 par. (3): "The parties shall be summoned at short notice and appeal, is urgent and priority." It therefore follows from reading paragraphs (1) and (3) that the procedure is one contentious, ensuring adversarial and rights of defense, in public session, in accordance with the judgment of the first instance.

The general rules for the trial at first instance apply here, on the proposal of evidence, communication applications, summoning the parties, presentation before the judge, etc.

Pork belly appeal court limited execution documents to investigate whether they respect the legal provisions on enforcement or, where appropriate, determine the scope and meaning of the device is running.[1]

The court shall immediately request the bailiff to submit the thermals set by the certified copies of the documents execution file at the expense of the interested party.

Samples approved by the court will be used only to prove the illegality or groundlessness of enforcement or enforcement activities or to prove refusal bailiff to start enforcement and not to tend to probe the circumstances that have been definitively cut into title enforceable the court which judged the merits of.

When asked for clarification device appeal to execution title or to clarify its scope and application, it is obvious that even sample some samples tend to fund law, but they are not able to give a new

[1]Zilberstein and Ciobanu, *Treaty Enforcement*, 258.

interpretation of the law by a judge ruled otherwise s infringes the principle of *res judicata*.

Settlement procedure execution appeal is governed by the rules of the procedure of common law, including the rules governing evidence

Enables third party to achieve their real right relied on the good undergo forced pursuit in the same way as in an action for common law, consequently, as long as open appeal to execution east, the third party has access to way finding action.[1]

5. THE PERIOD FOR BRINGING AN APPEAL TO EXECUTION

The deadline to file an objection to execution is 15 days calculated in accordance with art. 181 and following of NCPC and starts at different times.

The term of 15 days runs differently as appeal to execution is proper, against the interlocutory bailiff, to clarify the meaning, scope or application of the writ of execution or if a third party claims a right of ownership or other real right over the good traced .

Thus, art. 715 par. (1) NCPC, the appeal to the enforcement itself can be made within 15 days of the date when:

1. The applicant was informed of the execution act which he denies;

For example: "The plea lateness formulation execution appeal relied on by the respondent, the court notes that according to art. 173, para. 1 lit. a, final sentence of GO 92/2003 (1) „ The appeal can be made within 15 days, under penalty of forfeiture of the date when: a) the applicant was informed of the execution or the execution act he is contesting, the notification of summons or other notifications received or, failing that, when conducting enforcement or otherwise.

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[1]M. Stancu, *Tracking and forced the surrender of real estate* (Bucharest: Universul Juridic, 2009), 294.

In this case, the court finds that the subjects report execution of this case are intimate and SC SRL, appellant, even having the status of interested party, the third party to this report.

Therefore, in the absence of evidence to the contrary from the defendant, the court finds that the applicant was informed about enforcement at the earliest on 10/30/2015 upon receipt of letter 10.30.2015 issued by ANAF (tab 14), by which the appellant shall communicate that report as having tax can not issue number and date of execution file in which the seizure was that the present appeals.

The contrary would deny the court's view, the right of access to a court of an applicant as this, although he has taken reasonable steps to learn about the act of execution allegedly harmful to themselves, it was not officially informed by the respondent .

Starting from this date, based on the fact that the date of registration of execution appeal to court is 11.09.2015, according visa reception, the court finds that this complaint was made in implementing the 15 days provided by law, which is why reject as unfounded, except lateness formulation execution appeal relied on by the respondent."[1]

2. The person concerned received the communication or, as appropriate, regarding the withholding notice. If the attachment is founded on regular income, the deadline for appeal debtor starts no later than the date of first deductions from this income by the third party withheld;

3. The debtor disputes the execution itself receiving end of enforceability or order or the date you became aware of the first act of enforcement, in cases where the conclusion of permission not received any notice or enforcement and execution is done without notice.

Assuming the interlocutory appeal filed against the bailiff, the question that they do not become permanent, in which case the person concerned may appeal the decision within 15 days from notification of that decision - art. 175 par. (2) NCPC.

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[1] See Civil Sentence no. 261/2016 of the Court Mangalia, http://portal.just.ro/254/Lists/Jurisprudenta/DispForm.aspx?ID=224

The appeal concerning clarification of the meaning, scope or application of the writ of execution may be made at any time within the limitation of the right to require enforcement - art. 715 par. (3) NCPC. It appears as normal this hypothesis since, if we analyze this situation, we find that the party is entitled to request enforcement sits idly without taking the start of enforcement, not knowing if enforcement order covers or not conflicting provisions.

The limitation period referred to in art. 715 par.(3) it is the common law, contained in art. 706 NCPC.

Finally, art. 715 par. (5) envisages the challenge filed by a third person who claims to have a proprietary or other real right over the good traced, in which case the appeal to execution can be introduced throughout the enforcement procedure, but not later 15 days after the date of sale or forced surrender of the property.

Although the deadline for the introduction of execution appeal is a limitation period, however, applying the common law relating to the reinstatement period, the decay can be avoided if the party proves that he was prevented by a circumstance which does not depend on his will, to act legal procedure, in which case from the moment this question shall cease within 15 days, it must meet that act on their own initiative, showing the reasons that clips.[1]

However, in failing to appeal to execution, the third party is not nothing prevented the realization of the right to seek a separate application, but reserve the right where there permanently acquired by third party adjudicator under forced sale of assets traceable. Just to protect civil circulation of goods, to set a time limit on the possibility of formulating an objection to enforcement by a third party.

According to art. XII of Law. 2/2013 on measures to relieve courts and other measures to prepare the implementation of the new Code of Civil Procedure, as from 1 January 2016, the research process and, where appropriate, the substance of the appeals against execution will take place in the council chamber.

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[1]Tabacu, *Civil Procedural Law*, 462.

That is, in the current legal reality, appeal to execution shall be heard in open court, and the procedure is urgent, as it will appear on the court docket lists and ECRIS.

Regarding the conditions of admissibility of execution appeal art. NCPC 713 orders items that applications must meet.

As noted above, if the appeal to execution is proper or the arbitration award, the debtor can not rely on the path of execution appeal pleas of fact and law on which it could oppose the trial judgment on the merits or the remedies they had available.

Or, if you appeal to execution targets another title than a court decision, the law allows the debtor to invoke reasons of fact or law relating to the merits of any wording in that enforceable unless the law provides a legal remedy specific which may require abolition of - art.713 par. (2) NCPC.

For example: "According to Art. 712, para. 1 Civil Procedure Code: If enforcement is made pursuant to a judgment or arbitral debtor may invoke dispute about the reasons of fact or law that you could stand out in the judgment at first instance or a remedy that was open.

According to art. 1024 Civil Procedure Code: (1) the order for payment enforceable, even if the contested application for annulment and *res judicata* is provisional pending resolution of the application for annulment. Order becomes final payment due to non-introduction or rejection of the application for annulment.

The provisions of art. 637 remain applicable. (2) against enforcement of the order to pay the interested party may appeal to enforcement under civil law. In the appeal can not rely only on enforcement proceedings irregularities and fighting causes obligation arising after the order becomes final payment.

In this case, the appeal court finds that the reasons put forward are not likely to be subject to execution appeal being turned on enforcement under a writ of execution represented by a court or civil sentence no. 1827/24.06.2014 issued by Constanta Court.

Final through civil sentence no. 1976/02.09.2014 issued by Constanta Court in case no. Consequently the court finds that this ground

of opposition is unfounded, except for non-performance, as the defense fund, can not be relied upon execution appeal on track. "[1]

The effect of *res judicata* and in matters of appeal is inadmissible formulating a new application for appeal to execution for the same reason cited in a previous application, the same side, and that request was rejected.

Nothing prevent the appellant to formulate a new application based on considerations other new condition to be within the period prescribed by law for exercise execution appeal. Article 713 para. (3) allow do not pursue creditors to intervene in the enforcement proceedings initiated by other creditors to take part in the execution or distribution of the proceeds from the forced pursuit of the debtor's assets.

Finally, if the procedure forced pursuit movable or immovable or surrender foreclosure of real estate or movable appeal to execution may be brought by a third person, provided that the third party claim itself the ownership or other real right over the good followed.

6. SUSPENSION OF ENFORCEMENT

Suspension of enforcement is the effect of the introduction of execution appeal so that "Pending the execution appeal or other application on enforcement at the request of the interested party and only for justified reasons, the competent court may suspend the execution. Suspension may be required with appeal to execution or separate application." Thus, suspension *ope legis* does not intervene, it is necessary to ask the party concerned - contestant - by motivating thorough suspension request can be made in the application for appeal or in a separate document.

The term for suspension of operation is limited to the completion judgment execution appeal. In addition to solid reasons that motivate their execution suspedare objector application, they must be accompanied

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[1] See Civil Sentence no. 264/2016 of the Court of Mangalia. http://portal.just.ro/254/Lists/Jurisprudenta/DispForm.aspx?ID=170

by a security deposit prior data whose value is calculated according to art. 719 par. (2) NCPC.

This applies whether the object that bears appeal to execution is monetised; *a contrario*, if the object is not measured in money, bail will be 1,000 lei, unless otherwise provided by law.

Article 719 NCPC comprises in addition to voluntary suspension that we analyzed in the lines above and suspension compulsory execution.

Therefore, the suspension is mandatory and is not required giving bail in the cases shown in art.719 par. (4):

"1. decision or entry which is running is not by law enforceable;

2. document that run has been declared false by a judgment given in the first instance;

3. the debtor proves with authentic document it had obtained a reprieve from creditor or, where applicable, benefit from any term of payment. "

All otherwise, if there is urgency and if under par. (2) or (3) of the article. 719 NCPC, to bail, the court may order, upon without summoning the parties, the temporary suspension of execution until the settlement of the suspension.

It is obvious that this time is a temporary demand suspension even brought before suspension demand, but the court is bound by the documents in the file, which indicates that what was asked for suspension is fulfilled.

Clearly at this time the court itself does not verify the merits of the application for suspension, but feels the merits in relation to documents that accompany this application.

Bail on the contestant has done will remain unavailable, and will remain so even if the court rejects the request for provisional suspension.

The demand for suspension, whatever form - mandatory or voluntary, the court shall decide by a ruling that can be appealed only to call separately, within 5 days of delivery for the present and the communication part lack.

This conclusion is communicated by the court of its own motion and without delay bailiff - art. 719 NCPC.

A special case of paragraph regulated (5) art. NCPC 719 of which relates to goods subject followed destruction, deterioration, alteration or impairment, the court will suspend the execution only after distribution of the price obtained from the recovery of those assets.

7. APPEAL AGAINST IMPOSED SOLUTION IN THE DISPUTE

New Code of Civil Procedure establishes a different legal regime on appeal that may be exercised against a judgment in appeal to execution, as this is the appeal to the actual execution or appeal required to correction, clarification or application of the writ of execution.

Important judgment in the appeal to the execution itself may be made only call, with the exception of judgments on executive orders establishing the division of assets joint ownership quota-party or condominium as well as those in which a third person claim a right of ownership or other rights over the assets tracked.

Regarding the ruling by the appeal to execution aimed to clarify the meaning or application of the writ of execution, the decision is subject to the same appeal as the judgment which is enforceable title.

Thesis II of paragraph (2) of Article 718 NCPC governing case decision that resolved the complaint with respect to the meaning, scope or application of that title which does not emanate from a judicial body and not its judgment in the strict sense of laws.

In this case, the judgment which was solved only appeal to execution is subject to appeal under common law.

We appreciate, along with other authors[1], that judgments in the matter against execution appeal may be exercised extraordinary appeals and whether the conditions of admissibility for them.

Reported the effects of settlement of the opposition to executing code distinguishes between the grant of the appeal, given its subject, in

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[1]Tabacu, *Civil Procedural Law*, 468; Zilberstein and Ciobanu, *Civil Procedural Law.Enforcement*, 279, 280; I. Deleanu, *Treaty of Civil Procedure* (Bucharest: Europa Nova, 1997), 160; Huruba, *The Treaty of Civil Procedural Law*, 718.

which case either cancel or correct execution act challenged or shall order the cancellation or termination of the execution itself, or cancel or clear enforceable title.

That is, if we refer to the act concerned as an object of execution appeal court to put the him when he suffers a defect or cancels it when compliance with the provisions relating to enforcement.

If the protest wore on enforcement itself, the court or its cancellation has effect of avoidance express, or when only in this way can restore the previous situation or cease the execution for the reasons mentioned in art. 703 NCPC.

Appeal to the enforcement brought against the enforcement order has the solution admission highlights two possible namely cancellation of the condition that it does not emanate from a court or one arbitration, as the enforcement court vested with the appeal can not override authority judicata which has invested a lower court ruled that title when either clarify consequence of the continuing enforcement of the title after unclear aspects have been clarified via this procedure.

In terms of art. 712 paragraph (4) NCPC, in case of admission of the appeal will be ordered division of joint property.

Pursuant to art. 715 par. (4) NCPC, will be available real recognition of the right or obligation of restitution work. In case of rejection, according to art. 720 par. (3) NCPC, the contestant will be required to request compensation for damages caused by the delay of execution.

To protect the lender and the entire procedure of fulfilling the claims determined by the titles enforceable code intended to regulate and sanction bad faith of the appellant that, in such circumstances will be obliged to pay a fine judicial 1,000 lei 7,000 RON.

When the court rejected the appeal to execution, the amount of security lodged remains unavailable and will be used to settle the claim or the amounts imposed as an obligation in relation to par. (3) art. 720 NCPC.

Whatever the outcome of the court execution, the final decision will be communicated automatically and immediately and bailiff.

The admission of the appeal, the bailiff is subject to enforcement activities as measures taken or ordered by the court.

If the protest has covered the unjustified refusal of the bailiff to receive or record request for enforcement or perform an act of enforcement in case of admission of the appeal, the enforcement court can compel the bailiff through the same application, the court fined and, at the request of the interested party to pay compensation for damage caused by delay enforcement.

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